

# ABA

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By Electronic and United States Mail

October 28, 2005

Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, D.C. 20549-9303

Re: File No. S7-08-05  
Release Nos. 33-8617; 34-52491  
Revisions to Accelerated Filer Definition and Accelerated Deadlines for  
Filing Periodic Reports

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities of the American Bar Association, Section of Business Law (the "Committee") in response to the Securities and Exchange Commission's (the "Commission") request for comments on its September 22, 2005 release described above (the "Proposing Release").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee.

The Committee commends the Commission for revisiting its prior rulemaking setting accelerated deadlines for periodic reports filed under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The Commission's willingness to adjust its requirements to reflect actual experience with the significant changes to the Exchange Act reporting requirements that have been implemented in the last five years is certainly

appreciated by the registrant community and will result, we believe, in better information being made available to the markets.

### Proposed Filing Deadlines

The Commission is proposing to apply the currently scheduled 60-day deadline for the filing of a Form 10-K only to the largest of accelerated filers – those with an aggregate worldwide market value of outstanding voting and non-voting common equity held by non-affiliates (“public float”) of \$700 million or more. The Commission also is proposing to maintain the Form 10-Q filing deadline at 40 days following the close of the fiscal quarter for all accelerated filers.

The Committee has commented in the past, and continues to believe, that a 60-day filing deadline for a Form 10-K was (i) unrealistic, given the resources necessary to address the greatly expanded disclosure and auditing requirements; (ii) unnecessary, in light of the increased “real time” disclosure that is made available to the markets over the course of the year (including the Form 8-K furnishing of earnings reports, suggested by this Committee to the Commission as an alternative to accelerated filing); and (iii) possibly counterproductive, in light of efforts to cause more, not less, attention, thought and care to be devoted to the preparation and review of the periodic reports. Accordingly, the Committee recommends that the filing deadline for the Form 10-K remain at 75 days for all accelerated filers, including large accelerated filers. This obviously does not preclude any issuers with the resources to complete their filings sooner from doing so.

If the Commission determines to impose a 60-day deadline, we agree that it should be limited to the large accelerated filers. If nothing else, staggering the periodic reports would assist smaller companies that have had difficulty competing with larger companies for attention from their auditors prior to the filing deadline, particularly with the implementation of the new internal control over financial reporting requirements mandated by Section 404 of the Sarbanes-Oxley Act of 2002.

The Committee strongly endorses the Commission’s proposal to maintain the Form 10-Q filing deadline at 40 days for all accelerated filers.

### Large Accelerated Filers

The Committee acknowledges that the \$700 million public float test may be a logical cutoff in light of the recently adopted securities offering reforms (Release No. 33-8591). By approximating the definition of “Well Known Seasoned Issuers” adopted under those reforms, the \$700 million standard will serve to align the full benefits of WKSI status with the more demanding periodic reporting requirements. However, consideration should be given to allowing a large accelerated filer to opt out of fully accelerated filing deadlines and choose to file its Form 10-K within 75 days, rather than 60 days, following its fiscal year-end. The price of such opt-out would be that such issuer would not be permitted to avail itself of the benefits of WKSI status. In addition, or alternatively, the failure by a large accelerated filer to meet the 60-day Form 10-K filing deadline should

not cost the issuer its Form S-3 eligibility if it otherwise files the Form 10-K within 75 days; at most the penalty for a large accelerated filer's failure to meet the 60-day deadline should be the surrender of its WKSJ status until it files a Form 10-K within the 60-day period. This alternative could be structured either as an opt-in or opt-out procedure, with an opt-in approach having the benefit of not creating any late filing disqualification issues.

### Exit Procedures

With respect to the proposed standards for exiting accelerated filer and large accelerated filer status, the Committee believes that the proposed thresholds are too low to provide meaningful relief and would impose rigorous reporting deadlines on companies that have market capitalizations well below other companies that are subject to lesser requirements. That result cannot be justified merely because the company once had a higher market capitalization. The Committee shares the Commission's concern that issuers not be permitted to float in and out of a reporting status frequently and thus agrees that the exit threshold for a particular reporting status should be set well below that required to enter that status. We believe, however, that setting the exit threshold at least 50% below the entry threshold for large accelerated filers, and one third below the entry threshold for accelerated filers, would be more than adequate to address this concern. Thus, we suggest a \$350 million threshold, rather than the proposed \$75 million, to exit large accelerated filer status, and \$50 million, rather than \$25 million, to exit accelerated filer status.

The Commission notes (Proposing Release at 19) that there will be instances when a company has greatly reduced or eliminated its public float in the second half of its fiscal year but would still be subject to accelerated filer status for that year based on its public float as of the end of its second fiscal quarter, assuming the issuer continues to be a reporting company. For example, a company may go private but either leave public debt outstanding or issue public debt to finance or refinance the purchase of the public equity. Although eliminating the current two-year waiting period (derived from the Form 10-KSB eligibility requirements) as proposed would greatly alleviate this issue, in order to allow for a truly "prompt" exit from the accelerated filing system, the Commission should consider setting the exit thresholds as of the end of the fiscal year, rather than the end of the second quarter. While it is important that an issuer know well before the end of its fiscal year that it will be subject to a shorter filing deadline with respect to the Form 10-K for that fiscal year, it is less important to have advance notice that it will have additional time to file its next Form 10-K compared to prior years.

The Committee believes that a Form 8-K disclosing a change in accelerated filer status should not be mandatory. If such a requirement was adopted, it should only apply when the issuer will be subject to a longer, not a shorter filing period. In that situation, the Form 8-K should be filed prior to the date the Form 10-K would otherwise be due.

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The Committee appreciates the opportunity to comment on the proposal and respectfully requests that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the staff and to respond to any questions.

Respectfully submitted,

/s/ Dixie Johnson

Dixie Johnson  
Chair, Committee on Federal Regulation of Securities

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