

NetRoadshow

NetRoadshow, Inc.
3475 Piedmont Road
Suite 450
Atlanta, GA 30305

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Via E-Mail to: rule-comments@sec.gov

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: File No. S7-38-04
Comments of NetRoadshow, Inc.
Securities Offering Reform Release Nos. 33-8502 and 34-50624

Dear Mr. Katz:

This letter is submitted by NetRoadshow, Inc. (“NetRoadshow”) in response to the request of the Securities and Exchange Commission (the “Commission”) for comments on the above referenced release (the “Release”) on the Securities Offering Reform proposals (the “Proposals”).¹ While NetRoadshow supports the Commission’s efforts to provide more information to investors, NetRoadshow believes that, if adopted as currently proposed, the Proposals will have the unintended effect of discouraging the use of electronic road shows in offerings other than initial public offerings. This will result in a less efficient, more exclusive offering process largely dependent on live road shows to a smaller universe of investors. Accordingly, NetRoadshow believes that the proposal should be revised to provide that, in order to avoid filing, (1) a *bona fide* version of the electronic road show must be made available to the public during an issuer’s initial public offering, and (2) issuers shall be permitted, but not required, to make a *bona fide* version of the electronic road show available for offerings other than an initial public offering. NetRoadshow believes that this alternative approach will more appropriately further the Commission’s goal to limit selective disclosure while encouraging the use of technology to promote a more efficient offering process.

Who is NetRoadshow?

NetRoadshow is the leading provider of electronic road shows for the securities industry. Pursuant to the no-action relief² obtained by NetRoadshow in 1997, NetRoadshow now provides Internet based road shows to all of the major national and

¹ Proposed Rule: Securities Offering Reform, Rel. Nos. 33-8501, 34-50624, IC-26649, <http://www.sec.gov/rules/proposed/33-8501.pdf> (Nov. 17, 2004).

² Net Roadshow, Inc. (July 30, 1997).

substantially all of the regional underwriters in the United States. NetRoadshow also has offices in London and Hong Kong.³ In the last four years, NetRoadshow has provided electronic road shows for more than 6,000 offerings of debt or equity securities.

In preparation of this comment letter, NetRoadshow has solicited feedback from most of the national and regional underwriters in the U.S. and many institutional investors. While the comments in this letter are not made by or on behalf of these entities, NetRoadshow believes that the position stated in this letter reflects a general consensus of underwriters, sophisticated issuers, and institutional investors as to the expected impact of the Proposals and that the suggestions posed in this letter will alleviate many of those concerns.

Current Use of Electronic Road Shows

Electronic road shows are used in substantially all of the registered offerings in the U.S. In fact, with respect to equity offerings, it would be the rare case where an electronic road show is not used. Electronic road shows have previously been conducted pursuant to the line of no-action letters cited by the Commission in the Release.⁴ These no-action letters set forth three primary justifications to permit electronic road shows, all of which NetRoadshow believes are consistent with the publicly announced goals of the Commission:

- Electronic road shows “level the playing field” by permitting qualified investors not residing in major financial centers to access the same information available to the much smaller universe of qualified investors able to attend in person, or “live,” road shows;
- Electronic road shows facilitate a more efficient and streamlined offering process, permitting the “marketing” of an offering to be conducted in a much more compressed period of time while minimizing the burden on the issuer; and
- In light of the available technology and when conducted in the manner described in the no-action letters, electronic road shows are not permanent enough to constitute a “writing” and are sufficiently focused on a select audience such that they are not considered a radio or television broadcast, which is consistent with Congressional intent in the adoption and amendment of Section 2(10) of the Securities Exchange Act of 1933 (“1933 Act”).

In addition, electronic road shows offer the promise of eliminating problems of selective disclosure because the technology would allow an issuer to make some form of

³ Both the European and Asian markets have embraced Internet road shows. The 1997 NetRoadshow no-action letter serves as the standard in these markets.

⁴ Private Financial Network (Mar. 12, 1997); Net Roadshow, Inc. (July 30, 1997); Bloomberg L.P. (Oct. 22, 1997); Thompson Financial Services, Inc. (Sep 4, 1998); Activate.net Corporation (June 3, 1999); Charles Schwab & Co., Inc. (Nov. 15, 1999); and Charles Schwab & Co., Inc. (Feb. 9, 2000).

the road show available to all potential investors. However, doing so would be inconsistent with the legal theory underlying the existing line of no-action letters authorizing electronic road shows, as broad distribution of the electronic road show would likely be deemed a broadcast under Section 2(10) of the 1933 Act. Nonetheless, the objective of eliminating selective disclosure has been cited in at least one of the no-action letters⁵ and is also consistent with the recommendations of the Report and Recommendations of the NASD/NYSE IPO Advisory Committee⁶ (the “Blue Ribbon Report”) which the Commission cites to in the Release⁷. It is important to note that the Blue Ribbon Report deals exclusively with disclosure surrounding initial public offerings. The Blue Ribbon Report does not address, nor was it intended to address, follow on offerings.

As a result of the legal theory underlying the Commission’s views of electronic road shows, over the past seven years the technology associated with Internet electronic road shows (the most common type of electronic road show) has developed in such a manner that they are indistinguishable from live road shows, at least from an audience perspective. Like live road shows, electronic road shows are ephemeral in nature (as opposed to video tape, DVD, CD’s or other forms of permanent electronic media). Because of its ephemeral nature, the electronic road show is treated as oral communications under the existing regulatory regime as demonstrated by the following comparison:

- Invitation Process:
 - Live road show: Institutional accounts are contacted directly by their institutional salespeople at an investment bank and are scheduled to attend a one-on-one or group setting road show.
 - Electronic road show: Institutional accounts are contacted directly by their institutional salespeople from the investment bank and are invited to view the road show during a specific window of time.
- Attendance:
 - Live road show: In a group road show environment (as opposed to a “one-on-one” presentation), attendance is strictly monitored to ensure that only invited institutional accounts are in attendance. Underwriters keep a list of all attendees.
 - Electronic road show: Access to the electronic road show is restricted by both a password and a registration process to ensure that only the specifically identified institutional account is able to

⁵ Charles Schwab & Co., Inc. (Nov. 15, 1999).

⁶ Report and Recommendations of a Committee Convened by the New York Stock Exchange, Inc. and NASD at the Request of the U.S. Securities and Exchange Commission, available at www.nasd.com/web/groups/corp_comm/documents/news_release/nasdw_011458.pdf (May 29, 2003).

⁷ See Release at text accompanying note 186.

view the road show. NetRoadshow, on behalf of the underwriters and the issuer, keeps a record of all persons who view the presentation, including the date, time and length of time that person viewed the road show, as well as the ISP address of the exact computer used to view the road show.

- Prospectus Delivery:
 - Live road show: A hard copy of the preliminary prospectus is available for each attendee.
 - Electronic road show: A large red button reading “Preliminary Prospectus” is highlighted on the site, providing access to the entire preliminary prospectus. Unlike the other content within the road show presentation, the preliminary prospectus may be downloaded and printed by the investor.

- Retention of Materials:
 - Live road show: The presentation is typically conducted through the use of electronic PowerPoint slides. Investors are not able to take any written material (other than the preliminary prospectus and their own notes) from the presentation.
 - Electronic road show: The exact same PowerPoint slides that are used in the live road show are used in the electronic road show. The investor is unable to download, copy, print or otherwise retain a copy of the materials (other than the preliminary prospectus), and access to the presentation is limited to a set number of viewings or an unlimited number of viewings within a short (24 hour) time frame.

Accordingly, from the investor’s perspective, there is essentially no difference between a live road show and an electronic road show, other than the considerable benefit that they are not required to travel to the site of the live road show and may access the presentation at a time that is convenient for their schedule.

As noted earlier, substantially all registered offerings now utilize an electronic road show. With respect to initial public offerings, they are largely a complement to the more substantial (and grueling) live road shows conducted by underwriters and management of the issuer immediately prior to the pricing of the offering. With respect to offerings other than initial public offerings, however, the electronic road show assumes a critical role, either supplanting the live road show in its entirety or serving as a substitute for live road shows for those institutional investors that (1) would prefer the convenience of flexible timing offered by the electronic road show, (2) do not have the leverage or prospective purchasing power to merit a one-on-one live road show, or (3) do not have the resources to travel to the site of a live road show in one of the major

financial centers. In addition, the electronic road show permits simultaneous presentation to multiple persons in different geographic markets at the same or substantially the same time. This significantly expedites such follow-on offerings. It also reduces expenses associated with the offering and permits management of the issuer to reach a broad, targeted audience without unnecessary distraction from the issuer's operations.

Under the existing regulatory regime, road shows during initial public offerings and during offerings other than initial public offerings are not generally directed to retail investors. NetRoadshow believes, based on its discussions with its underwriter clients, that with respect to offerings other than initial public offerings, this is largely due to the fact that retail investors have limited interest in such offerings, as the retail investor is able to purchase the issuer's securities on the open market and generally will not devote the level of attention associated with attendance at a road show in order to make a relatively insignificant purchase. Instead, the road show (and the offering generally) is targeted to the institutional investors that the issuer wishes to attract and who are able to commit to purchasing a larger tranche of the issuer's securities in the short time associated with such offerings.

Impact of the Proposals

Electronic road shows are currently afforded the same treatment as live road shows – both are deemed oral communications not constituting a prospectus prohibited under Section 5 of the 1933 Act. As a result, neither the electronic road show itself nor the underlying presentation materials (typically slides identical to those used in the live road show) are required to be filed with the Commission or otherwise made publicly available. Investors are nonetheless protected, as (1) they must be provided with a copy of (or access to) the preliminary prospectus and advised of the primacy of that disclosure, and (2) the issuer remains subject to liability under Sections 12(a)(2) and 10b-5 for statements included in the presentation.

The Release sets forth a regulatory framework that would impose significant changes from the current regime:

- Electronic road shows would no longer be treated as oral communications but instead “graphic communications” and therefore a writing.
- Each electronic road show would constitute a free writing prospectus that must be filed with the Commission, although filing will not be required if the issuer relies on the exemption described immediately below.

- Assuming that the issuer does not want to file each electronic road show with the Commission, it must (i) make at least one version of a *bona fide* electronic road show readily available to any potential investor at or before the provision of an electronic road show to any investor, and (ii) file any material issuer information used at the electronic road show (other than the road show itself), presumably including slides and other materials used to make the presentation.
- Live road shows, however, would continue to be treated as oral communications and therefore neither they nor the presentation materials would have to be filed with the Commission or made available to the general public.

Because free writing prospectuses would not be part of a registration statement subject to liability under Section 11 of the 1933 Act, the liability standard applicable to electronic road shows would not change, e.g. any person using the free writing prospectus would be subject to liability under Section 12(a)(2) of the 1933 Act and the anti-fraud provisions of the federal securities laws, as is currently the case with respect to electronic road shows and as is and will continue to be the case with live road shows.

Even though the liability standard would not change, NetRoadshow believes, based on its conversations with underwriters and the significant volume of comments received by the Commission expressing concern with the Proposals, that the requirement to file a *bona fide* version of the electronic road show will substantially and adversely impact the willingness of underwriters and issuers to use electronic road shows in follow-on offerings for four reasons. First, mandatory publication of the electronic road show to a broad audience will increase the risk profile associated with the use of an electronic road show, at least relative to the use of a live road show for which publication will not be required. Second, preparation of a *bona fide* version of the road show will require additional time and expense, limiting the utility of electronic road shows in these offerings that generally take less than two or three days to complete. Third, there is usually very little or no retail investor interest in follow-on offerings since those securities already trade in the market. Lastly, many of the larger U.S. investment banks are exclusively focused on the institutional marketplace and have no retail distribution channels.

Recommendation

NetRoadshow believes that, with some modifications to the Proposals, the Commission can encourage the use of electronic road shows as a means to reduce selective disclosure while preserving their utility in the context of offerings other than initial public offerings.

First and foremost, the requirement that any issuer that uses an electronic road show either file it with the Commission or make a *bona fide* version publicly available should be restricted to initial public offerings. Initial public offerings are the offerings in which retail investors are most interested in participating. Initial public offerings tend to

attract a broad public following, and an electronic road show is more likely to be useful to the large number of retail investors that would like to participate. Further, by definition, initial public offerings are conducted before there is a significant amount of information available to the investing public or any following in the issuer's securities. By requiring a version of the initial public offering electronic road show to be made publicly available, the Commission can eliminate the potential problem of selective disclosure in the arena where the most significant disparity exists. Finally, initial public offerings are large undertakings with extended timetables. In those circumstances, the expense associated with preparation of a *bona fide* version of the electronic road show would be largely inconsequential. The timetable for an initial public offering would not be significantly impacted by a requirement to prepare another version of the road show.

Second, NetRoadshow suggests that, with respect to the use of electronic road shows in offerings other than initial public offerings, the Commission adopt a program of voluntary compliance. Essentially, an issuer conducting an offering other than an initial public offering would be permitted, but not required, to make a *bona fide* version of the electronic road show publicly available. As under the current Proposals, this "voluntary" *bona fide* version would constitute a free writing prospectus subject to liability under Section 12(a)(2) of the 1933 Act and the anti-fraud provisions of the federal securities laws. In offerings where the issuer or the underwriters expect there to be significant retail interest, they would be able to extend all of the advantages of electronic road shows (particularly reduced offering expenses and fairness to investors in remote locations). In offerings where no significant retail interest is expected (including offerings of high grade debt, convertible securities, asset backed securities, etc.) issuers would maintain the ability to use electronic road shows to conduct expedited offerings to institutional investors without the delay resulting from the preparation of a *bona fide* version of the road show to be made available to the public at large. Concerns associated with selective disclosure would be addressed by the requirement to file all material issuer information, as is currently proposed, and retail investors would of course still have the ability to purchase the issuer's securities on the open market based on existing information.

NetRoadshow believes that electronic road shows are a vital tool in today's offering process, both domestically and internationally, and is obviously interested in the development of an approach that will encourage their further use. With that in mind, NetRoadshow hopes that the Commission and the staff will consider these recommendations as a way to encourage the use of an efficient and equalizing technology in today's sophisticated financial markets. We appreciate the opportunity to comment on such important proposals.

Sincerely,

/s/ Brad Hammond

Brad Hammond
President and Chief Executive Officer
NetRoadshow, Inc.

cc: Hon. William H. Donaldson, Chairman
Hon. Paul S. Atkins, Commissioner
Hon. Roel C. Campos, Commissioner
Hon. Cynthia A. Glassman, Commissioner
Hon. Harvey J. Goldschmid, Commissioner
Alan L. Beller, Director, Division of Corporate Finance
Annette L. Nazareth, Director, Division of Market Regulation
Paul F. Roye, Director, Division of Investment Management
Giovanni P. Prezioso, General Counsel
Martin Dunn, Deputy Director, Division of Corporate Finance