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Jonathan G. Katz, Secretary
United States Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

VIA E-MAIL (rule-comments@sec.gov)

Re: **Securities Offering Reform**
File No.: S7-38-04
Release Nos.: 33-8501; 34-50624; IC-26649

Dear Mr. Katz:

The Society of Corporate Secretaries & Governance Professionals (the Society) is a professional association founded in 1946, serving more than 3,000 issuers. Job responsibilities of our members include working with corporate boards of directors and senior management regarding corporate governance; assuring issuer compliance with securities regulations and listing requirements; and coordinating activities with shareholders such as proxy voting for the annual meeting of shareholders and negotiation of shareholder proposals. The majority of Society members are attorneys. This letter is submitted in response to the Commission's request for comment in connection with the Securities Offering Reform proposals.

We commend the Commission and Staff for the superb analytical and drafting work that was involved in preparing these Securities Offering Reform proposals. Preparation of the proposals was clearly a mammoth and complex undertaking, and the proposals, if adopted, promise to have very positive effects on the capital raising process. We offer the following comments for your consideration.

<u>II. A. Definition of the "Just Debt" Well Known Seasoned Issuer</u>

The Proposals would revise Rule 405 to define the "just debt" Well Known Seasoned Issuer as an issuer that satisfies the following requirements as of the last business day of its most recently completed second fiscal quarter prior to the date of filing its 10-K:

- the issuer is eligible to file a registration statement on Form S-3 for primary offerings relying on General Instruction I.B.1, I.B.2, or (proposed) I.D; and
- the issuer must have issued at least $1 billion aggregate amount of *debt securities* in registered offerings during the past three years and register only debt securities.

General Instruction I.B.2 of Form S-3 permits primary offerings of non-convertible investment grade securities. An "investment grade security" is defined as a security that, at the time of sale, had at least one nationally recognized statistical rating organization that had rated the security in one of its generic rating categories which signifies investment grade.

It appears that the change in wording from "investment grade security" to "debt security" has the potential to be more restrictive, without a corresponding investor benefit, and would introduce uncertainty into the offering process as to whether a security is a "debt security." We note, as stated in the proposing release, that none of these issuers' debt offerings (issued between 1997 and 2003) were below investment grade and in fact, yielded an average of 44 basis points lower than other issuers, demonstrating their lower default risk. We would recommend a return to the "investment grade security" language for this category of issuer.

III. D. Communication Safe Harbors

We believe the protections potentially offered by the communications safe harbors could be very valuable and suggest the following as ways to improve their operation. Given the risk of liability associated with a violation, the closer the safe harbor rules can approach a bright line test, the better.

Certain interpretive questions on the definitions might be resolved before the rules are adopted. For example, factual and forward-looking information is covered explicitly by the safe harbor, but the expressions of opinion of management do not seem to be covered. We believe that the opinion of management is a type of information that is beneficial to investors and ought to be encouraged by protection of the safe harbor.

We suggest that it might be possible to simplify the definition of the safe harbor to eliminate some interpretive questions and make the safe harbor more appealing to issuers. This might be accomplished by making information about the company, its products, methods of product distribution, competitive situation, etc., fit squarely within the safe harbor. Conversely, any information about the transaction (the securities, underwriters, etc.) would be defined as outside the safe harbor unless it fits within Rules 134, 135 or other exemptions.

Interpretive questions on the conditions to the exemptions might also be resolved before the rules are adopted. For example, proposed Rule 168 would provide protection to information of the type previously released in the ordinary course, being released in the ordinary course, and requires that the timing, manner and form be materially consistent with similar past disclosures. There will always be disclosures that are unique or unusual, but are also of the type that should be covered by the safe harbor because they relate to the ordinary, ongoing business of the company. An example would be announcing a change in earnings guidance. This is not offering information, so it ought to be allowed under the safe harbor. But the company may have no track record of announcing a change in guidance, so will not be confidant that the safe harbor will apply.

Finally, we believe that making the safe harbor unavailable for the text of '34 Act reports incorporated by reference into a registration statement (10-Ks, 10-Qs and 8-Ks) is too broad and will make the safe harbor unworkable. We suggest that the safe harbor be defined to exclude only offering information, for example, information about the underwriters, securities, methods of distribution of the securities, etc.

III. D. 3. Definition of "Ineligible Issuer"

The definition of a "well-known seasoned issuer" would exclude those entities that are classified as "ineligible issuers." We believe that the proposed definition of "ineligible issuer" is too broad because it captures settlements or judicial or administrative decrees or orders relating to any violation of the federal securities laws during the past three years by companies or their subsidiaries. Implementation of this aspect of the definition of "ineligible issuer" would result in many companies becoming ineligible to use the benefits of the proposed registration and offering reforms for Well-Known Seasoned Issuers. Of particular concern is the fact that any violations of the federal securities laws by subsidiaries, such as regulated entities, may cause a company to lose eligibility.

We believe a more appropriate standard would focus on antifraud violations, which are scienter-based. This is the standard used in the safe harbor for forward-looking statements that is contained in Section 27A of the Securities Act and Section 21E of the Securities Exchange Act, as adopted in the Private Securities Litigation Reform Act of 1995. We do not believe that a broader standard, which would include "technical" violations of the federal securities laws, is necessary for purposes of the "ineligible issuer" definition.

Should the definition of "ineligible issuer" not be revised in the manner described above, companies may be less willing to enter into settlements with the Commission and other governmental agencies regarding alleged violations of the federal securities laws. While the Commission has indicated that waivers of ineligibility may be granted, the standards and procedures by which such a waiver would be issued may be disabling. Moreover, being required to seek a waiver could affect a company's ability to timely access the capital markets. We also recommend that the Commission modify its proposals to make any disqualification prospective only.

Also, you have requested comment as to whether an issuer should be considered ineligible if an affiliate of an issuer were found to have violated, settled allegations of violations of, or been made the subject of a judicial or administrative order or decree for violating or alleged violations of securities laws. We believe that this type of disqualification should not apply in the context of an acquisition of an entity that is a transgressor or alleged transgressor and should not apply to cause the disqualification of a subsidiary-issuer if the subsidiary's parent or sister entity is itself disqualified. In the former case, the acquisition by an eligible issuer should benefit the investor community, and in the latter case, the subsidiary-issuer should be evaluated as a separate entity.

VI. Prospectus Delivery – Rule 424 Cure Provision

We applaud that the Proposals would establish an "access equals delivery" model for prospectus delivery and that issuers and underwriters would be able to satisfy their delivery requirements if the prospectus is filed with the SEC by the required Rule 424 prospectus filing deadline.

While these are welcome advancements, we are concerned with the dire consequences of missing the Rule 424 filing deadline; namely, a Section 5 violation with rescission rights under Section 12(a)(1). The Proposing Release asked for comment on whether the SEC should consider any cure provisions in the event that the final prospectus is not filed within the required timeframe, or in the event that the notice was inadvertently not included. We strongly believe that the 'punishment does not fit the crime' in both of these situations and that a minimum cure period is needed.

VI B 1. Access Equals Delivery

We strongly support the general concept of "access equals delivery" and are pleased that the Commission's proposals increasingly recognize the ease and functionality of the Internet as a default method of disclosure both to individual recipients and the market generally. We recommend that the Commission similarly move forward to extend this position to the delivery of proxy statements and other related materials. It is the case that electronic delivery, and voting, does presently exist in the proxy voting process, but for most companies it is limited to the small minority of stockholders who have proactively signed up for electronic delivery, and to employee-stockholder populations. If you used your 1933 Act proposals as an analogy, you could allow for a system where issuers could mail a proxy card and short notification sheet to other investors, along with the URL for the full proxy statement and the Annual Report. Investors could also call or write in to obtain a printed proxy statement and/or Annual Report. Such a system would dramatically reduce the printing, postage and other handling charges for proxy distribution while retaining the opportunity for each investor to obtain printed materials on request and without charge.

VII. A. Risk factor disclosure

We do not believe that the "risk factors" disclosure model in Item 503 of Regulation S-K is appropriate for the Form 10-K. The history and the explicit language of 503 (c) (e.g., "your lack of operating history") make clear that this item was drafted with the IPO in mind and as part of an introduction to a company which had not previously been a 1934 Act reporting company. As you know, the resulting practice, as called for explicitly in the item, has been for an issuer to prepare a multi-page list of macro and micro risk factors. Despite admonitions as to Plain English, the list often repeats information provided elsewhere in greater detail, and/or is filled with numerous cross-references to other portions of the document.

We would be surprised if 1934 Act registrants, counsel and auditors are currently operating on the assumption that the 10-K lacks any requirement to include "risk factors". Item 101 of S-K ("description of business"), for example, refers to risk-related disclosures both generally and specifically (e.g., "material areas peculiar to the registrant's business", "availability of raw materials", "the extent to which the business is ...seasonal", "dependence" upon a few customers, "competitive conditions", etc.). The Item 303 Management's Discussion and Analysis is also very risk-oriented with its focus on trends and uncertainties, and this focus is highlighted in the Commission and staff comments and interpretations of the MD&A section. See Releases 34-26831 (May 18, 1989), 33-8056 (January 22, 2002) and 33-8350 (December 29, 2003). Other risk-related 10-K items include, e.g., 303 (a)(4) on offbalance sheet arrangements; 305 on quantitative and qualitative disclosures about market risk; and the use of forward-looking statements accompanied by "meaningful cautionary statements" in accord with the PSLRA.

The result of the current 10-K rules and the Commission's interpretative guidance is that risk factors are both called for at present, and are placed interstitially throughout the document to accompany related disclosure about the business and its past, present and expected future operations. It would be both duplicative and confusing to add the Item 503 requirement for an introductory list of "significant" risk factors. We recommend that this proposal not be adopted. As an alternative, we recommend that Item 101 and/or other items currently included in the Form 10-K be amended with specificity if the Commission believes that there are particular risk factor topics which are not receiving adequate attention in current filings.

<u>VII. B. Disclosure of Unresolved Staff Comments</u>

We respectfully disagree with the Commission's suggestion that it is necessary to establish additional incentives for accelerated filers to timely resolve outstanding staff comments on their Exchange Act reports and therefore object to the proposal to require disclosure in the Form 10-K of material unresolved staff comments on an issuer's Exchange Act reports. We believe it is inappropriate to use the integrated disclosure system to that end, and that the potential for Commission enforcement action to address disclosure deficiencies constitutes sufficient incentive for accelerated filers to respond to the staff's comments.

We believe that the result on the disclosure system of adopting the proposal would not be positive. Some companies' documents may have to include random and confusing content that is not necessarily material. The context of the disclosure will lack comparability among issuers, since many if not most registrants will not have to include any such disclosure. Disclosure of a particular comment will appear in the Forms 10-K of an unrelated group of issuers, on the one hand, while other companies that received the same comment will not have to make (and will not make) any such disclosure. The staff has recently announced that it will routinely publish all comment-letter correspondence, http://www.sec.gov/news/press/2004-89.htm, and we suggest that this data source be relied upon as the place where all comments are disclosed.

Disclosure of unresolved comments would create asymmetry with resolved comments, and further heighten the probability that any such disclosure would be out of place and unrelated both as to topic and importance to the other disclosure in the 10-K. The Release proposes that only "material" comments need to be disclosed, but at the same time many more, and more "material" (or at least interesting) comments will await disclosure when the comment process is finally completed.

The standard of materiality itself would be hard to interpret in this context and would further lead to disparate analysis and practice by issuers. For example, the company might reach one conclusion on the materiality question if it analyzes the potential impact by assuming that the staff's position will be imposed in its entirety. On the other hand, if the company reasonably believes that the comment will be the subject of further discussion with the staff, and that the final outcome will be very different from the staff's initial position, then the company might reach a very different conclusion as to materiality. Resolving this question "correctly", however, will become a high stakes game for companies.

Nevertheless, should the Commission decide that an additional incentive is required, we believe that it would be more appropriate to require only that the issuer check a box on the cover of the Form 10-K to indicate that there are unresolved staff comments on the issuer's Exchange Act reports. Such a disclosure by the issuer could result in the posting of the comment letter and any related correspondence on the Commission's website promptly following the filing of the Form 10-K (rather than waiting until 45 days after the staff has completed the filing review).

With regard to the timeframe to resolve outstanding staff comments before disclosure is required, we believe that the Commission should focus on those situations where the staff's initial comment letter was issued more than 180 days before the end of the fiscal year covered by the annual report and the issuer has failed to provide any written response to such comments as of the date of the filing of the annual report. In situations where there is a continuing dialogue between the staff and the issuer relating to the comments, we believe that no disclosure should be required.

Thank you for the opportunity to comment on this reform initiative. Please do not hesitate to contact us if you have any questions.

Cordially,

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