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January 31, 2005

Via Email

Re: **Securities Offering Reform (File No. S7-38-04)**

Jonathan G. Katz
U.S. Securities and Exchange Commission
450 Fifth Avenue, N.W.
Washington, D.C. 20549-0609

Dear Mr. Katz:

We are submitting this letter in response to a request for comments by the Securities and Exchange Commission (the "Commission" or the "SEC") regarding the proposed rules to modify the registration, communications and offering processes under the Securities Act of 1933 (the "Reform Proposal"). We support the Commission's efforts to improve access to the capital markets through streamlined registration procedures, encourage the continuous dissemination of information during offerings and provide alternative means for communicating with investors which recognizes advancements in technology. Various aspects of the Reform Proposal have been under discussion for a number of years and have also been the subject of prior reform attempts by the Commission. We believe the Reform Proposal largely achieves the Commission's goals of modernizing the way securities offerings are conducted today without compromising the delivery of timely information to investors or instituting unnecessary speedbumps. We recognize that the Reform Proposal represents and reflects years of careful consideration, research and dedication on the part of the Commission's staff.

We appreciate the opportunity to comment. Our recommendations and suggestions for incremental modifications or clarifications in a number of areas are intended to assist the Commission in meeting the stated objectives of the Reform Proposal. Some of our suggested comments also address issues that we believe, based on our experience, may impede offering participants during capital raising in ways inconsistent with the overall intention of the Reform Proposal. Our letter discusses the issues largely in the order presented in the Reform Proposal.

Well-Known Seasoned Issuer (“WKSI”); Other Categories of IssuersDefinition of WKSI

Under the Reform Proposal, WKSIs are eligible for the broadest set of communications and shelf reforms. A WKSI is principally defined as any issuer that, as of the last business day of its most recently completed second fiscal quarter prior to the date of filing its Form 10-K or Form 20-F, is eligible to use Form S-3 or Form F-3 and has either \$700 million of market capitalization held by non-affiliates or has issued \$1 billion of registered debt in the last three years.¹ This look-back approach to the most recently completed second fiscal quarter prior to the filing of a Form 10-K was first used when the Commission accelerated the filing deadlines for Exchange Act reports on Form 10-K and Form 10-Q. The Commission believed that an issuer needed to know in advance whether it would become an accelerated filer at the end of its fiscal year.²

The determination of eligibility based on the time periods provided in the definition is complex and we recommend that the Commission clarify by providing an example of what it intends. For instance, under the proposal a U.S. issuer with a calendar year-end that intends to file a registration statement in 2006 prior to filing its Form 10-K will assess its WKSI eligibility on the basis of its market capitalization as of the end of June 2004, the date used to determine whether it was an accelerated filer with respect to its most recent Form 10-K filed in 2005. The issuer will again assess its eligibility as a WKSI when it files a Form 10-K in 2006, at that time based on its market capitalization as of the end of June 2005.

Determining WKSI status based on market capitalization as of almost 20-months prior to the determination date could create results that are contrary to the views expressed in the Reform Proposal that WKSIs represent the largest public companies. Market capitalization is intended to be an indicator of companies with the highest level of analyst coverage, institutional ownership and trading volume. We do not believe that measuring market capitalization based on such old historical data serves any useful purpose for determining WKSI eligibility, and in fact may be detrimental to issuers. We recommend that the Commission modify the definition to use an issuer’s more recent market capitalization as the basis for WKSI eligibility. We make several suggestions with respect to WKSI eligibility based on registered debt offerings below which are also applicable to WKSI eligibility based on market capitalization.

WKSI Eligibility Based on Registered Debt Offerings

An issuer that has registered at least \$1 billion aggregate amount of debt securities in the last three years and will only register debt securities may qualify as a WKSI if it meets the other stated conditions. We ask that the Commission confirm that the \$1 billion amount includes any debt registered pursuant to exchange offers for securities originally issued in a private placement, so-called “Exxon Capital” exchange offers.

The determination of eligibility based on registered debt uses the same measurement date as that used for evaluating WKSI qualification based on market capitalization, looking back to the last business day of the second fiscal quarter prior to the filing of the most recent Form 10-K or Form 20-F. The requirement that the debt must have been issued in a trailing three-year look-back period based on such date of determination could create anomalous consequences. Using the same dates as in the example given above, an issuer filing a registration statement in 2006 prior to filing its Form 10-K must look back and calculate the amount of debt it issued in the last three years as of June 2004 to determine whether it qualifies as a WKSI. The issuer will not be able to count towards the threshold amount any debt it has registered over the most recent year and a half. This approach seems inconsistent with the objective expressed in the Reform Proposal that the Commission intends for WKSI to constitute those issuers that have been most active in offering registered securities.

We recommend that the Commission consider assessing WKSI eligibility based on whether \$1 billion of registered debt has been issued in the last three years at the time of filing the registration statement, or alternatively, adopting the transaction requirements for primary offerings by registrants under Form S-3 or Form F-3. Similar to Form S-3 or Form F-3, the Commission could provide that an issuer must have issued \$1 billion of debt over the prior three years, with such three-year period ending at or 60 days prior to the date of filing of a registration statement. We believe WKSI eligibility based on market capitalization could also be assessed in this manner.

The requirement for a WKSI to reevaluate its eligibility upon the filing of a Form 10-K in connection with the trailing three-year look-back period for registered debt could cause WKSI status to change more frequently than the Commission intends. For this reason we ask that the Commission also consider modifying the formulation to \$1 billion of registered debt outstanding based on either of the two time periods stated above, rather than the amount of debt issued on a trailing basis. The extent of analyst coverage seems more likely to depend on the amount of securities outstanding at the time than on the amount registered during some historical period.

We request that the Commission evaluate whether WKSI eligibility could be determined on the basis of any of the alternatives discussed above, instead of imposing a single standard. We believe that an issuer that satisfies any of the requirements set forth above is likely to have a high level of analyst coverage, institutional ownership and trading volume.

Other Recommendations

We recommend that the Commission permit Schedule B issuers to become eligible as WKSI when such issuers satisfy the registered debt test. In addition, the Commission should provide in its proposed rules that voluntary filers are considered unseasoned issuers for purposes of the Reform Proposal, instead of making the reference only in a footnote to the text of the release.³

We believe several technical modifications should be made to the definition of well-known seasoned issuer in the proposed amendments to Rule 405. First, the definition appears to require that all of the seven listed criteria must be met in order to achieve WKSI status. We note that the rule should instead require that either provision (1) or (2) must be satisfied, not both, since WKSI eligibility is established either through qualification as a primary registrant or as a majority-owned subsidiary. In addition, the requirements listed in (3), (4) and (5) of the definition are potentially confusing as they are unnecessarily duplicative of the eligibility requirements in Form S-3 or Form F-3. Form S-3 or Form F-3 eligibility is already listed as a requirement under (1)(i). Finally, the cross-reference for issuers relying on General Instruction I.B.2 of Form S-3 or Form F-3 in (1)(i) should be to paragraph (1)(ii)(B), which refers to WKSI eligibility based on debt issuance (instead of (1)(i)(A) which does not exist) and paragraph (1)(ii)(B) (instead of (1)(i)(B) which does not exist).

Ineligible Issuers

The Reform Proposal considers certain issuers ineligible to take advantage of any of the proposed reforms, including the ability to use free writing prospectuses, the communications safe harbors, other exemptions and exclusions, and the automatic shelf registration statement procedure.⁴ We believe that the list of ineligible issuers should be narrowed in some limited respect as set forth below.

Ineligible Due to Failure to File Exchange Act Reports

Ineligible issuers include reporting issuers that have not filed all Exchange Act reports required. Unlike other aspects of the Reform Proposal and existing regulations, including eligibility for use of Form S-3 or Form F-3, there is no time period given with respect to which compliance with an issuer's reporting obligations is assessed. We do not believe that the Commission intends to bar an issuer that may have failed to file a single Form 8-K several years ago from being considered eligible to use any of the proposed reforms indefinitely. We recommend that the Commission amend the definition to require compliance with reporting in the last twelve months, or the length of time since such issuer became subject to the reporting requirements, if less than twelve months. This is a familiar standard in other Commission obligations such as eligibility for use of Form S-3 and Form F-3. We ask that the Commission clarify whether or not it intends for this requirement to pertain only to the requirement that an issuer is current in fulfilling its reporting obligations (as the definition is currently drafted), and not to whether such reports were timely filed.

Ineligible Due to Entry into Settlements

Issuers that have been found to have violated the federal securities laws, have entered into a settlement with any government agency involving allegations of violations of federal securities laws, or have been made the subject of a judicial or administrative decree or order prohibiting certain conduct or activities regarding the federal securities laws during the past three years are considered

ineligible issuers under the Reform Proposal. We do not believe that entry into a settlement which neither admits nor denies any wrongdoing should automatically result in an issuer being ineligible for all of the proposed reforms. Such a “one size fits all” approach inappropriately imposes the same penalty on a wide range of possible actions, ranging from inadvertent failure to make certain disclosures or maintain books or records to outright fraud.

An issuer that has entered into such a settlement will have publicly disclosed the matter, may well have been subject to intense scrutiny by the marketplace and will likely have paid a significant fine. The issuer has already suffered reputational and economic damage as a result, and its shareholders are negatively affected by any decrease in stock price and payment of the fine made. We believe that it is not necessary in all cases to further penalize the issuer by prohibiting it from taking advantage of any of the proposed reforms.

This proposal will also upset the long-standing policy of the Commission to encourage issuers facing allegations of securities law violations to resolve the matter by entering into settlements with the Commission. Evaluating the loss of the ability to use the advantages conferred by the Reform Proposal could cause further delays and lengthen the settlement process. We recommend that the Commission remove this particular category of ineligible issuers altogether. The Commission should instead retain an ability to consider a particular issuer ineligible for the proposed reforms as part of its settlement negotiations on a case-by-case basis, evaluate each issuer individually and tailor the penalties depending upon the severity of the actions alleged.

If the Commission nonetheless determines to continue to consider all such issuers to be ineligible to use the proposed reforms regardless of individual circumstances, we recommend several changes. We believe that the retroactive effect of the proposal is unjust and that it should only apply to settlements entered into after the effective date of the Reform Proposal. It would not have been possible for an issuer who entered into a settlement prior to the adoption of the Reform Proposal to have asked the Commission to consider using its exemptive authority under the proposed rule to determine, upon a showing of good cause, that it is not necessary under the circumstances for this issuer to be considered an ineligible issuer.⁵ In addition, a board of directors, in determining whether or not to accept the terms of a particular settlement, should have been entitled to take into account all of the potential consequences to the issuer that could result from the settlement. In the alternative and at a minimum, we recommend that the Commission consider making issuers ineligible on a retroactive basis only with respect to WKSI status, instead of the entire panoply of the proposed reforms.

Other Recommendations

An issuer who received a “going concern” opinion from its auditors for the most recent fiscal year is also considered an ineligible issuer. We do not believe that the Commission should consider an issuer to be ineligible on the basis of concerns by the auditor about the viability of its business, when the issuer has not performed any action the Commission alleges or views as wrongful. Such

an opinion may have no effect on an issuer's market capitalization, and is not indicative of the level of analyst coverage or availability of public information about the issuer, all of which are important foundations that the Commission considered in developing the Reform Proposal. We also recommend that the Commission modify the definition of ineligible issuer based on a filing for bankruptcy or insolvency during the past three years to exclude the filing of a petition for bankruptcy by a third party against an issuer in the event that the petition is dismissed. Without this modification, the proposed rule will result in an issuer becoming ineligible as a consequence of the filing of a meritless bankruptcy petition.

Communications Proposals

Definition of Written Communication

The Reform Proposal amends the definition of graphic communication,⁶ which is considered to be written communication, to include all forms of electronic media such as electronic mail and Internet web sites. The Reform Proposal indicates that live telephone calls, even those carried through the Internet, will continue to be considered oral communications. Under this analysis, we recommend that the Commission provide that live webcast presentations carried on the Internet, whether audio or video, are not considered written communications. Live webcast presentations are similar to telephonic conference calls in which interested parties click on a web site for access instead of dialing a telephone number. It should not make a difference whether, for example, a presentation for investors is held through a telephonic conference call or as a webcast, and both can be conducted in an interactive format or as listen- or view-only. Any visual presentations, such as powerpoints or slides, provided as part of the live webcast presentation should also be considered oral communications. This is similar to the analysis for live road shows.

We believe that there should be a distinction between live and recorded events.⁷ In the event an issuer decides to record a live webcast to be made available later on a company's web site, the recorded version would be considered a written communication. Recorded events are more analogous to recordings made on either audiotapes or videotapes, both of which are considered graphic communications. We recommend that the Commission clarify this distinction in the final rules.

Permitted Continuation of Ongoing Communications During an Offering

The Reform Proposal creates two new safe harbors to permit the continuation of ongoing communications related to regularly-released factual business information and forward-looking information during a registered offering.⁸ We recommend that the final release largely adopt what is proposed, with a few modifications to provide greater certainty for issuers as to the type and format of information eligible for the safe harbors. We note that the general prohibition that the safe harbors are not available for any communication that may be in technical compliance but is part of a plan or scheme to evade the

requirements of Section 5 of the Securities Act will provide an additional safeguard against potential abuses.

With respect to the definition of factual business information,⁹ we recommend that the Commission clarify that it includes all information set forth in any report that the issuer files pursuant to the Exchange Act other than forward-looking information, instead of being restricted to factual information set forth in such reports¹⁰. The use of the term “factual information” appears to be an unintended limitation that could cause confusion as to whether, for example, the risk factors described in a Form 10-K or Form 20-F or contracts filed as exhibits are included.

Authorization and Approval Before Use of Safe Harbors

The safe harbor deems a communication to be released or disseminated on behalf of the issuer if the issuer both authorizes such communication and approves it before its use.¹¹ This requirement to have both authorization and approval is unnecessary and confusing. It also appears in other proposed rules in the Reform Proposal, whenever there is a condition that information is provided by or on behalf of an issuer.¹² We suggest that the final rules require either authorization or approval by the issuer, instead of both. One situation where the authorization and approval requirement appears unnecessary is where an authorized executive officer speaks on behalf of an issuer. The additional approval requirement in this case appears to suggest, we believe incorrectly, that such an executive officer will need to further obtain approval prior to making any statements about the issuer’s business in order to be covered by the safe harbor. If modified to a requirement to obtain either authorization or approval, the concept of approval may then apply where a non-executive employee or a third party such as an investor relations firm must obtain specific permission prior to communicating about the issuer within the safe harbor.

We recommend that the Commission also apply the concept of authorization or approval to free writing prospectuses prepared by offering participants other than the issuer that are required to be filed.¹³ The proposed rules appear to indicate that free writing prospectuses published or distributed by media with which an underwriter participates only trigger a filing requirement if made on its behalf,¹⁴ but it is not completely clear. We recommend that the Commission clarify that that an underwriter free writing prospectus which triggers a filing requirement must be prepared by or on behalf of the underwriter, indicating that it was either authorized or approved.

In addition, we agree that the Commission should not add any further requirement or specificity with respect to limiting the approval or authorization available to any issuer. Issuers of varying sizes are likely to have different but nonetheless appropriate means of authorizing or approving the release or dissemination of such information. Any attempt by the Commission to adopt a single standard will require at least some issuers to change their otherwise acceptable practices.

“Regularly Released” Condition

The proposed rules require as a condition to both safe harbors that the issuer has previously released or disseminated information of the type described in the ordinary course of its business and that the information is released or disseminated in the ordinary course of the issuer’s business and the timing, manner and form in which the information is released or disseminated is materially consistent with similar past disclosures.¹⁵ We believe that it is not necessary to define the types of communications which constitute “ordinary course”, as that is a term already familiar to issuers from its use in other Commission regulations such as Item 601 of Regulation S-K.

We understand the Commission’s concerns that without these conditions an issuer may be disseminating these types of information in the course of a registered offering, particularly forward-looking information, in order to condition the market for the offering. However, we believe that the conditions are unnecessarily restrictive to meet the stated objectives.

We question the “timing, manner and form” requirement, given that the requirement is applied to a broad range of information, including advertisements, about an issuer’s products and services. We do not believe that the Commission intends to suggest that an issuer may not deviate from its prior manner or form of advertising for its business, including the use of a different format or medium. The timing of an advertisement may depend on the introduction of new products or be dictated by seasonal demand and may not follow an exact schedule, although it could still be considered “regularly released”.

We also do not believe that the Commission intends for the Reform Proposal to narrow the scope of how and when issuers can convey important factual business information, or to suggest that management may not comment on new developments, such as a major acquisition, simply because statements related to acquisitions are not regularly released by a particular issuer due to the general absence of such events in the issuer’s business. While we recognize that the release of any information which does not appear to strictly fit within the safe harbor will not automatically be deemed a violation of Section 5 of the Securities Act, we believe that the Commission understands that issuers often change their behaviors to align themselves within a safe harbor.

We recommend that the Commission adopt a slightly broader approach which continues to require regularly released information but remove the reference to “timing, manner and form”. Issuers should be encouraged to communicate important business information based on the occurrence of significant events, such as mergers or acquisitions, which do not follow a set schedule. Even without the reference to “timing, manner and form”, the rules will require the release or dissemination of information to be materially consistent with the content of issuer’s past releases or form of dissemination. This formulation provides issuers with appropriate flexibility while still maintaining safeguards to ensure that information is not being disseminated to condition the market for an offering. Alternatively, the Commission could provide as a general

instruction that these safe harbors permit factual business information or forward-looking information to be disseminated by an issuer provided that it is not intended to condition the market, and allow the proposed conditions to the exemption to be used as factors to determine whether the general instruction has been satisfied.

We also agree that the Commission should not require any particular history or length of time that an issuer has been regularly releasing factual business or forward-looking information as an additional condition to reliance upon the exemption. There are varying practices for the release of such information among issuers and between particular industries and any regulated standards may not be appropriate to their individual situations.

Application of the Safe Harbors for a Non-Reporting Issuer

The Reform Proposal describes the shift in the Commission's position over the years with respect to forward-looking information. The Commission now recognizes the value of publicly disclosing statements about future performance. The safe harbor for forward-looking statements is not available to non-reporting issuers¹⁶ because the Commission believes that the lack of such information or history for these issuers in the marketplace creates the greatest potential that the continued release of forward-looking information will be used to condition the market. We recommend, however, that the Commission make available the safe harbor for forward-looking statements to non-reporting foreign private issuers who satisfy the requirements in Rule 139(a)(2) with respect to the F-3 eligibility requirements, other than the reporting history as permitted, and the trading of their securities in a designated offshore market for the minimum period stated. These foreign private issuers often have been providing forward-looking information regularly and should be able to continue this practice with the benefit of the safe harbor.

We also recommend that the Commission expand the safe harbors for forward-looking statements to any non-reporting issuer that provides such information due to contractual obligations. Non-reporting issuers often issue high yield debt securities exempt from registration and agree in the governing instrument to prepare information similar to that required by the Commission of an Exchange Act reporting issuer, and to make such information available widely to current and potential investors. The information provided generally includes an MD&A discussion which could contain forward-looking statements. In addition, the safe harbor for releasing factual information should not be limited in this instance to the dissemination of such information to persons other than in their capacities as investors or potential investors,¹⁷ since the non-reporting issuers have agreed to provide their investors with this information.

To further facilitate the dissemination of forward-looking information by non-reporting issuers, we support making available the safe harbor under Section 27A of the Securities Act to those issuers in connection with their initial public offerings. We believe that the current system under the safe harbor is anomalous in encouraging reporting issuers that are well-followed by analysts and have a

history of filing Exchange Act reports to provide forward-looking information, while discouraging non-reporting issuers, which have neither research coverage nor public reporting requirements, from communicating information about their potential future outlook in the IPO registration statement.

Other Recommendations

As proposed, the definitions of factual business information and forward-looking information exclude information about the registered offering or information released or disseminated as part of the offering activities in the registered offering.¹⁸ We recommend that the adopting release clarify that the reference to offering activities is intended to capture situations where an issuer is engaged in promoting or marketing the securities being offered, such as during a road show.

We believe that the Commission intends for the safe harbors to encourage issuers to provide factual business and forward-looking information that is useful for market participants. Therefore we agree with the Commission that there ought not be any limitation on the availability of the safe harbor for issuers that have failed to comply with Regulation FD, Regulation G or any Form 8-K requirements for earnings releases. There exists sufficient enforcement mechanisms against those issuers who are found to have violated those laws and regulations.

In addition, the Commission should confirm our belief that, since these types of communications will not be considered offers when disseminated during a registered offering, the release of such information will not be considered a general solicitation or directed selling efforts when disseminated during private placements pursuant to Rule 144A or Regulation S. Foreign private issuers will particularly benefit from an affirmative statement by the Commission to this effect. These issuers have been issuing unregistered securities more frequently in the last few years and are concerned about the Commission's prohibitions related to exempt securities, which are often very different than their local securities regulations.

As a technical matter, we suggest that proposed Rule 169 not exclude the release of "forward-looking information" by non-reporting issuers through making it an exclusion from the definition of "factual business information",¹⁹ which appears to indicate that forward-looking information is part of factual information. Instead, it should follow proposed Rule 168 which separately defines "factual business information" and "forward-looking information".

Other Permitted Communications Prior to Filing a Registration Statement

The Reform Proposal excludes any communication that does not reference a securities offering made by or on behalf of an issuer more than 30 days before the filing of the registration statement from being considered an offer to sell, offer for sale or offer to buy the securities that are the subject of the registration statement for purposes of Section 5(c) of the Securities Act, provided that the

issuer takes reasonable steps within its control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing the registration statement.²⁰

Reasonable Steps to Control Further Distribution

We recommend that the adopting release indicate that the further distribution or publication of any communication made during the 30-day period will not presumptively evidence the failure of an issuer to take reasonable steps to prevent such distribution in violation of Section 5 of the Securities Act. The Commission recognizes that an issuer will not be able to control the republication or accessing of previously published press releases but indicates that the issuer should be able to control the publication of an interview.²¹ We note that often an issuer can only seek some oral understanding or assurance from the media as to when a particular interview may be published. The media is otherwise free to change their initial plans based on their view of the most newsworthy events at the time of publication. If the staff is satisfied with the measures taken by an issuer, the issuer should not be required to include such information as part of the registration statement or file it as a free writing prospectus.

We do not believe that the Commission intends that an issuer control the further distribution or publication of all past communications prior to the filing of the registration statement that could be disseminated during the 30-day period. We therefore recommend that the Commission consider imposing a time limit as to the past communications to be covered. Otherwise, the proposed rule appears to indicate that an issuer will need to be concerned about interviews with the media given even a year prior to the filing of a registration statement, at a time when it may not have had any intention of offering registered securities, that may later be re-published.

Application to Non-Reporting Issuers

We also support the application of the exclusion for non-reporting issuers and do not believe that there is a greater potential for abuse with this category of issuers. The proposed rule contains a general prohibition on any plan or scheme to evade the requirements of Section 5 of the Securities Act. Registration statements filed by non-reporting issuers are usually reviewed by the Commission's staff prior to being declared effective, so the staff will likely have an opportunity to comment on any perceived abuse.

We seek confirmation, however, that the Commission indeed intends for this exemption from Section 5(c) of the Securities Act to operate as a bright-line test that an issuer can rely upon in making communications up to the 30th day prior to the filing of a registration statement without those communications being considered offers. The general prohibition with respect to plans or schemes to evade should not become a means by which the staff will question communications which occur shortly before the 30 day period begins. We expect this exemption to include situations where an issuer has already engaged an underwriter and begun preparation for the offering prior to the 30th day period. In

our experience issuers almost always engage underwriters prior to the 30 day period, and if the exemption does not operate in this way it will be of extremely limited utility. It is unclear to us with respect to this particular proposal how technical compliance could nonetheless be considered a plan or scheme to evade the requirements. We believe that the Commission should indicate that so long as the communications are made within the relevant time period and the conditions are satisfied, they will be presumed to be acceptable.

Rule 134 Communications

The Reform Proposal revises communications made pursuant to Rule 134 to include an expanded list of permissible information.²² Statements made in reliance on Rule 134 will not be considered either statutory prospectuses under Section 2(a)(10) of the Securities Act or free writing prospectuses as defined in Rule 405 of the Securities Act.

Expansion of Permitted Information

We believe that the Commission can further expand the list of permissible information without any meaningful risk that a Rule 134 notice will act as a means to improperly offer securities. All issuers must already have a registration statement on file before being able to publish or transmit a Rule 134 notice.

Keeping in mind the types of statements that the Reform Proposal indicates will be considered helpful to investors during an offering, we recommend that the adopting release clarify that the permitted description of marketing events²³ includes the road show schedule as well as the means to access any electronic road show made widely available pursuant to proposed Rule 433. In addition, the description of the procedures by which underwriters will conduct an offering²⁴ should permit the inclusion of the names, telephone numbers and email addresses of underwriters and participating dealers. Issuers should be able to refer to the availability of both the filed registration statement, any free writing prospectus and Exchange Act reports either on their own or on the SEC's website. We also recommend that the Commission confirm that it is acceptable to include the information permissible under Securities Act Rule 135 in a communication made under Rule 134.

Availability of a Statutory Prospectus

One of the conditions for satisfying revised Rule 134 is that the communication made in reliance on Rule 134 must be published or transmitted only after a registration statement has been filed, including a prospectus satisfying the requirements of Section 10 of the Securities Act. For a preliminary prospectus used in an initial public offering a Section 10 compliant prospectus must contain a bona fide estimate of the price range and the maximum amount of securities to be offered. This requirement is more restrictive than Rule 134 as in effect today which permits the issuance of Rule 134 notices when the a registration statement is first filed. It is also contrary to the spirit and intent of the Reform Proposal to restrict communications in this manner.

We do not believe that the selling impact of a Rule 134 notice will increase by permitting it to be used as soon as a registration statement is filed. Moreover, the earlier a Rule 134 notice is available the sooner it can be used to locate persons that might be interested in receiving a prospectus. This is consistent with the original purpose of Rule 134, which was to provide an identifying statement that could be used to locate persons that might be interested in receiving a prospectus.

Free Writing Prospectus

The Reform Proposal will permit a written communication that constitutes an offer outside of the statutory prospectus beyond those currently permitted by the Securities Act, defined as a “free writing prospectus.”²⁵ A free writing prospectus includes any written communication that constitutes an offer for a registered offering that is used after the registration statement is filed, other than by means of a prospectus satisfying the requirements of Section 10(a) of the Securities Act or that does not fall within the exception from the definition of prospectus in clause (a) of Section 2(a)(10) of the Securities Act because a final prospectus accompanied or preceded the offer.²⁶ WKSIs may use a free writing prospectus even prior to the filing of a registration statement. We believe that this definition is appropriate so long as the definition of “written communication” is revised as recommended above.

As the concept of free writing prospectuses is novel and likely to cause some initial confusion in the market, we recommend that the Commission confirm in the adopting release that the definition of free writing prospectus will not encompass any written communication that is not considered to be an offer to sell or solicitation of an offer to buy registered securities. Currently, credit rating agencies produce and publicly release reports on the credit quality of an issuer on the basis of public information and information provided specifically by the issuer to the rating agencies. These releases contain important analysis of the issuer which investors rely upon in evaluating the issuer and the offering. We recommend that the Commission make clear that written communications not currently interpreted as violating Section 5, such as rating agency reports, will not constitute free writing prospectuses under the new rules.

Given the flexibility that the Commission has proposed for the content and use of free writing prospectuses, we agree with the Commission that it is not necessary to require that a free writing prospectus be filed as part of a registration statement. Registration statements are subject to Section 11 of the Securities Act and issuers and offering participants are well aware of the requirement to include in a registration statement information related to the issuer and the offering to avoid the prospectus containing a material misstatement or omission. In addition, the Reform Proposal makes clear that free writing prospectuses are subject to certain Securities Act liabilities and therefore also may not contain material misstatements or omissions. We agree with the Commission that it is not necessary to require that issuers approve every free writing prospectus before its use. The Commission has long been of the view that issuers and other offering

participants can and should determine among themselves these types of practice issues in compliance with the Securities Act and related rules and regulations.

Media Publications

Any written communication about an issuer or its securities that constitutes an offer of securities related to a registered offering, for which an issuer or other offering participant provided information that is published or disseminated by an unaffiliated person that is in the business of publishing, broadcasting or otherwise disseminating written communications will be considered to be a free writing prospectus.²⁷

We recommend that the Commission clarify that the publication, broadcast or dissemination by media of a news story about an issuer or the offering, independent of any involvement by the issuer or other offering participant, will not be considered a free writing prospectus. This should be the case even if the article or news story cites “sources” close to the offering. We urge the Commission not to presume responsibility by the issuer or other offering participant in those instances unless there is direct evidence of such involvement, as sources for press accounts are often impossible to trace. In “hot” offerings with enormous media attention there is often intense competition among the media to claim the latest “inside” information. We are concerned that with the adoption of the proposed reforms the Commission staff will consider the filing of media articles or broadcasts as free writing prospectuses a less onerous request than its current practice of requiring the inclusion of these items in registration statements. We recommend that the adopting release clarify that it is not the Commission’s intent to suggest that issuers and other offering participants must file matters that the media independently elects to report about the issuer or the offering.

In addition, the adoption of the Reform Proposal may result in widespread use of free writing prospectuses to communicate information to potential investors. One consequence of the use of these types of communications is the likelihood that a number of them will fall into the hands of the media, without the knowledge or consent of any of the offering participants. In the past the Commission staff has often required that any information prepared by an offering participant which is reported by the media must be included in the registration statement for the offering, even if the media did not obtain it from the issuer or any underwriter. While we understand the Commission’s current concerns with respect to potential Section 5 violations in these situations, we believe that this should not continue to be the staff’s practice upon the adoption of the Reform Proposal. Free writing prospectuses will be subject to Section 12(a)(2) liability. If the staff’s current approach remains in effect, we believe it would severely chill the use of free writing prospectuses.

In addition, we note the interpretation in footnote 145 of the Reform Proposal which distinguishes between inviting press to a live road show with a limited audience or having an article published based on information provided at a readily accessible electronic road show open to an unrestricted audience. The

latter article will not be treated as a free writing prospectus of the issuer or other offering participant due to the unrestricted and available nature of the electronic road show. Consistent with this interpretation, we seek clarification that any media reports based on conference calls or webcasts which are announced in accordance with Regulation FD for U.S. issuers, or otherwise by foreign private issuers, should also not be treated as free writing prospectuses.

The Reform Proposal does not make available the exception for the conditions to a free writing prospectus that is published or distributed by media to an issuer affiliated with such media. We believe that this will create a competitive disadvantage for issuers in the publishing, newspaper or television business and other issuers who operate a media business as a segment, Internet companies that distributes news through the Internet and investment firms that invest in a variety of different businesses. This will also limit the amount of public information about those issuers, some of which are Fortune 100 companies widely held by individual shareholders. We recommend that the Commission remove the non-affiliation reference and instead require that any affiliate relationship must be disclosed in the free writing prospectus that is filed.

Use of a Free Writing Prospectus by WKSIs

WKSIs are permitted to use a free writing prospectus prior to the filing of a registration statement related to a public offering of securities, with appropriate legends.²⁸ Any free writing prospectus used prior to the filing of a registration statement must be filed at the time the registration statement is filed. We agree with the Commission that it is appropriate to liberalize communications for WKSIs even though it may be rare for such issuers not to have shelf registration statements on file before making offers. Since WKSIs must eventually file these written offers as free writing prospectuses, the application of the exemption should not be dependent upon a WKSI filing a registration statement within any particular period of time.

It is unclear when a media interview or broadcast which constitutes a free writing prospectus is required to be filed if conducted by a WKSI prior to the filing of a registration statement. We recommend that the Commission make an exception to the requirement to file free writing prospectuses related to media within one business day after publication or distribution in this instance.²⁹ Any free writing prospectuses in connection with media interviews or broadcasts by WKSIs which occur prior to the filing of a registration statement should not be required to be filed until such time as the registration statement is filed.

Filing Conditions for a Free Writing Prospectus

The Reform Proposal includes filing conditions so that certain free writing prospectuses must be filed no later than the date of first use.³⁰ An issuer will be required to file (1) any issuer free writing prospectus, (2) any free writing prospectus of any person used by the issuer, (3) any issuer information that is contained in a free writing prospectus prepared by any other person and (4) any

free writing prospectus prepared by any person that contains only a description of the final terms of the issuer's securities.

Free Writing Prospectus Prepared by Other Offering Participants and Liability for Free Writing Prospectus

Information prepared by an offering participant other than the issuer on the basis of issuer information is not required to be filed as a free writing prospectus, unless it meets one of the other requirements imposing filing obligations, such as being distributed in a manner reasonably designed to lead to the broad dissemination of such information,³¹ or if information provided by the offering participant is published or disseminated by the media.³² We support the Commission's efforts to distinguish between free writing prospectuses containing issuer information prepared by any other person and free writing prospectuses prepared on the basis of issuer information, which include underwriter free writing prospectuses. We believe that this structure will facilitate the use of free writing prospectuses to communicate information to potential investors. It is also consistent with the offering process today where underwriters prepare their own analysis for the benefit of their clients.

We seek confirmation from the Commission that an issuer, for purposes of the Reform Proposal but in particular with respect to the use of free writing prospectuses, is the entity issuing registered securities³³ and does not include any subsidiary or affiliate that may be an underwriter or participating dealer in the offering.

We are concerned about the potential liability associated with free writing prospectuses. Free writing prospectuses are a novel means of providing issuers and other offering participants with an alternative method of communicating with investors. Both offering participants and investors can benefit from the use of free writing prospectuses, which promote the concept that investors should be armed with sufficient and appropriate information in order to make their investment decisions. We believe that the Commission should take certain steps to address the liability issues associated with free writing prospectuses which will encourage their use without adversely affecting investors.

Section 12(a)(2) liability attaches to an offering participant that sells securities by means of use of a free writing prospectus. The current law is unclear as to how "use" of a free writing prospectus will be interpreted. We believe that the Commission should clarify that, absent clear evidence of use of a free writing prospectus, (1) the review of such free writing prospectus by any offering participant will not equate to use and (2) the filing of such free writing prospectus by the issuer or any other offering participant will not create any presumption of use by anyone other than the offering participant filing the free writing prospectus. We address each of these issues below.

Review of Free Writing Prospectuses

As the Commission is aware, issuers and underwriters are both involved in preparing the statutory prospectus and also work together on other aspects of the offering. Once the Reform Proposal is adopted, an issuer may believe that it must review any underwriter free writing prospectus to confirm its factual accuracy and that it does not contain any issuer information that triggers a filing requirement on its part. An issuer may be concerned that an underwriter free writing prospectus includes issuer information that an underwriter obtained in the course of due diligence which is potentially material.

We believe that the current Reform Proposal presents issuers with the difficult decision of either (1) prohibiting underwriters from preparing free writing prospectuses so as to avoid the dissemination of possible factual errors or the distribution of a free writing prospectus containing issuer information that is not filed, or (2) examining such a free writing prospectus for factual accuracy and issuer information and thereby through mere review possibly triggering a filing requirement and potential liability. We recommend that the Commission clarify in its adopting release that a review by the issuer of an underwriter free writing prospectus does not constitute authorization and/or approval by the issuer, triggering a filing requirement on its part. In addition, the review by itself should not be considered a use of the free writing prospectus by the issuer for liability purposes.

Without this clarification, issuers may believe that they have little choice but to prohibit the use of free writing prospectus by underwriters altogether. The Commission should also consider providing that if an issuer prohibits the use of any underwriter free writing prospectus which would trigger a filing requirement on its part, then the issuer should not be required to file, and should not be liable for, any such underwriter free writing prospectus which constitutes a breach of the agreement. Issuers should not be responsible for actions taken by underwriters which they could not have anticipated and in fact tried to prevent. In addition, if an underwriter files a free writing prospectus which the issuer has not reviewed, we do not believe that the issuer should have any risk of liability for it absent clear evidence of use by the issuer.

Managing underwriters of an offering may also determine that it is necessary to review free writing prospectuses prepared by other offering participants. They may believe that it is necessary to review free writing prospectuses as part of their "reasonable care" defense under Section 12(a)(2). We ask that the Commission adopt similar protections for underwriters with respect to any free writing prospectus by any other offering participant that they decide to review. Managing underwriters should be permitted to review free writing prospectuses prepared by the issuer or other underwriters involved in the offering without being concerned that the review will constitute its authorization and/or approval. Authorization and/or approval of a free writing prospectus by an underwriter may not trigger a filing requirement, but could be considered "use" of the free writing prospectus for Section 12(a)(2) liability purposes. We believe that an underwriter also should not be liable for any free writing prospectus

absent clear evidence of use, and may have prohibited in agreements with the issuer or other underwriters.

We believe that these are important modifications to the proposed rules governing free writing prospectuses. Without these clarifications from the Commission, issuers and underwriters may be concerned that free writing prospectuses carry too much risk in terms of potential liability and severely restrict or prohibit their use in offerings altogether.

Filing of Free Writing Prospectuses

The Reform Proposal indicates that prior efforts by the Commission to reform the offering process – which would have required all free writing prospectuses to be filed, regardless of whose communications were involved – were met with objections due to concerns that offering participants would have become liable for communications that they had not prepared or used. It is the Commission’s position that limiting the filing condition to a narrower range of items addresses these concerns about potential cross-liability under Section 12(a)(2) of the Securities Act.³⁴

We understand that ultimately the courts will decide, based on the facts and circumstances of a particular situation, which offering participants may be liable for a specific free writing prospectus. However, we urge the Commission to make clear in the final rules that the limitations on filing requirements is intended to limit the liability for a free writing prospectus only to an offering participant that used such prospectus to offer the registered securities.

The Commission should provide that the filing of a free writing prospectus by any offering participant does not create any presumption that any other offering participant, other than the offering participant that prepared the free writing prospectus, used such prospectus to offer or sell securities. We believe that, absent clear evidence of affirmative use, liability should only attach to the offering participant that actually used the free writing prospectus to sell securities.

Other Liability Issues

Proposed Rule 433 states that a free writing prospectus “will be deemed to be public”. We understand that this statement is intended to make clear that free writing prospectuses are subject to Section 12(a)(2) liability.³⁵ We are concerned that this statement could be construed to mean that all free writing prospectuses, regardless of whether or not filed or sent to a limited number of persons, will give rise to claims that the information influenced the investment decision of all potential investors. This language could lead to an increased risk of class action lawsuits. It could also raise unnecessary concerns under Regulation G.³⁶ We believe that the Commission could instead propose that an offering participant that uses a free writing prospectus is deemed to consent to Section 12(a)(2) liability and achieve the same result, but without the potential adverse consequences.

The law surrounding free writing prospectuses is unknown at the moment and without precedent. We are also concerned with respect to the application of the “reasonable care” defense under Section 12(a)(2) of the Securities Act in the context of free writing prospectuses. We believe that the Commission can further facilitate the use of free writing prospectuses by stating that Rule 176 is an appropriate interpretation to this defense. However, the Commission should also include a clear statement that by extending the rule it does not intend to change the law as to what constitutes reasonable care under Section 12(a)(2), and that Rule 176 is available only to the extent that it is relevant to the defense.

Final Term Sheets as Free Writing Prospectuses

The Reform Proposal indicates that a free writing prospectus that contains only a description of the securities offered, regardless of whether an issuer or other offering participant prepared or used it, will not be subject to filing if it only reflects the preliminary terms of the securities being offered.³⁷ We believe the Commission intends to include within this provision preliminary term sheets prepared by an issuer or other offering participants which may be provided to potential investors to assess their interest in the securities being offered, and to negotiate or otherwise discuss the potential terms of the offering. Any free writing prospectus prepared by any person that contains only a description of the final terms of the issuer’s securities will need to be filed by the issuer within two days of the later of the date such terms have become final and the date of first use.

We believe that the Commission should allow market participants to develop their own practices as to the use of final term sheets and should not mandate the filing of such term sheets. Any final term sheet prepared by an issuer must already be filed as an issuer free writing prospectus. We recommend that the Commission not otherwise require the filing of any final term sheets.

The requirement to file final term sheets does not recognize the variety of market practices that may be implicated. There may be different versions of final term sheets since each underwriter may wish to prepare its own version for its customers, referencing previous offerings that it was involved with or highlighting what each of them believes to be the key terms. In addition, some underwriters may wish to prepare term sheets for certain customers which only summarize certain provisions, send an email about a particular final term they had previously discussed, or include additional information in a free writing prospectus containing the final terms. Under the proposed rules it appears that a final term sheet which includes such additional information will not be required to be filed. There is an inherent uncertainty as to when a description of some, but less than all, final terms constitute a final term sheet and whether the inclusion of any additional information causes an otherwise final term sheet not to be subject to filing. We do not see any need for the Commission to insert itself into market practice in this area.

The issuer should not be required to file final term sheets prepared by one or more underwriters. Issuers may be concerned that they will subject themselves to potential liability for all the final term sheets they will be required to file and

the time necessary to negotiate the content of each underwriter final term sheet could result in an unnecessary delay for an offering. Alternatively, issuers may prohibit underwriters from preparing final term sheets altogether.

In addition, we note that the text of the proposed rules appears to require the issuer to file any free writing prospectus it prepared, without exception,³⁸ through the definition of issuer free writing prospectus. We request that the final rules make clear that an exception exists for term sheets prepared by an issuer which are not final, consistent with the release.

Other Recommendations

The Reform Proposal does not indicate how a free writing prospectus is to be filed. We recommend that a new form be developed solely for the purpose of filing a free writing prospectus rather than using existing Form 8-K or Form 6-K. A current report on Form 8-K is automatically incorporated by reference into registration statements unless deemed “furnished” instead of “filed”. In addition, non-reporting issuers are not subject to, and may not use, Exchange Act reporting forms. If an underwriter free writing prospectus is being filed, the form should refer to the related registration statement and the free writing prospectus then becomes part of the issuer’s filing record on Edgar, not the underwriter’s.

The Reform Proposal provides a “cure” to fix an immaterial or unintentional failure to file or delay in filing a free writing prospectus so long as certain conditions are met and the free writing prospectus is filed as soon as practicable after discovery of the failure.³⁹ We support making available such a provision to resolve an inadvertent failure to file or delay in filing. We agree with the Commission that it is not necessary to have any length of time pass before an issuer can complete a transaction. The cure provision assumes both that the mistake was not an intentional effort to avoid the filing requirement and the free writing prospectus has now been filed.

The cure provision is available with respect to all free writing prospectuses that are required to be filed, including certain news articles or interviews. If during an offering an issuer or offering participant participates in a media interview and fails to file the resulting article or broadcast, we encourage the Commission to confirm that in those situations the cure provision will allow the responsible party to later file the article or broadcast as a free writing prospectus and the Commission staff will not require that it also be included in a registration statement under review by the staff.

Electronic Road Shows

The Reform Proposal makes an exception for the filing of road shows transmitted or made available by means of graphic communications which are free writing prospectuses, so long as the issuer makes at least one version of a bona fide electronic road show available without restriction by means of a graphic communication to any person. If there is more than one version transmitted or

made available, the version available without restriction must be made available no later than the other versions.⁴⁰

We do not believe that it is necessary to include a definition of road show to describe these activities. Issuers and other offering participants are familiar with road shows, including those made available through webcasts. We believe the adoption of this proposed rule will lead to more widespread use of electronic road shows. The absence of the conditions in the no-action letters that are not being included in the Reform Proposal is appropriate. We believe that electronic road shows transmitted over television or radio should not be treated any differently, as both will be considered graphic communications.

We believe that the definition of a bona fide electronic road show is generally adequate for this purpose.⁴¹ The Reform Proposal should not discourage different versions of electronic road shows. Issuers should be allowed to tailor road show presentations to audiences with different levels of investment sophistication and familiarity with the issuer. We believe that the requirement that a bona fide electronic road show must contain the same general information as the other versions provides sufficient guidance. We encourage the Commission to clarify that this is intended to mean that the same general types of subject matters should be covered.

The Commission should also consider expressly permitting editing of electronic road shows. Editing will allow issuers to correct errors before the presentation and will make it easier for issuers to ensure that the bona fide electronic road show contains the same general information. We interpret the Reform Proposal to provide that visual presentations, such as slides or powerpoint presentations used but not distributed at live road shows, continue to be considered oral communications along with the live road show. The use of electronic media to transmit an otherwise oral presentation to an audience overflow room should also be viewed as part of the live road show and thus an oral communication instead of a free writing prospectus. Its use is to accommodate the size of the audience and issuers should not be penalized for conducting an offering which generates a great deal of interest in their road show.

We note that the text of the release indicates that an electronic road show or script will not be subject to filing, except for material issuer information, if (1) the issuer makes at least one version of a bona fide electronic road show readily available electronically to any potential investor at the same time as the electronic road show and (2) files any issuer free writing prospectus or material issuer information used at an electronic road show (other than the road show itself).⁴² We are not certain what the Commission intends by the parenthetical, "other than the road show itself". The proposed rules exclude the filing of electronic road shows as long as the stated conditions are met and does not include the language in the parenthetical. If this is intended to confirm that any visual presentations, such as slides or powerpoint presentations, used during an electronic road show are not required to be filed, we support the Commission's views and ask that this be clearly stated in the final rules.

Unlike the text of the release, the proposed rules indicate that only issuer information contained in a free writing prospectus prepared by any other person is required to be filed by its reference to paragraph (d)(1)(i)(C) of proposed Rule 433.⁴³ The text of the release, however, states that any issuer free writing prospectus or material issuer information must be filed.⁴⁴ We recommend that filing be limited to the requirement in the proposed rules.

Form and Content of a Free Writing Prospectus

We believe that the Commission has provided appropriate flexibility by not dictating the form and content of free writing prospectuses, other than the required legend, in light of its goals that free writing prospectuses serve as an alternative means of written communication from statutory prospectuses which must meet certain informational requirements. We agree with the Commission that it should not limit the type of information that can be included in a free writing prospectus or require explicitly that it contain a balanced presentation. We believe that the legend recommending that potential investors read the statutory prospectus is sufficient in indicating that investors should not rely solely on the free writing prospectus. In addition, the Securities Act liabilities associated with the use of free writing prospectuses will generally curb the potential for abuse.

We recommend that the Commission specifically permit the incorporation by reference of the statutory prospectus into the free writing prospectus. The communication made in the free writing prospectus should be considered against the totality of the information available since it is subject to Section 12(a)(2) liability. Although the Commission does not impose any content requirements for free writing prospectuses, we note that the NASD rules which regulate member communications with the public, the so-called "fair and balanced" rule, appears to apply to underwriter free writing prospectuses.⁴⁵ To eliminate any uncertainty, the Commission should indicate that the information in the statutory prospectus, including any risk factors, should be considered in determining underwriters compliance with their NASD obligations. In addition, the Commission should also specifically permit a later free writing prospectus to modify or supersede any statement contained in a prior free writing prospectus to the extent that a statement in such later free writing prospectus modifies or replaces statements made previously.

The proposed rules prohibit free writing prospectuses from containing information that is inconsistent with information contained in any statutory prospectus or Exchange Act reports filed by the issuer.⁴⁶ We believe that this requirement should not apply to free writing prospectuses prepared by underwriters. Underwriters should be permitted to offer their own analysis of the securities being registered or the business, financial conditions or prospects of the issuer, which may differ from the issuer's public disclosure documents.

The Reform Proposal, although not in the proposed rules, indicates that the legend may not contain any impermissible disclaimers such as (1) disclaimers regarding accuracy or completeness, (2) statements requiring investors to read or

acknowledge that they have read any disclaimers or legends or the registration statement or (3) language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation of an offer to buy. We understand the Commission's concerns with respect to disclaimers which can dilute the effect of the legend. However, we believe that a free writing prospectus, which may be very brief, should be allowed to contain language indicating that it is not a complete description of either the issuer or the securities being offered. This is consistent with the language in the legend which includes a statement that for "more complete information" the investor should read the statutory prospectus.

Treatment of Communications on Web Sites and Other Electronic Issues

The Reform Proposal addresses additional concerns that may be raised with respect to the use of the Internet and other electronic media to communicate and deliver information to investors. It makes clear that an offer of an issuer's securities that is contained on an issuer's web site or hyperlinked by the issuer to a third party web site is considered a written offer of securities made by the issuer, and under the Reform Proposal will be considered an issuer free writing prospectus.⁴⁷ We recognize that this interpretation is largely consistent with the Commission's prior statements on the use of the Internet.⁴⁸

The Reform Proposal indicates that these rules will not apply to historical issuer information that otherwise could be considered an offer but that is properly identified as such and located in a separate section of the issuer's web site containing historical issuer information, sometimes known as archives. That information will not be considered a current offer of the issuer's securities, which could include regularly released information that will benefit from the proposed safe harbors.

We agree that historical issuer information on an issuer's web site that is accessed at a later time should not be considered a current written offer. We believe that the Commission should clarify, however, that it is not necessary to segregate historical information into a separate area of an issuer's web site in order for such information to be deemed historical. A clearly dated document should suffice for this purpose. As one example, accelerated filers are required to include Exchange Act reports on their web sites,⁴⁹ and generally comply by gathering and placing such information on their investor relations page under a heading entitled "Exchange Act Reports" or "SEC Filings." Sometimes this page is hyperlinked to the Commission's or a third party's website with direct access to Edgar filings made by the issuer so that it is updated in "real time". This page could include all filings made with the Commission for any number of years. New reports are added automatically as they are filed with the Commission, and other than the date of the report, there is no indication which reports are considered "historical" rather than current.

It should not be necessary for an issuer who registers securities for an offering to remove any Exchange Act reports. This manner of organization is widely adopted and accepted. It will confuse the public, including potential investors, if this information is required to be segregated into two different

locations. Similarly, most issuers include all recent press releases and earnings webcast on their web sites. If a press release or earnings webcast satisfied the proposed safe harbors when issued, including the 30-day exemption,⁵⁰ we believe issuers should be permitted to keep them on their web site without the need for archiving. The requirement to archive historical information will also be most harmful for a WKSI that may continually be in the market as a result of the flexibility provided by the Reform Proposal. The concept of an archive section does not recognize the developments in the use of corporate web sites as a dynamic tool for communicating with investors, especially in light of the recent requirements by the Commission and the listing exchanges to include disclosure and corporate governance information on such web sites.

Regulation FD

The Reform Proposal will amend the exclusions from Regulation FD for communications made during a registered offering,⁵¹ including a filed registration statement, a free writing prospectus used after filing of the registration statement, any other Section 10(b) prospectus, Rule 134 and Rule 135 notices and an oral communication made in connection with the registered offering after filing of the registration statement for the offering. We believe that it is appropriate to continue to exclude the oral communications of an issuer made in connection with a registered offering from any filing or public disclosure requirements. We agree with the Commission's view that not doing so could adversely affect the capital formation process.

The amendments proposed also narrow the types of registered offerings eligible for the exclusion to those involving capital formation for the account of the issuer and underwritten offerings that are both an issuer capital formation and a selling security holder offering. It is unclear why the Reform Proposal excludes any selling security holder offering that is not combined with an offering by the issuer. Even if the issuer is not raising funds for itself in a selling security holder offering, the issuer did raise capital when it originally sold securities to its selling security holders. We believe that there may be a negative impact on the cooperation offered by issuers to selling security holders and an adverse impact on these types of secondary offerings if the types of registered offerings eligible for the exclusion from Regulation FD provided to registered securities offerings is not expanded to include all offerings registered by the issuer. This is also consistent with current practice and we are not aware of any perceived abuses.

Use of Research Reports

The Reform Proposal amends several rules pursuant to which research reports are issued. The Reform Proposal recognizes the importance of research coverage in disseminating information and analysis of issuers of securities. The level of analyst coverage is one factor that the Commission reviewed in making distinctions among the categories of issuers for purposes of the types and extent of the flexibility deemed appropriate in the Reform Proposal. We support the Commission's efforts to expand upon the exemptions for research under Rules 137, 138 and 139 of the Securities Act, particularly in light of both the global

research settlement and the rules recently adopted by the SROs which have made the research function operate independently of investment banking.

Definition of Research Report

The Reform Proposal applies the exemptions for research under Rules 137, 138 and 139 to a “research report” and adopts the definition as used in Regulation AC.⁵² A research report is defined as a written communication that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision. Currently, Rules 137, 138 and 139 apply to “information, opinions or recommendations” about an issuer or its securities,⁵³ which also include oral communications.

We recognize that the Commission may believe that it is appropriate to apply its existing definition of research reports to the Commission’s research rules, especially given that the SROs have defined the term in their regulation of research produced by member firms. While the definition may be appropriate for purposes of Regulation AC since analyst certification should be limited to written reports, we believe that it is too restrictive for purposes of the exemptions provided under Rules 137, 138 and 139.

The Commission has proposed broadening the exemptions available for research in recognition that recent regulations and the global research settlement have required structural reforms and increased disclosure, which addressed many of the perceived abuses. The Commission understands the valuable role that research plays in providing the market and investors with information about reporting issuers. Limiting the application of the rules in a manner that is more restrictive than their existing application seems contrary to the Commission’s intent to make the exemptions available for a wider range of circumstances than is currently the case under these rules. We believe that the Commission should not restrict the use of these exemptions to research reports as defined under the Reform Proposal, and should include oral communications in the final rules.

Rule 138

Rule 138 permits a broker or dealer participating in a distribution of an issuer’s common stock and similar securities to publish or distribute research that is confined to the type of securities, such as fixed income securities, which is not being distributed. Proposed revisions to Rule 138 include expanding the categories of eligible issuers to issuers that are current in their Exchange Act reporting requirements.⁵⁴ We recommend that the Commission instead amend this proposal to include all issuers subject to reporting requirements pursuant to Section 13 or Section 15(d) of the Exchange Act.

It will be difficult for brokers and dealers to confirm whether an issuer is current in its obligations and “has filed all required periodic reports”, especially in light of the limitations on communications under the global settlement and SRO rules between research analysts and the investment banker who covers the issuer. Requiring research analysts to conduct an independent investigation of the

issuer's obligations, even though only limited to Form 10-K, Form 10-Q and Form 20-F filings, is more difficult than it first appears and also unnecessary. An issuer that is not current in its reporting obligations is subject to penalties imposed by the Commission. Brokers and dealers should not be responsible for making those determinations or be the parties subject to additional consequences of an issuer not remaining current.

Liability Standards

The Reform Proposal indicates that Section 12(a)(2) and Section 17(a)(2) liability applies at the time of contract of sale, when an investment decision is made. We recognize that it is difficult to identify an exact point in time which would constitute the contract of sale in every offering. However, we believe that the Commission should make clear that in no event does a time of contract of sale occur prior to the execution of an underwriting agreement between the issuer and the underwriters, to avoid concerns that an indication of interest by an investor for the securities being offered, the so-called "circle", would constitute a contract of sale. We agree that that it is not necessary for the Reform Proposal to require the actual delivery of a prospectus and term sheet in order to shift the liability determination to the time of sale.

In addition, we seek clarification with respect to the proposed rule determining that the issuer is a "seller" under Section 12(a)(2) of the Securities Act⁵⁵. We believe that the final rule should only reference any issuer free writing prospectus and any other free writing prospectus used by the issuer, instead of the broader language in the proposed rule which references information about the issuer or its securities (1) provided by or on behalf of the issuer and (2) included in any other free writing prospectus.⁵⁶ The proposed rule is unnecessarily broad and could be read, we believe incorrectly, to include any underwriter free writing prospectus prepared on the basis of issuer information or containing information from the registration statement.

Securities Act Registration Proposals

Shelf Offering Reforms

We support the Commission's efforts to reform the shelf offering process to meet the demands and realities of today's marketplace, where information about seasoned issuers, particularly WKSIs, is widely available and quickly disseminated through both advancements in technology and the breadth of analyst coverage. We commend the Commission staff for bringing current the framework of shelf offerings in a manner designed to provide both investor protection and flexibility for issuers and other offering participants in capital formation.

Other than the proposed definition of "ineligible issuers" as discussed above, we agree with the flexibility afforded to WKSIs in the Reform Proposal, particularly with respect to the shelf reforms. We support the ability of WKSIs to use automatic shelf registration statements containing a base prospectus with minimal required information other than incorporated Exchange Act reports.

WKSIs will be able to omit information on whether the offering is a primary or secondary offering, the names of any security holders and any plan of distribution, all of which provides sufficient flexibility for WKSIs to take advantage of market opportunities as they arise. Post-effective amendments, which also become automatically effective, are required only for the addition of new types of securities or new eligible issuers and the securities they intend to issue.

NASD Issues

We are concerned that under the NASD shelf proposal⁵⁷ shelf offerings of WKSIs and seasoned issuers affiliated with broker-dealers⁵⁸ will continue to be subject to filing and review under the NASD Corporate Financing Rule. This review typically takes several weeks and may inhibit the ability of such issuers to quickly access the market in the manner contemplated by the Reform Proposal. We are also concerned about delays caused by the proposed revised filing procedure under which distribution participants may be required to obtain NASD approval to participate in a shelf takedown immediately preceding the offering. Under the existing procedure, the shelf as a whole is cleared and there is no requirement to pre-clear takedowns. This change does not appear to serve any regulatory purpose and conflicts with the objectives of the Reform Proposal.

Procedural Changes to Shelf Registration

We believe that the procedural changes to the shelf registration process for seasoned issuers in the Reform Proposal accomplishes the Commission's objectives of codifying existing practice and provides shelf issuers with additional certainty with respect to the information that is permitted to be omitted from the base prospectus. We believe that the Reform Proposal has appropriately eliminated the requirement that a shelf registration statement only register the securities that an issuer intends to issue in the next two years. This restriction is unnecessary and has not always provided an accurate indication of an issuer's future plans. It is generally difficult for issuers to make a prediction not only as to how much capital they will need in the next two years, but whether registered securities offerings will provide the best terms.

We support the Commission's decision to permit immediate takedowns, eliminating the "convenient shelf" rule, and to eliminate the restrictions on primary "at-the-market" offerings of equity securities. The Reform Proposal will permit seasoned issuers that are not WKSIs to add selling shareholders through a prospectus supplement instead of a post-effective amendment if the resale registration statement identifies the private transaction, the private transaction is completed and the securities issued are outstanding prior to filing the resale registration statement.⁵⁹ We believe this is an important and useful modification which will help streamline what is generally an administrative process for adding or amending the list of selling shareholders contained in the base prospectus. This process has at times delayed selling shareholders from being able to sell their securities until the necessary signatures or consents were received. We ask that

the Commission further expand the proposal by eliminating the requirement to fulfill the stated conditions prior to being able to add selling shareholders through a prospectus supplement. This seems appropriate since the prospectus supplement will be subject to Section 11 liability and the addition of a selling shareholder is very rarely material information for an investor.

Amended Rule 424 continues to include references to filing multiple copies, which we recommend revising to reflect electronic filing on Edgar. In addition, we recommend that the identification of the Exchange Act reports incorporated by reference into the prospectus and the registration fee table not be required on the cover page.⁶⁰ This information could be required on the inside of the prospectus instead. It is already at times difficult, particularly under the plain English rules, to be able to include all of the relevant information on the front cover. Investors are familiar with the ability of shelf issuers to incorporate by reference their Exchange Act documents, which is a cornerstone for shelf offerings. They have long been able to locate those documents even without such a list and it is not necessary to provide this list on the front cover. With respect to the fees paid, this information will only be of interest to issuers and not to any investors, especially under the pay-as-you-go system which no longer gives any indication of how much the issuer intends to offer in the near term.

With respect to proposed changes to Form S-3 or Form F-3 to add WKSIs as a new category of issuer, we agree with the Commission that it is appropriate to permit majority-owned subsidiaries of a WKSI to also be treated as a WKSI for purposes of issuing its own securities and registering such securities on Form S-3 and Form F-3 so long as certain conditions are satisfied, including that there is a full and unconditional guarantee from the parent. This availability should not be limited only to wholly owned subsidiaries. We also believe that Rule 434 can be eliminated as it is little used. We note that revised Rule 430B(b) should refer to a form of prospectus filed as part of a registration statement, for offerings pursuant to Rule 415(a)(1)(x) by an issuer eligible to use Form S-3 or Form F-3 for primary offerings, instead of Rule 415(a)(1)(i), which pertains only to securities offered or sold by a person other than the registrant.

Although not proposed, we believe that the Commission should consider expanding the transaction eligibility requirements in Form S-3 and Form F-3 to include the ability to register all debt securities, instead of being limited to investment grade securities. The Reform Proposal represents the Commission's view that an issuer's Exchange Act record provides the basic source of information for potential investors with respect to the issuer and its business, and forms the basis for the market's evaluation of the issuer and the pricing of its securities. This view is represented in many of the proposed reforms, particularly the availability of incorporation by reference for Exchange Acts reports under Form S-1 and Form F-1 and the concept of "access equals delivery". We believe that so long as an issuer meets the requirement to timely file its Exchange Act reports, the Commission should not continue to use credit quality as a distinction in determining Form S-3 and Form F-3 eligibility.

Form S-1 and Form F-1

We support the proposed amendments to Form S-1 and Form F-1 to permit a reporting issuer that has filed at least one annual report and that is current in its reporting obligation to incorporate by reference into such form information from its previously filed Exchange Act reports and documents. This is consistent with the overall emphasis in the Reform Proposal on the importance of Exchange Act reports in providing information about the issuer. The ability to incorporate by reference will eliminate what was largely a duplicative process whereby information from those Exchange Act reports were copied verbatim into Form S-1 or Form F-1 for reporting issuers not eligible to use Form S-3 or Form F-3. We do not believe that there should be any other eligibility requirements, other than with respect to the category of ineligible issuers as discussed above.

We recommend that the Commission also permit all Exchange Act reports subsequently filed by the issuer, prior to the termination of the offering, to be incorporated by reference into the Form S-1 or Form F-1, so-called “forward incorporation”. We believe that the Commission is permitting incorporation by reference of historical information in these forms because Exchange Act reports have become the primary source of information about issuers, are now subject to mandatory review by the Commission staff every three years and widely available on the Internet. There should not be a distinction between recognizing that issuers should be able to provide information otherwise required in a prospectus through their Exchange Act reports on a historical, but not on an ongoing, basis.

Prospectus Delivery Reforms

Under the “access equals delivery” model for prospectus delivery under the Reform Proposal, a final prospectus will be deemed to precede or accompany a security for sale for purposes of Securities Act Section 5(b)(2) as long as it is filed with the Commission.⁶¹ Final prospectuses will also no longer be required to be delivered in connection with market making transactions by dealers affiliated with the issuer.⁶² We support the proposed new rules and the Commission’s efforts in this area, which will facilitate the transmission of information while recognizing that the widespread adoption of advancements in technology make actual delivery of final prospectuses no longer necessary. We do not believe that this will affect the timing of the filing of a final prospectus, as the rules requiring when such filings must be made do not change.

The Reform Proposal establishes several conditions prior to the availability of the “access equals delivery” model. We recommend that the conditions not be applied to brokers or dealers that are only required to deliver a final prospectus for a specified period after a registration statement becomes effective to persons who buy securities in the aftermarket and were not involved in the initial distribution of the securities.

Additional Exchange Act Disclosure Proposals

The Reform Proposal will require plain English disclosure of risk factors in Form 10-K,⁶³ with material changes to such risk factors required in Form 10-Q.⁶⁴ As the Commission is aware, issuers often include a lengthy discussion of the risks associated with any forward-looking statements made in those reports, as permitted by Section 27A of the Securities Act. We recommend that the adopting release make clear that issuers can elect to include the discussion about the uncertainty associated with forward-looking statements either in the general risk factor section or in a separate discussion. In addition, the proposed rule refers to Item 503(c) of Regulation S-K, which requires a discussion of risk factors “when appropriate”. The Commission should clarify whether or not an issuer has the discretion to elect not to include any risk factor disclosure on this basis.

An accelerated filer will also be required to disclose in its Form 10-K⁶⁵ and Form 20-F⁶⁶ written comments from the Commission staff, which the issuer believes are material and which remain unresolved, regarding its periodic filings under the Exchange Act, not less than 180 days before the end of its fiscal year to which the annual report relates. We note that foreign private issuers do not meet the definition of accelerated filers, which include only U.S. companies of a certain size. We believe that the 180 day period is an appropriate length of time since certain staff comments, especially those related to new accounting changes or developments, can involve extensive communications between the issuer and the staff.

We understand that the Commission staff has expressed concerns about the potential for issuers to conduct registered offerings through automatic shelf registrations at the time that staff comments remain unresolved. We note that staff comments are taken very seriously by issuers as well as other offering participants and the lawyers and auditors involved in the offering. It is not unusual for material staff comments to delay an offering until there has been an opportunity to resolve the issues cited, either through a discussion with the staff or the comment and response letter process. We do not believe that the Reform Proposal will change this practice.

We do not believe that an issuer should be required to list each outstanding comment in its disclosure by repeating the comment verbatim as issued by the staff. The issuer should instead be permitted to paraphrase or summarize. Some of the comments tend to be quite lengthy and provide background on staff positions, and by sheer size may appear more alarming than the actual text suggests. In addition, we note that the Commission initiatives on making public comment and response letters within 45 days after the resolutions of the issues involved⁶⁷ will provide the public with the opportunity to view all of the staff’s comments. We do not believe that it is necessary for the staff to play a role in determining which unresolved comments should be disclosed. Issuers are required to make materiality determinations with respect to key elements of required disclosure and are able to make these assessments.

We also do not believe that it is necessary for the Form 10-Q to be amended to either include or update this disclosure. Since the Form 10-Q generally requires updating of information previously disclosed in Form 10-K, issuers may include any material developments related to those comments in any case.

Transition Period

We recommend that the Commission in adopting the final rules establish an effective date after which both newly filed registration statements and existing registration statements are immediately able to take advantage of all of the offering, registration and communication reforms, particularly since the Reform Proposal indicates that at least some of the communications reforms being proposed are codifications of existing staff positions. We believe that so long as the effective date is some brief period after the adopting release, issuers and other offering participants will be able to make an orderly transition to the revised rules.

We appreciate the opportunity to comment on the Reform Proposal. We would be pleased to discuss any questions that the Commission or its staff may have about our comment letter. Please contact either Richard Sandler at (212) 450-4224 or Jeffrey Small at (212) 450-4500.

¹ Proposed amendment to Rule 405.

² Acceleration of Periodic Report Filing Dates and Disclosure Concerning Web Site Access to Reports, Release No. 33-8128 (September 5, 2002).

³ Proposed Rule 433(d)(6)(ii).

⁴ See note 1, *supra*.

⁵ *Id.*

⁶ *Id.*

⁷ The Reform Proposal also indicates that widely distributed “blast” voicemails are similar to broadcasts and therefore written communications. See footnote 61 of the Reform Proposal.

⁸ Proposed Rules 168 and 169.

⁹ Proposed Rule 168(b)(1).

¹⁰ Proposed Rule 168(b)(1)(iii).

¹¹ Proposed Rule 168(b)(3).

¹² See proposed Rule 159A, proposed Rule 163, proposed Rule 169 and proposed Rule 433.

¹³ Proposed Rule 433(d)(1)(ii).

¹⁴ Proposed Rule 433(f).

¹⁵ Proposed Rules 168(d) and 169(d).

¹⁶ Proposed Rule 169(c)(2).

¹⁷ Proposed Rule 169(d)(3).

¹⁸ Proposed Rules 168(c) and 169(c)(1).

¹⁹ Proposed Rule 169(c)(2).

²⁰ Proposed Rule 163A.

²¹ See footnote 106 of the Reform Proposal.

²² Proposed amendments to Rule 134(a).

²³ Proposed Rule 134(a)(9).

²⁴ Proposed Rule 134(a)(10).

²⁵ Proposed Rule 433.

²⁶ See note 1, *supra*.

²⁷ Proposed Rule 433(f).

²⁸ Proposed Rule 163.

²⁹ Proposed Rule 433(f)(2).

³⁰ Proposed Rule 433(d).

³¹ Proposed Rule 433(d)(1)(ii).

³² Proposed Rule 433(f).

³³ Section 2(a)(4) of the Securities Act.

³⁴ Reform Proposal, pages 87 to 88.

³⁵ *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995).

³⁶ Regulation G; see also Final Rule: Conditions for Use of Non-GAAP Financial Measures, Release No. 33-8176 (January 24, 2003).

³⁷ Reform Proposal, page 87.

³⁸ Proposed Rule 433(d)(1)(i)(A).

³⁹ Proposed Rule 163(b)(2).

⁴⁰ Proposed Rule 433(d)(6).

⁴¹ Proposed Rule 433(h)(4).

⁴² Reform Proposal, page 91.

⁴³ Proposed Rule 433(d)(6)(ii).

⁴⁴ Proposed Rule 433(d)(1)(i)(A).

⁴⁵ NASD Rule 2210; see also SEC Release No. 34-47820 (May 9, 2003).

⁴⁶ Proposed Rule 433(c)(1).

⁴⁷ Proposed Rule 433(e).

⁴⁸ Use of Electronic Media, Release No. 33-7856 (Apr. 28, 2000).

⁴⁹ See note 2, *supra*.

⁵⁰ Proposed Rule 163A.

⁵¹ Proposed Rule 100(b)(2).

⁵² Regulation AC.

⁵³ See Rules 137, 138 and 139.

⁵⁴ Proposed Instructions to paragraph (a)(1).

⁵⁵ Proposed Rule 159A.

⁵⁶ Proposed Rule 159A(c).

⁵⁷ Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Corporate Financing Rule and Shelf Offerings of Securities, SEC Release No. 34-50749 (November 29, 2004).

⁵⁸ The NASD filing requirement is triggered only if the affiliated broker-dealer participates in the distribution in some capacity, which is generally the case.

⁵⁹ Revised General Instructions II.G.

⁶⁰ Proposed amendment to Rule 424(g).

⁶¹ Proposed Rule 172.

⁶² Reform Proposal, footnote 360.

⁶³ Proposed Part I. Item 1A of Form 10-K.

⁶⁴ Proposed Part II. Item 1A of Form 10-Q.

⁶⁵ Proposed Part II, Item 1B of Form 10-K.

⁶⁶ Proposed Item 4A of Form 20-F.

⁶⁷ SEC Staff to Publicly Release Comment Letters and Responses (June 24, 2004).