

Via e-mail

To: rule-comments@sec.gov

From: Howard Schneider, Partner, Katten Muchin Zavis Rosenman
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cc: Michael.Hogan@theharris.com

Re: File Number S7-38-04 Federal Register Notice on SECURITIES OFFERING REFORM
(the "Release")

Date: January 24, 2005

Securities & Exchange Commission ("SEC")

Dear Sirs and Madam—

We write on behalf of our client, *Harrisdirect*, an online broker-dealer, which from time to time offers securities in public offerings to its customer base and also offers, through an online service (which for these purposes could include *Harrisdirect* itself), the ability to view, over the Internet, a "road show," either in live format or in recorded form.¹ As used herein, "road show" has the same meaning as used in the Release when discussing a "road show" (see particularly the discussion under the Caption, "(b) Electronic Road Shows"; hereinafter "Road Shows"). Our comments herein are limited to the Road Show proposals in the Release.

On December 17, 1999, we wrote a letter² on behalf of *Harrisdirect*'s predecessor-in-interest, *DLJdirect*,³ seeking no-action relief by requesting further liberalization of the ability to provide Road Show access to retail investors who met certain qualifications. Our rationale then was to further narrow the distinction between professional or institutional investors and retail investors in connection with access to Road Shows. We are, of course, delighted to see the Commission go almost the whole way and state:

"While we are not proposing to require that road shows be made available to unrestricted audiences, issuers and underwritings would be free to open road shows to all investors, and we believe that our proposal will encourage issuers to do so. (Emphasis supplied. See, also, our response

¹ As we understand the proposal, a traditional live road show of and in itself would continue to be an oral communication and thus not subject to the document delivery requirements of Section 2(a)(10) of the Securities Act; however, the transmission of either a live road show or a recording of a road show shown over the Internet is, as proposed, a written communication, but one which would be subject to the free writing prospectus rules contained in the Release (Rule 433).

² Request letter dated December 17, 1999 from Rosenman & Colin LLP to Catherine Dixon, then Chief Counsel, Division of Corporation Finance.

³ *Harrisdirect* is the successor-in-interest to *CFSBdirect*, which was, in turn, the successor-in-interest to *DLJdirect*.

below to the Commission's second bullet point under its Request for Comments on Road Shows.)

Moreover, by withdrawing all prior no-action letters pertaining to the topic of electronic Road Shows, the Commission is eliminating an impediment to full and unrestricted use of a key information vehicle heretofore available only to institutional and then (via the no-action route) highly qualified investors. In our prior no-action request we quoted former SEC Chairman Levitt who said in a speech to the Economic Club of New York (October 17, 1999) that the

“...Commission was planning to take action...[regarding]...roadshows where the banker's analysts gives some investors a select look at an IPO that's not available to ordinary investors.”

The Commission is now seeking to level the playing field and it should be commended for doing so.

Turning now to the Commission's Request for Comment on the issue of Road Shows, our client's views are as follows:

- *Should we include a definition of road show to describe these activities? If so, what should the description cover? That the road show be made to more than a specified number of persons?*

We believe that the term Road Show has a known meaning in the industry and there is no need to further define the term.

- *Will our proposal, if adopted, lead to more widespread use of electronic road shows? To such road shows being available to all potential investors? Should we make it a condition that electronic road shows be available to all potential investors.*

Our clients' strongly held view is that the SEC should make it a condition that all potential investors be given access to Road Shows. If the concept is to open Road Shows to greater investor access—a laudable public policy objective—the best way to do so is to mandate compliance rather than leave it to issuers and underwritings to pick and choose which Road Shows will be fully accessible and which will not.

- *Should we consider including any of the conditions in the electronic road show no-action letters that we are not including in our proposals. If so, which ones and why?*

None of the conditions in the no-action letters should be included. Those conditions were essentially restrictive of complete investor access.

- *Is our proposed definition of what constitutes a “bona fide electronic road show” adequate? Is there any reason to discourage transmission of different versions of a road show? For example, could an issuer prepare a road show for some investors and a second, less-informative version for others. Should we otherwise limit this possibility?*

The proposal for the availability of more than one version (other than with respect to minor or de minimus differences) of an electronic Road Show flies in the face of equal access to information for all investors and is subject to potential abuse. Accordingly, our

client believes that the Commission's definition of a "bona fide electronic road show" should be abandoned or substantially modified. First, there should be only one substantive version of a Road Show and it should be available to everyone. Second, the very concept of a "less-informative version for others" should be anathema to the SEC—where full disclosure and equal access to that disclosure should be the guiding principles. Accordingly, we believe that the SEC should emphatically state that the electronic version of a Road Show needs to be substantially the same for use as a free writing prospectus; should contain the same subject matter; and should contain all questions and answers or other interaction between management and investors.

- *Should an issuer be permitted to edit a retransmitted road show? Should the rule expressly permit editing?*

Other than to eliminate gaps or technical flaws, no editing should be permitted.

- *Should visual presentations such as slides or power point presentations used but not distributed at live road shows be considered free writing prospectuses? Should we consider the use of electronic media to transmit an otherwise oral presentation to an audience overflow room as a written communication and an electronic road show, even if the presentation to the overflow room is not interactive?*

As to the first question and consistent with our views above, all visual presentations such as slides and power point presentations should be required to be included in a free writing prospectus and should be made available to all investors. We have no view on the second question.

- *Should electronic road shows transmitted over the television or radio be treated differently from electronic road shows transmitted through the Internet?*

No, all methods of broadcasting, telecasting and/or electronically transmitted materials should be treated the same.

- *Should electronic road shows in business combination transactions be treated in the same manner as proposed Rule 433? If so, should there be a filing obligation similar to that in Securities Act Rule 425? If not, what filing and other disclosure requirements should apply?*

Business combination transactions should be treated the same as proposed Rule 433. The filing could be a proxy filing and/or an analogous filing to that required under Rule 425.

We hope the Commission will find our comments helpful. Should the Staff have any questions on the contents of this communication, please feel free to contact the writer at (212) 940-8787 or by email at howard.schneider@kmzr.com.

Respectfully submitted,

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