ABA

AMERICAN BAR ASSOCIATION

Defending Liberty
Pursuing Justice

Section of Business Law
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5588
FAX: (312) 988-5578
email: businesslaw@abanet.org
website:
www.abanet.org/buslaw

February 3, 2005

Via E-mail: rule-comments@sec.gov

Mr. Jonathan G. Katz, Secretary
Securities and Exchange Commission,
450 Fifth Street, NW,
Washington, D.C. 20549-0609.

Re: Proposed Rule Change by the NASD Relating to the Corporate Financing Rule and Shelf Offerings of Securities
File No. SR-NASD-2004-022

Dear Mr. Katz:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law[1] in response to the request of the Commission for comments on the above-identified rule proposal by the National Association of Securities Dealers, Inc. (the "NASD") published for comment on December 7, 2004 (the "Proposal").[2] It was prepared by the Committee's Subcommittee on NASD Corporate Financing Rules.

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

1 References herein to "we" and "our" refer to the Committee.

2 SEC Release No. 34-50749 (Nov. 29, 2004); 69 F.R. 70735 (Dec.7, 2004) ("SEC Release").

We support the initiative of the NASD to amend the procedures for the filing and review of shelf offerings under the NASD's Corporate Financing Rule, NASD Conduct Rule 2710, especially in light of the recent proposal of the Commission to substantially reform the registration and offering requirements under the Securities Act of 1933 (the "Securities Offering Reform Proposal").[3] As the NASD recognizes in its Proposal, the current procedures for the filing and review for those shelf offerings that are required to be filed with the NASD for review are unsatisfactory because Rule 2710 was originally designed for the review of initial public offerings and other one-time offerings with an identified underwriter participating in a traditionally structured underwriting arrangement. However, we have concluded that many of the revisions that the NASD has proposed will not serve to effectively improve such procedures and, in fact, may prove more cumbersome than the current procedures. In particular, we believe that the NASD Proposal would expand the application of Rule 2710's filing and review requirements to sales of securities from a shelf registration for which NASD filing and review is not necessary and would impose extraordinary burdens.[4] We also believe that the filing and review of shelf offerings by the NASD currently results and, under the Proposal, will continue to result in unnecessary delays in the pricing and distribution of shelf offerings, which will hamper access to the capital markets by issuers, especially, but not solely, by "well-known seasoned issuers" ("WKSIs") under the regime of shelf registration proposed by the Commission in the Securities Offering Reform Proposal. Finally, we are not in favor of expanding the definition of "underwriter and related persons," a change that does not relate specifically to shelf offerings and that the NASD has not explained in the Proposal.

We welcome the opportunity to comment on those general points, as well as on the specific provisions of the Proposal.

Rule 2710 and Fair Practice Determinations

Rule 2710 was adopted to ensure that member firms do not take advantage of their role in public offerings to charge excessive amounts of underwriting compensation or impose unreasonable underwriting terms. It was intended to be, historically has been, and should be, applied with common sense and flexibility to determine when underwriting terms are reasonable and when they are not. It was not

---

3 SEC Release No. 33-8501 (Nov. 3, 2004). *See*¸ discussion below of potential conflicts between the SEC's Securities Offering Reform Proposal and this NASD Proposal.

4 While the NASD Proposal focuses primarily on clarifying the application of Rule 2710 to shelf offerings, the approach of the NASD to require the filing of any offering of securities that is not a private placement or otherwise clearly exempt from NASD filing is equally problematic in non-shelf situations. For example, an issuer may register securities on a non-shelf registration statement for a placement to a limited number of institutional investors, where the broker/dealer acts as a placement agent. Such transactions are similar to private placements, except for the registration of the securities, but would be subject to filing under Rule 2710 unless a specific exemption were available.

drafted as an anti-fraud rule but for the purpose of establishing "fair practice" standards for members in their distribution of public offerings.[5] Thus, for the Rule to operate effectively, the NASD must be able to exercise some judgement and discretion in making determinations that the application of the Rule is fair and reasonable based on all the facts and circumstances of an offering.

We understand that the Commission staff has instructed the NASD to grant exemptions from the provisions of any NASD rule (including Rule 2710) only in rare circumstances, and not as a form of rulemaking outside of the public comment process.[6] While we agree that rulemaking outside of the Rule 19b-4 process is not appropriate, we believe that inappropriate rulemaking should be distinguished from interpretive advice that results in an appropriate application of the Rule in a manner consistent with the intent of the provision, including those few situations that may warrant an exemption pursuant to Rule 2710(j) and the Rule 9600 Series. The exemption process has, moreover, been a useful means for the NASD to develop experience in the application of a provision to unanticipated situations that will subsequently allow it to develop the criteria necessary for a formal rulemaking.

We are concerned that the SEC's directive has had the unintended effect of restricting the NASD's ability to apply Rule 2710 on a day-to-day basis in a manner that is fair to members and consistent with the purpose of the Rule through appropriate interpretations and exemptions. Since its receipt of the SEC's letter in March 2003, it is our observation that the NASD has adhered to an increasingly literal reading of NASD Rule 2710 (and other rules) that results in unwarranted restrictions and limitations on the terms of an offering and the activities of members. These restrictions and limitations often negatively impact the issuer and its shareholders as well.

We believe that the NASD's current inability to exercise discretion in interpretating and applying its rules (including Rule 2710), and to grant exemptions thereto, is contrary to its general interpretative and specific exemptive authority.[7] It also contradicts the assurances made by the NASD in response to comments on the proposed extensive amendments to Rule 2710 adopted December 23, 2003[8] that the NASD would

---

5 The Corporate Financing Rule was originally adopted in 1972 as an interpretation of the NASD's basic ethical rule, Rule 2110, which requires that members conform to "high standards of commercial honor and just and equitable principles of trade." The Corporate Financing Interpretation to Article III, Section 1 of the NASD Rules of Fair Practice (the "Interpretation"). At that time, the Interpretation was structured as a narrative discussion of the ethical standards and guidelines that should be applied to the review of public offerings and had a certain amount of flexibility in its application in order to address the myriad situations that arise in underwriting arrangements.

6 *See*, letter dated March 27, 2003 from Annette L. Nazareth, Director, SEC Division of Market Regulation, to T. Grant Callery, Executive Vice President and General Counsel, NASD.

7 *See*, Rule 2710(j) and the Rule 9600 Series.

8 SEC Release No. 34-48989 (Dec. 23, 2003); 68 F.R. 75684 (Dec. 31, 2003).

consider exemptions on a case-by-case basis in order to ensure flexibility in the application of the Rule in a number of situations.[9] If the NASD is not allowed to exercise its discretion in a reasonable manner (including the granting of exemptions where appropriate), to ensure the fair and appropriate application of the Rule on a day-to-day basis, then the Rule is not working properly.

Since the adoption of Regulation D, Rule 144A and Rule 415 by the SEC and issuance of the interpretations by the SEC Division of Corporation Finance with respect to PIPE and equity line transactions, the distinction between public and private offerings and the trading markets has blurred and is likely to continue to blur as a result of the SEC's Securities Offering Reform Proposal, with the result that many "public offerings" of SEC-registered securities are sold in transactions that are closer to ordinary market transactions than to traditional underwritings. Given that the purpose of requiring filing under Rule 2710 is to permit the NASD to review the reasonableness of underwriting terms and other distribution arrangements in connection with public offerings, we believe that NASD filing should not be required in the case of such SEC-registered sales where there is no need for a prior review of underwriting terms and arrangements; nor should offerings be subject to the substantive requirements of Rule 2710 where it is more appropriate to apply the NASD's Mark-Up Policy, IM-2440 (the "Mark-Up Policy"). Filing, with its attendant costs and delays, should not be required for the sole purpose of reminding members of their obligations to comply with the Rule, nor for the purpose of NASD oversight of members' sales practices for general anti-manipulation purposes. NASD filing is also not necessary to provide the NASD with copies of offering material for post-offering review since, with rare exceptions (such as intrastate offerings or offerings exempt under Section 3(a)(2) of the Securities Act of 1933 or Rule 504 of Regulation D), offering documents and underwriting agreements are required to be filed and should therefore be available for access on the EDGAR system and from third-party providers of EDGAR-filed documents.

Our view of the purpose of filing with the NASD under Rule 2710 guides most of the comments that follow.

Specific Comments on the NASD Proposals Related to Shelf Offerings

Definition of "Participation or Participating in a Public Offering"

The Proposal would amend the definition of "participation or participating in a public offering" (hereafter, "participation in a public offering") by adding that the

9 For example, in response to comments recommending that a number of exceptions from treatment as underwriting compensation be added, the Commission stated: "In certain situations, NASD Regulation believes that there are circumstances where the recommended exception is appropriate, but a specific exception with objective criteria cannot be developed to ensure the bona fide nature of the transaction. Therefore, NASD Regulation proposes to consider exemptions on a case by case basis pursuant to the standards in paragraph (i) in the following situations". (SEC Release No. 34-44044 (Mar. 6, 2001); 66 F.R. 14949 (Mar. 14, 2001), at 14962.

term includes participating in the distribution of the offering not only on an underwritten basis, but also on a "principal, agency or any other basis, and participation in a shelf takedown that does not satisfy the requirements of the market transaction exemption." We believe that this proposal to expand the definition should not be adopted for a number of reasons.

We do not support the addition of the language "participation in a shelf takedown that does not satisfy the requirements of the market transaction exemption" because the definition of "participation in a public offering" was intended to enumerate the types of distribution-related activities by a broker/dealer, in comparison to normal trading activities, that are considered to be a "participation" in an offering. The proposed language, moreover, appears to function more in the nature of a filing requirement that should be set forth in Rule 2710(b)(10).

We also believe that the proposed amendment to add the terms "agency" and "principal" would inappropriately extend the coverage of Rules 2710, 2720 and 2810 to a sale in any public offering, including any offering pursuant to a shelf registration, that is an ordinary trading transaction. Ordinary trading transactions were intended to be regulated under the NASD's Mark-Up Policy. Therefore, we are concerned that the proposed amendment would inappropriately extend Rules 2710, 2720 and 2810 to any sale of securities (even one share) from a registration statement or offering circular, including takedowns of securities from a shelf registration that do not meet the standard of being a "distribution" for purposes of SEC Regulation M or a "public offering" for purposes of NASD Rule 2720(b)(7), unless a specific exemption is available.[10] The extension of Rule 2710 to ordinary market transactions serves no regulatory purpose.[11]

Since securities are often sold by a broker/dealer acting as "placement agent" from a shelf registration or other registered offering to a limited group of investors in a manner similar to a private placement, we recommend that (instead of adopting the proposed amendments to the definition of "participation in a public offering") the Rule be amended to state clearly that it applies only to offerings that are "public" in nature,

---

10 The term "public offering" is defined in Rule 2720(b)(7) as "any primary or secondary distribution of securities made pursuant to a registration statement or offering circular . . . and all other securities distributions of any kind whatsoever . . .". The NASD states in footnote 7 in the SEC Release with respect to the definition of public offering in Rule 2720(b)(7) that the "NASD does not define the term 'distribution' and uses this term in the general sense." SEC Release, at 70740. Thus, the NASD is taking the position that Rule 2710 applies to any offering of securities, regardless of amount or manner of sale. However, this position is inconsistent with the NASD's later explanation that the Market Transaction Exemption is "designed to be narrow and cover securities sold on an agency basis in an ordinary market transaction that does not rise to the level of a 'distribution.'" Thus, in this context, the NASD is willing to recognize that certain offerings of securities are not a "distribution" and "would be governed by the NASD's Mark-Up Policy." SEC Release, at 70745.

11 There are other rules in place, including the 2300 and 2400 Series, to regulate members' ordinary trading activities.

regardless of whether the offering is registered with the SEC.[12] Further, in light of the fact that many shelf takedowns are indistinguishable from ordinary trading or the sale of a large block position, we recommend that the Rule be amended to state that it only applies to a public offering where the amount of securities and the manner of sale meet the requirements of being a "distribution" for purposes of SEC Regulation M, [13] *i.e.*, where the magnitude of the offering and the special selling efforts and selling methods distinguish such a "public offering" from ordinary trading transactions.[14]

We believe that the burdens imposed on members that would result from the adoption of the NASD's proposal to amend the definition of "participation in a public offering" are not justified by any need to review the amount or other circumstances of the compensation of the member selling such offerings, whose compensation is likely limited to a standard agency fee that is within the NASD's Mark-Up Policy. As discussed below, the Market Transaction Exemption proposed by the NASD is not sufficiently broad to address the unnecessary burdens that would result from the proposed expansion of the Rule.

In order to understand the burdens that expansion of the rule will cause, one may imagine that Jane Smith of Tulsa Oklahoma is one of ten shareholders whose shares in QRS Corp. have been registered on a shelf registration statement. Ms. Smith, who decides to sell her shares, asks her broker, Main Street Brokers, to sell them for her. Since the shares are not eligible for the Market Transaction Exemption, because they are traded on the Over-the-Counter Bulletin Board, Main Street Brokers must make a filing with the NASD. Since Ms. Smith is the first to sell her shares under the shelf, Main Street Brokers must make the initial filing and pay the filing fee for the entire amount of the shelf.[15]

Rule 2710 requires that a member making a filing provide information about (among other things):

- Compensation received during the period commencing 180 days before the required filing by any participating NASD member or other person

---

12 *See*, discussion of "Public Offering" in NASDAQ Marketplace IM-4350-3, which establishes a number of criteria to determine whether an offering is considered "public" in nature for purposes of the NASDAQ shareholder approval requirements in NASDAQ Marketplace Rule 4350(i)(1).

13 *See*, definition of "distribution" in Rule 100 of SEC Regulation M.

14 Whereas the definition of "distribution" in Regulation M applies to any offering of securities, whether or not registered, we are recommending that Rule 2710 only apply to registered and unregistered offerings that are public in nature and also meet the standards for being a "distribution."

15 Main Street Brokers will probably obtain this fee from Ms. Smith. The other selling shareholders will receive a "free ride".

deemed to be an underwriter or related person[16] from the issuer, any affiliate of the issuer, and any selling shareholder, including shares received from any such person and payment for providing services in connection with the public offering; and

- The affiliation of any NASD member with the issuer, any affiliate of the issuer or any selling shareholder.

Obtaining the two categories of information from the issuer and its affiliates described above is likely to be difficult and time-consuming for a broker merely preparing to offer shares on the market for a selling shareholder. The manager of an underwritten offering and its attorney representative is usually able to require the issuer, its affiliates and shareholders, and the other participating members to provide the necessary information, but Main Street Brokers is unlikely to have that kind of leverage over persons with whom it has little or no contact.

The NASD has not demonstrated a need for the filing of the information it would require members to provide under Rule 2710(b) when selling on behalf of selling shareholders. In such cases, the member's compensation is likely to consist solely of an agreed-upon commission that would come within the NASD's Mark-Up Policy. The member is unlikely to have any relationship with the issuer or the other shareholders or to have received any "item of value" from the issuer prior to the transaction which would result in "unfair" compensation. Where there is nothing of consequence to review for purposes of Rule 2710, member firms should not be put to the expense of gathering information and filing an offering under Rule 2710, especially when it is unlikely that they will be able to provide such information.

Moreover, the NASD's proposed amendment to the definition of participation in a public offering is so broad that it is likely to require NASD filing for other types of registration statements that were not intended to be covered by Rule 2710. For example, we believe that the Proposal would require members to file so-called "market-making prospectuses" on Rule 415 registration statements that are for the purpose of permitting an affiliated member to act as a market-maker in the purchase and sale of outstanding securities of the issuer in compliance with Section 5 of the Securities Act. Such market-making prospectuses are particularly frequent with respect to the trading of debt securities of parent companies of the major member firms. Historically, NASD staff provided advice that such market making prospectuses were not subject to filing and compliance with the substantive requirements of Rule 2710, as they covered ordinary trading transactions. In light of the proposed amendment to the definition of "participation in a public offering" and other amendments contained in the Proposal, we recommend that the NASD amend the definition of "participation in a public offering" to distinguish between underwritten distributions and distributions by member firms acting

16 See the discussion under "Definition of Underwriter and Related Person" with respect to the proposal to expand the category of persons included in that definition.

solely as brokers or market makers, so that there is no confusion on this point in the future.[17]

Definition of "Takedown"

The NASD is proposing to adopt a definition of "takedown" that would cover any sale of securities from a shelf registration statement, regardless of the amount of securities or manner of sale. Consistent with our recommendations with respect to the definition of "participation in a public offering," we recommend that the proposed definition of "takedown" be amended to limit the application of the Rule to shelf takedowns of securities sold in transactions that are public in nature and that meet the definition of "distribution" in SEC Regulation M.

The Market Transaction Exemption

We do not believe that the NASD's proposal to establish a Market Transaction Exemption ("MTE") is an adequate solution to the burdens that are created by the NASD's sweeping proposal to expand the category of shelf distributions that must be filed for review prior to any sales of securities from a shelf registration. Nor does the MTE address the expansion of the Rule to any sales of securities on an agency or principal basis, which are not covered by the MTE unless such sales are pursuant to a shelf registration. As set forth above, we recommend that the NASD adopt more focused and narrow filing requirements that will apply Rules 2710, 2720 and 2810 only to offerings that are public in nature and have sufficient magnitude and the presence of special selling efforts and methods to be considered a distribution of securities under Regulation M. Moreover, the MTE does not address sales of straight debt securities, thereby not being available for sales of less-than-investment grade debt securities that may be sold by a selling securityholder on a shelf registration or otherwise.[18]

The NASD has not shown how the conditions of the MTE relate to the need for NASD filing and review. We believe that only three of the conditions should be preserved: the first, requiring that the shelf offering not be the initial public offering of the issuer's equity securities and does not occur within 90 days of the initial public offering; the second, making the exemption unavailable if the participating member has entered into any underwriting, distribution, equity line or other agreement with the issuer or any selling securityholder with respect to the sale of the securities offered; and the third, requiring that the member's compensation not exceed the amount permitted under the Mark-Up Policy.

---

17 This clarification is more important now that NASD Rules 3110, 3112 and 3113 put a greater emphasis on establishing procedures for compliance with all applicable NASD Rules.

18 Rule 2710(b)(7)(B) provides an exemption from filing (but not compliance with the substantive requirements of Rule 2710) for debt securities rated investment grade.

We do not believe that the exemption, if there must be an exemption, should be restricted to securities listed on The Nasdaq Stock Market or a national securities exchange. The purpose of the exemption is to identify those sales of securities from a shelf registration that do not require NASD pre-review of the underwriting terms and arrangements. As set forth above, the application of the Corporate Financing Rule is not for the purpose of providing general oversight of members' sales practices, but instead advances investor protection through the review of members' underwriting terms and arrangements. Regardless of the market on which securities may be traded, therefore, the need for NASD filing and review should depend upon whether there are terms and arrangements of the offering that should be regulated by Rule 2710. Where the member's commission or discount is limited to that required under the NASD's Mark-Up Policy, filing and review under Rule 2710 serves no purpose but to impose an unreasonable burden and expense upon the security holder.

Moreover, we do not believe that there should be a volume limitation as part of the conditions. When the member's compensation is limited to the Mark-Up Policy and the other conditions of the MTE are met, the amount of securities being sold does not raise any review issues requiring filing and review by the NASD.

We also do not believe that a member selling securities in a market transaction from a shelf registration statement should be required to file under Rule 2710 in all cases where the member is selling its own securities or those of a company of which it is an affiliate or has a conflict-of-interest as defined in Rule 2720. [19] So long as the securities offered are either debt or preferred securities rated investment grade or equity securities with a bona fide independent market,[20] we do not believe that pre-filing and review of such shelf takedowns is necessarily in the interest of investors.[21] The NASD can monitor and review such offerings based entirely on the member's filings with the SEC. As discussed below, under "Seasoned Issuer Exemption", the presence of Rule 2720 conflicts or affiliation should not automatically trigger NASD review in every circumstance.

---

19 Technically, the text of this condition of the MTE does not encompass a member's sales from a shelf registration of its own securities, as the condition only applies to members that are "an affiliate of the issuer."

20 As defined in Rule 2720(b)(3).

21 Rule 2720 recognizes that where an offering is of debt or preferred securities rated investment grade or of equity securities for which a bona fide independent market exists, it is not necessary that a qualified independent underwriter be employed to price the offering, despite the existence of a conflict of interest or affiliation with an NASD member participating in the offering, because such securities are accurately and efficiently priced by the market. Thus, NASD review of the terms of the offering would not advance the purposes of the rule.

The Seasoned Issuer Exemption

We support the NASD's proposal to take the existing exemptions under Rule 2710(b)(7)(C)(i) and (ii) (the "shelf offering exemptions"), which made reference to the standards for Forms S-3 and F-3 as they existed prior to October 21, 1992 and for Form F-10 as it existed prior to June 21, 1991, and to create a single "Seasoned Issuer Exemption"[22] which states the conditions of the exemption in the Rule without requiring reference to superseded Securities Act forms. We believe that the inclusion of the quantitative standards for the exemptions will assist members in complying with the Rule.

We note, however, that certain offerings permitted to be filed on Form S-3 (both pre- and post-October 1992) and, therefore, exempt from filing with the NASD under the NASD's current shelf offering exemptions would not be exempt under the proposed Seasoned Issuer Exemption. Form S-3 may be used, even if the issuer does not meet the market requirement, for transactions involving secondary offerings by persons other than the issuer of securities listed on a national securities exchange or quoted on Nasdaq and also by the issuer for certain right offerings. We believe that, even if the NASD does not wish to expand the Seasoned Issuer Exemption itself to cover such offerings, the NASD should adopt another provision to exempt from the NASD's filing requirements these and other debt and equity offerings by selling shareholders and issuers that are registered on SEC Form S-3 and that do not present the same level of regulatory concerns as primary offerings of equity to the public.

The SEC, in the Securities Offering Reform Proposal, has proposed to permit automatic effectiveness without SEC staff review of shelf registration filings by certain issuers defined as well-known seasoned issuers (WKSIs). An issuer would qualify as a WKSI if it were current in its Exchange Act reporting requirements for the past 12 months and otherwise eligible to use Form S-3, and either had a public common equity float of $700 million or had issued at least $1 billion in SEC-registered debt within the last three years. A WKSI with less than three years of Exchange Act reporting history would not be eligible for the NASD's proposed Seasoned Issuer Exemption. We believe that a $700 million public equity float or $1 billion in SEC-registered debt is a sufficient indicator that an issuer does not require the protections afforded by NASD review of underwriting compensation. Furthermore, the incompatibility between the SEC's proposed automatic effectiveness provisions for WKSIs and the NASD's requirement that selling members obtain a no-objections opinion could reduce the effectiveness of the SEC's proposal for some issuers. We recommend, therefore, that the

22 The NASD's proposed "Seasoned Issuer Exemption" should be distinguished from the SEC's proposed category of "seasoned issuer" in the Securities Offering Reform Proposal.

Seasoned Issuer Exemption be extended to all WKSIs, whether or not they are offering securities pursuant to a shelf registration.[23]

The Securities Offering Reform Proposal would also expand Form S-3 eligibility to subsidiaries of a company that meets the Form S-3 standards to register non-convertible debt and guarantees, but the NASD shelf exemptions and the proposed Seasoned Issuer Exemption are only available with respect to offerings of securities by an issuer that satisfies the reporting history and has outstanding securities that meet the alternative market value of public float or annual trading volume requirements (the "market requirements") of the exemptions, and is not available to subsidiaries of such a company. Thus, unless such debt or guarantees are rated investment grade, there would not be an NASD exemption from filing available to subsidiaries of issuers that can meet the exemption standards. We recommend that the Seasoned Issuer Exemption be extended to the debt offerings of qualifying subsidiaries of a company that meets the standards of the exemption.[24]

Furthermore, we recommend that the Seasoned Issuer Exemption be amended to:

- clarify that the exemption is available not only to the issuing company, but also to selling securityholders;
- delete the requirement that the exemption is only available with respect to securities to be sold pursuant to shelf registration;
- delete the requirement that the exemption is available only to securities registered on Form S-3, F-3 or F-10; and
- be available to sales of securities subject to NASD Rule 2720.

The first recommendation is for the purpose of clarifying that the Seasoned Issuer Exemption is available to selling securityholders, whereas the language of the exemption apparently restricts its availability to primary offerings, since the text references "offerings by a company that has been subject to the reporting requirements . . . ." This same issue has arisen under the current shelf offering exemptions and NASD staff has consistently interpreted the shelf offering exemptions to be available for sales of securities by shareholders and debtholders of the issuer.

---

23 Further discussion of the Proposal's compatibility with the Securities Offering Reform Proposal is included at the end of this letter.

24 If the NASD believes that the exemption should not be available for offerings of trust preferred securities and other securities by affiliates that are direct participation programs, such offerings could be specifically excluded from the exemption.

The second recommendation is for the purpose of making the Seasoned Issuer Exemption available in the case of any sale of securities of a U.S. or Canadian company that would qualify on the basis of the reporting history and market requirements, regardless of whether the offering is registered pursuant to Rule 415.[25] There is no feature inherent in the shelf registration process on Form S-3, Form F-3, or Form F-10 by a Seasoned Issuer (as defined in the proposed exemption) that makes it more suitable for exemption from filing than an offering that meets the same reporting history and market requirements but is not registered as a shelf offering. In particular, we note that the NASD does not intend the Seasoned Issuer Exemption to be limited to shelf takedowns that are distinguishable from traditional underwritten offerings. Thus, the NASD's proposed definition of "shelf offering" and the terms of the Seasoned Issuer Exemption as proposed do not preclude the use of the exemption in connection with a Rule 415 shelf registration in which the entire amount of the shelf may be sold in a single transaction.[26] If the Commission's Securities Offering Reform Proposals are adopted, it appears likely that WKSIs will register securities exclusively as shelf offerings, given the streamlined requirements for such offerings. However, other issuers will still have reason to choose between registering securities as a stand-alone offering or pursuant to a Rule 415 shelf. The availability of the NASD's Seasoned Issuer Exemption should not be a factor in that choice.

The third recommendation, to delete the specific requirement that the securities be registered on SEC Forms S-3, F-3 and F-10, is made because this requirement is unnecessary so long as the securities meet the reporting history and market requirements of the Seasoned Issuer Exemption. This recommendation is also being made in consideration of the ability of shareholders that have acquired registered securities pursuant to a Form S-8 to resell such securities on Form S-8 in compliance with the shelf registration requirements. Such resale transactions on Form S-8 will not be eligible to rely on the Seasoned Issuer Exemption even though the issuer meets the reporting history and market requirements of that exemption and could otherwise register the securities on Form S-3. Therefore, in light of the incorporation of the objective reporting history and market requirements into the Seasoned Issuer Exemption, we recommend that the requirement that the securities be registered on SEC Forms S-3, F-3 and F-10 be deleted from the exemption.

---

25 The NASD also proposes that members determine whether the Seasoned Issuer Exemption is available at the time of each takedown of securities from a shelf registration. If the NASD revises the Seasoned Issuer Exemption to be available in the case of any offering of securities of a company meeting the reporting history and market requirements of the Exemption, we recommend that the NASD clarify that, in the case of non-shelf offerings, the Exemption is available if the issuer's securities would qualify under the Exemption at the time of the required filing date.

26 *See*, footnote 20, SEC Release, at 70744, which states that the NASD is proposing to rescind its policy set forth in NASD Notice to Members 93-88 (December 1993) that the current shelf offering exemptions are not available if the shelf-registered securities are sold in a conventional underwritten offering within a few days following the effective date of the registration statement.

Finally, we do not believe that the Seasoned Issuer Exemption should be unavailable solely because the offering is subject to the provisions of Rule 2720. Rule 2720 applies to certain offerings when the securities being offered are those of a member or when a participating member is affiliated with or has a conflict of interest with respect to the issuer, as those terms are defined in Rule 2720. Rule 2720 provides several requirements for offerings subject to its provisions. However, the most important of these, that a qualified independent underwriter ("QIU") must perform independent due diligence and provide a pricing opinion with respect to the securities offered under the rule, is not required if the offering is of equity securities with a bona fide independent market or of investment grade rated debt securities. The other relevant provisions of Rule 2720 that may apply to the offering impose corporate governance standards for the issuer (which have been superseded by the stricter corporate governance standards of the listed markets) require disclosure of certain information and prohibit sales to discretionary accounts without prior specific written authorization by the account holders. In cases where the offering would come within Rule 2720, but the issuer would meet the Seasoned Issuer Exemption, we believe that pre-filing and review by the NASD is no more necessary than is the case for offerings not subject to Rule 2720.[27] Such offerings regularly occur when a large financial services holding company issues securities that are to be sold, at least in part, by a subsidiary that is an NASD member firm.

We recommend, therefore, that the Seasoned Issuer Exemption in Proposed Rule 2710(b)(10)(C) and the introduction to the NASD filing exemptions in Rule 2710(b)(7) be amended to delete from the exemptions the exception for offerings subject to the provisions of Rule 2720. If, however, the NASD determines that members having an affiliation or conflict of interest with the member are to be required to file shelf offerings with the NASD for review notwithstanding the availability of a filing exemption, we believe that other members participating in such shelf-takedowns who do not themselves have an affiliation or conflict of interest should not be required to file.

Foreign Sovereign Issuers

In its response to comments with respect to NASD Notice to Members 01-59 (September 2001), publishing concepts related to the filing of shelf offerings, the NASD states that it declines to extend the Seasoned Issuer Exemption to foreign governments that file on Schedule B rather than use Form F-3 and Rule 415, on the basis that it disagrees with the comment that foreign governments are not likely to need NASD review of the underwriting terms and arrangements with U.S. underwriters. The NASD references "recent concerns related to inequitable practices of members in such offerings . . . [that] call into question the assumptions that commenters have made concerning the ability of Schedule B issuers to negotiate on an even footing with global

27 In the case of offerings subject to Rule 2720 by Seasoned Issuers that require the participation of a QIU, the NASD may wish to consider that the exemption be conditioned on the QIU being on the Corporate Financing Department's list of previously-approved QIUs.

investment banking firms . . ."[28] However, the NASD has neither provided the details of any enforcement actions that would allow us to determine whether the foreign sovereign issuers referenced would have met the quantitative requirements of the Seasoned Issuer Exemption nor stated the nature of the "inequitable practices" that the NASD believes would be addressed by Rule 2710. We note that foreign sovereign issuers typically pay underwriting compensation of less than 1%. Thus, we assume that the inequitable practices are more likely to relate to members' sale of the securities, which would not generally be addressed through the pre-offering filing with the NASD's Corporate Financing Department.

We recommend that the Seasoned Issuer Exemption be amended so that it is available to foreign sovereign issuers. If the NASD, nonetheless, continues to take the position that the Seasoned Issuer Exemption should not be made available for offerings by foreign sovereign issuers, then the NASD should amend its proposed definition of "shelf offering" to include offerings by sovereign issuers conducted pursuant to procedures of the commission permitting shelf offerings by Schedule B issuers. This will make the new filing procedures for Rule 415 shelf offerings available for offerings by Schedule B issuers.[29]

Proposed Shelf Filing Procedures

The Proposal contains a number of innovations with respect to filing of shelf offerings, which would, if adopted, represent improvements over the present system. The first of these is that members, having filed once with respect to a specific shelf registration, would not be required to file again unless there has been a material change in the underwriting terms or new facts relating to affiliation or conflicts of interest arise. This would replace the requirement that members make a filing at the time of filing every prospectus supplement with the NASD, which, for some issuers, may occur weekly or even more frequently. A second innovation, which we applaud, would make the relevant date for calculating the 180-day look-back period for items of value and the 180-day lockup period the date of the offering in which the member participates, rather than the original filing date of the registration statement. The NASD has not mentioned calculation of the 15% limit on overallotment options, but we recommend that the Rule be amended to state that the 15% overallotment option will be calculated on an offering-by-offering basis, and not for the entire registration statement.

There are other aspects of the proposed amendments to shelf filing procedures that we do not support. In particular, we believe that the Rule should not require every member to make a filing and obtain a no-objections opinion before it may

---

28 SEC Release, at 70744.

29 We note that there are other offerings that are candidates for the proposed shelf offering procedures but which are not made pursuant to Rule 415. These include shelf offerings on Form F-9 and bank offerings exempt from SEC registration pursuant to Section 3(a)(2) of the Securities Act.

first participate in a shelf-takedown.[30] Issuers or selling securityholders may wish to sell the shelf-registered securities through a different member than was previously involved in the first shelf-takedown of securities. In fact, in the case of primary offerings by issuers and sales of a large block of securities by a selling shareholder, it is standard practice to request bids for the takedown, which generally results in different members participating in different takedowns from a shelf registration. Under the current NASD review procedures, a subsequent takedown may be completed and a filing made with the NASD the next day (assuming that a no-objections opinion or conditional no-objections opinion has previously been issued for the shelf registration statement) even though a different member may participate in the current takedown. Under the Proposal, if there are three members participating in a shelf takedown, and one has not previously filed, that one member must obtain a no-objections opinion before it may participate. If the member cannot obtain the opinion in time, the issuer will be forced to decide whether to remove the member from the syndicate or to delay the offering.

Subsequent members participating in shelf offerings for registrations in which an initial member filing has previously been made should not be required to obtain a no-objections letter if (i) the offering will be subject to the same form of underwriting agreement already filed with the NASD (if an underwriting agreement is used in connection with the takedown) and (ii) the new member does not receive underwriting compensation from all sources in excess of 8%.[31] In this connection, we note that the NASD already requires, as a condition to the issuance of a no objections opinion for the initial filing of a shelf registration statement, that the "Plan of Distribution" section of the base prospectus contain a statement that underwriting compensation will not exceed 8% for any offering of securities off the shelf.

We understand that the NASD proposes to make automated no-objections opinions available on the COBRADesk system seven days a week and 24 hours a day. However, a member seeking to obtain a no-objections opinion must still perform the due diligence and fact-gathering required to provide the necessary information to COBRADesk. Depending on the circumstances, that information may take hours or days

---

30 In Notice to Members 93-88 (December 1993), the NASD announced a process for the review of shelf offerings that allowed the registrant-issuer to file a shelf offering with the NASD and obtain a "life of shelf" no-objections opinion on behalf of any members that may participate in any shelf takedown from the registration statement, so long as there was no change to the reviewed underwriting terms and arrangements. We believe that the NASD should codify that process, as it appears to have worked effectively in the past. An issuer (or, in the alternative, the first filing NASD member) can submit the necessary information to the NASD for review and the issuer can undertake to limit the amount of the underwriting discount or commission to 8%. In comparison, under the Proposal, each member will be required to individually file and obtain a firm-specific "life of shelf" no-objections letter.

31 "Subsequent Member Filing," as proposed by the NASD, is generally unnecessary as the NASD can establish an automated notification to monitor subsequent filings with the SEC for any prospectus supplement with respect to shelf registration that was previously filed with the NASD and received a "life of shelf" no objections letter.

to obtain, especially if information must be obtained from parties, like 5% beneficial owners, over whom neither the issuer nor the member is likely to have much control. Even after this information has been obtained, there may be facts concerning the receipt of items of value, affiliation or underwriting terms that do not fall within the strict requirements for automatic approval by COBRADesk, but which require consideration and determination by the NASD. Such determinations are also likely to take hours or days to be made, even in the best of circumstances. If the rule adopted will require reliance on automatic grants of no-objections opinions by the NASD's COBRADesk system, we recommend that the rule changes should not become effective until the public has had an opportunity to see and comment on the relevant portions of the COBRADesk interface.[32]

Filing and No-Objections Opinion in a Shelf Offering

We believe that the NASD should not adopt proposed Rule 2710(b)(4)(A)(iii), which would require that a member file a shelf takedown with the NASD for review "before the member sells securities in any takedown required to be filed," because a member will not be able to comply with this requirement in many types of shelf offerings. For example, in the case of a "spot" shelf takedown, a member is contacted by the issuer or selling shareholder and must take down and sell the securities within a few minutes. There is generally little or no time to gather the relevant information and to submit a filing to the NASD before such sales occur.

We also are not in favor of language proposed in Rule 2710(b)(10)(A) that a member must file documents and receive an opinion of no objections prior to its "participation in the shelf offering" or prior to "participating in a takedown." The definition of "participation in a public offering" includes activities occurring before the filing of the offering with the SEC and NASD, such as preparation of the offering or other documents. Further, when these two provisions are compared, the first in Rule 2710(b)(4)(A)(iii) requires filing before sales of these securities, while the second in Rule 2710(b)(10)(A) requires that a no objections opinion be issued prior to a member's participation in the offering – which participation must have already occurred prior to when the filing is made and sales have occurred.

Currently, members endeavor to comply with the NASD's filing requirements with respect to shelf offerings by submitting as much information as known

32 The NASD filing requirements and review procedures are significantly supplemented by the form of information templates in the NASD's COBRADesk filing system and the staff procedures related to submissions of information to COBRADesk. Thus, we believe that it is difficult to assess the efficacy and operation of the NASD Proposal with respect to the filing and review procedures for shelf offerings until the NASD publishes for comment a detailed description of the related staff procedures and templates for the submission of shelf offerings via COBRADesk. We also note that it is inevitable that there will be periods of time when COBRADesk will be unavailable, either for reasons beyond the control of the NASD, or for scheduled maintenance or updating.

and as allowed by NASD staff on the shelf takedown through COBRADesk within 24 hours of the member being chosen to purchase or sell a takedown and by obtaining the NASD's opinion of no-objections before closing of the sales of the securities to investors occurs. Thus, although sales have actually occurred, the closing of such sales will be effectively conditioned on the NASD member or members receiving the NASD's opinion of no-objections, which may delay the closing beyond the standard three-day settlement period.

We recommend, therefore, that all of the filing requirements for shelf offerings be included in Rule 2710(b)(10), and that Rule 2710(b)(4)(A) be amended to reference the shelf filing requirements by adding in the introduction "Except as set forth in paragraph (10), below, with respect to shelf offerings". As noted above, we believe that proposed Subparagraph (b)(4)(A)(iii) should not be adopted. Instead, we recommend that the introduction and subprovisions of Rule 2710(b)(10) be amended to require the filing of a shelf takedown and the issuance of a no objections letter for that takedown (whether by action of NASD staff or through an automated system) "prior to the closing of a shelf takedown." Such an approach would address the significant issues associated with a member submitting filing information to the NASD through the COBRADesk system.[33]

Specific Comments on Other Proposals

The General Filing Requirements in Rule 2710

We believe that the NASD should not adopt the proposed amendment to Rule 2710(b)(4)(B) that would change the text "No sales of securities subject to this Rule shall commence" to "No participating member shall commence selling in any offering". We recommend that the proposed amendment should either not be adopted or should be revised to say "No participating member shall commence sales of securities subject to this Rule unless . . .".

In Rule Filing SR-NASD-00-04, the NASD amended Rules 2710(b)(4)(A) and (B) to clarify that filing of an offering is required prior to the commencement of offering the securities and that a member cannot "sell" an offering unless it has obtained

33 There are a number of problems with the NASD's current procedures for the review of shelf offering takedowns, which will also impact the successful implementation of the NASD's proposed filing and review procedures for shelf offerings. These problems affect the ability of a member to timely file a shelf takedown for review and to timely obtain a no-objections letter from the NASD. For example, currently and in the case of an Initial Filing under the Proposal, NASD staff only allow input of information on the participating member(s) and the specific takedown into the templates in COBRADesk when the prospectus supplement is filed with the SEC and will not rely on a draft prospectus supplement. Since the prospectus supplement may be filed with the SEC up to two days after the takedown, NASD review of the filing is generally delayed for at least two days after a takedown. Thus, we believe that it is currently and will continue to be difficult for members to avoid violating the strict application of the NASD's filing requirements for shelf offerings unless changes are made to the COBRADesk system.

an opinion of no objections from the NASD. This structure works appropriately in public offerings other than shelf takedowns. We believe that the amendment proposed by the NASD would prohibit a member's efforts to *offer* securities for sale prior to receiving a no objections letter. Such offering efforts must occur, in the case of SEC registered offerings, after the registration statement is filed with the SEC and the NASD filing is also made.

Filing Requirement of Rule 2810

Rule 2810 is proposed to be amended by adding a new paragraph (c), which will provide, in part: "All offerings of securities included within the scope of this Rule shall be subject to the provisions of Rule 2710 . . ." In its response to comments to NASD Notice to Members 01-59 (September 2001), the NASD states that the proposed amendment applies only to the filing requirements of Rule 2810, and that the NASD would not review direct participation programs ("DPPs") for compliance with the substantive requirements of Rule 2710.[34] Since the amendment to Rule 2810 is ambiguous on this point, we recommend that the provision be amended to state clearly that it applies to the filing provisions contained in Rule 2710(b).

Definition of "Underwriter and Related Persons"

The NASD proposes to amend the definition of "underwriter and related persons" by deleting "and any other persons related to any participating member" and replacing it with "and any other persons that receive any item of value that would be considered underwriting compensation." We support the deletion, because use of the term "related" in the definition has been so vague as to be meaningless, thereby allowing the NASD to identify any person as possibly "related to a participating member." However, we do not support the proposal to include in the definition "any other persons that receive any item of value that would be considered underwriting compensation" on the grounds that it will create a circular relationship between the definition and the provisions governing the calculation of underwriting compensation and will expand the definition of "underwriter and related person" in ways that may be unpredictable and unfair to underwriters who may have had nothing to do with such other persons.

When Rule 2710 was extensively amended at the end of 2003, one of the goals of the NASD was to create greater certainty for members by adopting bright-line tests for when items of value are to be considered underwriting compensation. Under the amended Rule, all items of value received by an underwriter or related person during the 180-day period before the required filing date are considered underwriting compensation unless there is a specific exclusion in the Rule. If the term "underwriter and related person" is amended to include any person who receives an item of value considered to be underwriting compensation, and Rule 2710(d)(1) requires that all items of value received by the underwriters and related persons during the 180-day review period be included in

34 SEC Release, at 70745.

underwriting compensation, then any person who receives an item of value during the 180-day review period will automatically be considered an "underwriter and related person." As a result, the compensation received by such persons will be included in the calculation of underwriting compensation. Thus, there will be a circular relationship between the definition and Rule 2710(d)(1).

Historically, in order to determine the amount of underwriting compensation, the persons who are underwriters and related persons have been first identified on the basis of their role in the transaction and then any compensation received by such persons within the 180-day review period has been analyzed to determine whether it is underwriting compensation. The NASD Proposal would reverse this analytical process to treat as an underwriter and related person any person who receives a type of compensation or fee that the NASD believes ought to be counted as part of the total underwriting compensation, whether or not the recipient is participating in the selling effort or is affiliated with, or a family member of, a person who is participating.

Although the NASD Proposal does not discuss the statutory basis or purpose for this change, the NASD has informally indicated that this proposal is a response to situations in which a consultant or service provider to the issuer has argued that it did not come within the definition of underwriter and related person and that, therefore, the NASD could not include its fee in underwriting compensation for the offering.[35] If the NASD discovers that a member is intentionally evading the limit on total underwriting compensation by directing the issuer to make payments to third parties who are not specifically within the definition of "underwriter and related persons" or the definition of "participating member," we believe that the NASD is able to associate that third party with the member for purposes of taking remedial action under its general enforcement powers to address cases of attempted circumvention of the Rule.

This proposal is a matter of serious concern to attorneys who represent members in connection with NASD filings. It opens up the category of persons who may be considered underwriters and related persons, and the items of value they may receive, without any defined limit. Issuers make payments to any numbers of persons for services and some of those services are "in connection with" the issuer's public offering. However, NASD Rule 2710 was not intended to regulate the issuer's payments to consultants and advisors, public relations firms, and to the issuer's directors providing management services, but to regulate the amount of underwriting compensation received by members of the NASD.

---

35 It is difficult to address the need for this amendment in light of the lack of information. In one known case, however, the issuer's consulting arrangement was entered into with a family member of an associated person of a member that was an underwriter and related person for the issuer's offering – not a third party. The definition of "participating member" in Rule 2710(a)(5) encompasses the members of the immediate family of associated persons. Thus, the proposed amendment to the definition of "underwriter and related person" is not necessary in order to reach a consulting arrangement with an immediate family member of an associated person of a participating member.

The NASD has already begun quite actively to identify consulting contracts of third parties unaffiliated with the underwriters as underwriting compensation. A frequently-seen example is an advisory or management agreement between the principal owner of an issuer and the issuer (for instance, following a leveraged buyout). Such agreements typically require the principal owner (in many cases, a venture capital firm, which has representation on the Board of Directors of the issuer) to provide ongoing management and financial advice in return for an annual fee. When the principal owner and the issuer enter into an agreement to terminate the advisory agreement for a fixed fee within 180 days of the required filing date of the public offering[36] and the advisory agreement makes any reference to the public offering, the NASD will presume that the termination fee is underwriting compensation.[37] While the underwriters (who do not receive any benefit from the advisory fee) may eventually be successful in rebutting the presumption by demonstrating that the adviser provided substantial services not in connection with the public offering, such a demonstration is generally extremely time-consuming and is not, in any case, certain of success. These arrangements may involve issues of fiduciary duty for LBO sponsors or others, but if the underwriters did not arrange the fee agreements (other than suggesting that the market might view termination of the fee agreements favorably) and do not benefit from them, it seems unfair to count the amount of such fees against the total amount of permitted underwriting compensation.

We believe that the NASD should be conservative in its extension of the Corporate Financing Rule to persons who are not members, associated persons of members, affiliates of members, or immediate family of associated persons of members. The category of "financial consultants and advisors" that is included in the definition of "underwriter and related persons" has proved to be highly problematic in that it appears to treat as an underwriter and related person any of the issuer's consultants or advisors. We believe that the "financial consultants and advisers" referred to in the definition was intended primarily to encompass members and their affiliates that act in an advisory role to the issuer and, therefore, are not covered by the distribution-related activities enumerated in the definition "participation in a public offering." We further believe that the term was only intended to reach non-member or member-affiliated advisors to the

36 Such a termination arrangement is usual when the issuer determines to go public so that the issuer does not have a continuing obligation on its financial statements for the remainder of the consulting and advisory fee.

37 In such a case, the NASD will take the position that any cash fee and the value of any securities that represent the principal owner's termination fee will be included in the calculation of underwriting compensation.

issuer in situations where the advisor has provided services to the issuer that are normally provided by the underwriter of the offering.[38]

We, therefore, recommend that the definition of "underwriter and related persons" should not be amended in such a way as to permit the NASD to exercise its discretion to regulate the compensation of persons who are not associated or affiliated with a member participating in the offering, unless such person comes within the categories of being underwriter's counsel, a finder, or a financial consultant or advisor that is providing services to the issuer normally provided by the underwriter. Instead, we believe that the definition of underwriter and related person should be amended to read: "Consists of underwriters' counsel, financial consultants and advisers to the issuer that provide services normally provided by the underwriter, finders and any participating member."

Definition of "Investment Grade Rated"

We recommend that the NASD adopt a definition of "investment grade rated" in Rule 2710 (a) to be "an issue of securities that are rated by a nationally recognized statistical rating organization in one of its four highest generic rating categories." This amendment is necessary because the NASD has proposed an amendment to the exemption in Rule 2710(b)(7)(B) for investment grade rated debt that would delete the explanatory language from the provision. Since the term "investment grade rated" is used elsewhere in Rule 2710 with respect to non-convertible debt and preferred securities, the NASD should adopt a definition of the term.[39]

Compatibility with the Commission's Securities Offering Reform Proposal

There are a number of provisions in the Commission's Securities Offering Reform Proposal that may not be compatible with Rule 2710, currently or as proposed to be amended. We are aware that the NASD Proposal was drafted before the Commission's proposal was issued, so we would like to take this opportunity to point out potential conflicts that should be addressed.

1. Certain offerings by issuers that would be eligible to rely on the SEC's shelf offering procedures for WKSIs do not come within the NASD's current shelf exemptions or the NASD's proposed Seasoned Issuer Exemption. Thus, offerings by

---

38 Thus, contrary to NASD's review policies, we do not believe that fees paid to the issuer's public relations firm or a venture capital company providing management advice to the issuer should result in the firm or company being considered to be within the definition of underwriter or related persons, when such firm or company is not affiliated with an NASD member.

39 Alternatively, the NASD may wish to include the definition in Rule 2720 and to further amend Rule 2720 to replace explanations of the term that are in the substantive provisions of the rule with the term "investment grade debt." Definitions in Rule 2720 are incorporated by reference into Rule 2710.

certain WKSIs would be required to be filed with the NASD for review and, also, may not be able to rely on the NASD's proposed review procedures for shelf offerings that, under certain circumstances, provides for electronic issuance of the NASD's no objections letter. Such issuers and offerings include:

a. WKSIs that do not meet the three-year reporting history of the NASD's Seasoned Issuer Exemption;

b. WKSIs that are subject to NASD Rule 2720;

c. offerings by subsidiaries of WKSIs of non-convertible debt and guarantees, pursuant to amendment proposed by the SEC; and

d. offerings by persons other than a company that is a WKSI of securities listed on a national securities exchange or quoted on Nasdaq.

2. Rule 163 would allow pre-filing offers by WKSIs. With respect to offerings by WKSIs that must be filed with the NASD, Rule 2710 requires that the filing be made prior to the commencement of offers of the securities – thereby preventing the WKSI from being able to make pre-filing offers in reliance on Rule 163.

3. Automatic shelf registration would allow a WKSI's registration statement to be effective upon filing. However, if the offering is required to be filed with the NASD, it will be impossible for an underwriter to comply with the NASD's filing requirement until after such effectiveness, because the NASD will not accept a filing without, among other things, a registration statement or other offering document. Thus, no sales from such a registration statement may be made until the NASD has issued a no objections opinion.

* * *

We hope that these comments will be helpful to the Commission. We would be pleased to discuss any aspects of these comments with the staffs of the NASD or SEC. Questions may be directed to Peter W. LaVigne (212) 558-7042 or Suzanne E. Rothwell (202) 371-7216.

Respectfully submitted,

/s/ Dixie L. Johnson

Dixie L. Johnson, Chair,
Committee on Federal Regulation of Securities

Drafting Committee:
Peter W. LaVigne
Suzanne E. Rothwell

cc: Joseph E. Price, Vice President
NASD Corporate Financing Department