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January 21, 2005

Re: Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Corporate Financing Rules and Shelf Offerings of Securities – File No. SR-NASD-2004-022

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

Dear Mr. Katz:

We are writing to provide comments on the proposals (the "Proposals") reflected in the Commission's "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" (Release No. 34-50749; File No. SR-NASD-2004-22).

The Proposals would represent a sweeping change in the regulation of shelf offerings under Conduct Rule 2710 (the "Rule") of the National Association of Securities Dealers, Inc. (the "NASD"), and when juxtaposed with the Securities and Exchange Commissions (the "Commission") own proposed securities offering reforms (the "Reforms"), appear to create a "speed bump" that would effectively preclude issuers from entering the U.S. public capital markets with the ease and efficiency contemplated by the Reforms or even under the current regulations. In addition, the Proposals will have the effect of restricting the timely and efficient formation of capital in certain instances by denying the "Seasoned Issuer Exemption" to other registrants qualified to use the current exemption contained in Conduct Rule 2710(b)(7)(C) such as finance subsidiaries, subsidiary guarantors and trust vehicles.

We, as well as our clients, continue to analyze and explore the ramifications of the Proposals to issuers, underwriters and other participants in the U.S. securities markets. We believe, however, that the Commission should proceed cautiously before adopting final

changes to the Rule, particularly in light of your own Reforms. Respectfully, we urge the Commission to modify the Proposals to reflect this and other comment letters before proceeding to adopt final rules.

Below we have set forth specific comments on various aspects of the Proposals in the order they appear.

1. Proposed Rule 2710(a)(6)

Subsection (a)(6) defines "Underwriter and Related Person."[1] In the current version of the Rule the term includes "any other person related to any participating member."

New subsection (a)(6) would expand "Underwriter and Related Person" to include "any other persons that receive any item of value that would be considered underwriting compensation." Subsection (c)(3)(A) of the Rule defines "Items of Value" and includes part (vi) which states an "Item of Value" includes "financial consulting and advisory fees whether in the form of cash, securities or any other item of value." Based upon the aforementioned, an issuers pension consultant, insurance advisor and accountant would appear to become "Underwriters and Related Persons" and their fees and commissions received in the 180 day period prior to an offering would be deemed underwriters compensation subject to the Rule even though said payments are not in connection with a securities offering.

Moreover, the proposed definition is circular, in that the definition of underwriter and related person would include anyone who receives underwriting compensation, and underwriting compensation would include any item of value received by an underwriter and related persons. The net result of this circular structuring is that there is literally no limit to what may be deemed underwriting compensation, and no limit to whom may be deemed an underwriter and related person.

The current definition in Conduct Rule 2710(a)(6) should be retained as the proposed rule is overly inclusive.

2. Proposed Rule 2710(b)(4)

Subsection (b)(4)(B) is entitled "Requirement for Filing" and as proposed requires that "no member shall commence selling in any offering required to be filed by this Rule, Rule 2720 or Rule 2810 unless…. (ii) NASD has provided an opinion to the member

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[1] "Consists of underwriter's counsel, financial consultants and advisors, finders, any participating member, and any other persons related to any participating member."

or that covers the member stating that it has no objection to the proposed underwriting other terms or arrangements." Proposed subsection 2710(b)(4)(10)(A) goes further and would mandate that a member required to file under the proposed Rule "receive a no-objections opinion pursuant to such filing prior to its *participation* in the shelf offering." Current subsection 2710(a)(5)[2] defines "participation" to include "participation in any advisory or consulting capacity to the issuer related to the offering." Read strictly, a member would need approval from the Corporate Finance Department (the "Department") prior to discussing a shelf offering with its client, and prior to participating in advisory or drafting sessions that normally preceed the filing of a registration statement, a clear impossibility.[3] That cannot have been the intended result of the proposed rule change.

We believe these proposals create unreasonable time constraints upon the capital raising process. In addition, "deferral" letters (comment letters) issued by the NASD through its COBRADesk system currently include the following notice:

> Please be advised that:
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> - If the Department determines that your response is incomplete, we will notify you within five (5) business days that additional information is required and that your review and possibly, the issuance of a "No Objections Notification" will be delayed.
>
> - After reviewing complete responses we may or many not have additional comments.
>
> - The department requires timely submissions of completed responses (at least five (5) business days prior to the anticipated effective date of the offering).
>
> - The Department will require up to five (5) business days to review and analyzed the information provided in the completed responses prior to issuing a "no objections" opinion.

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[2] "Participation in the preparation of the offering or other documents, participation in the distribution of the offering on an underwritten, non-underwritten, or any other basis, furnishing of customer and/or broker lists for solicitation, or participation in any advisory or consulting capacity to the issuer related to the offering, but not the preparation of an appraisal in a savings and loan conversion or a bank offering or the preparation of a fairness opinion pursuant to SEC Rule 13e-3."

[3] It is instructive to note that the provision as proposed would require that a filing be made with the Department before the filing of a registration statement with the S.E.C., but that the Department will not accept a filing until the S.E.C. filing is made.

It is our belief that the intent of a Shelf Registration is to allow issuers quick and efficient access to the capital markets. It is not uncommon for an underwriter to be retained and a takedown priced within hours, all without any preliminary prospectus. This timing issue is magnified by the fact that the Commission's Reforms will allow, "well-known seasoned issuer" ("WKSIs")[4] to file "automatic shelf registration statements" that would become effective immediately upon filing. These "WKSIs" would not even be required to specify the amount of securities to be offered in the Registration Statement. This approach would permit a qualified well-known seasoned issuer to make unlimited sales of its shelf registration at a moments notice. While the Commission is "deregulating" WKSIs, the NASD proposes rigid requirements that will clearly cause timing issues unless an exception from filing under the Rule is available.

Suffice it to say that we believe that all WKSIs, and any other co-registrants qualified to use Form S-3, F-3 or F-10, be exempted from the Rule. We believe that the timing requirements of proposed section (b)(4)(B) is not in step with market practices and realities or the intent of the Commission's Reforms.

3. Proposed Rule 2710(b)(7)

Proposed Rule 2710(b)(7) deletes prior subsection (C) which exempted from filing a public offering "registered with the Commission on registration statement Form S-3 or F-3 pursuant to the standards for those Forms prior to October 21, 1992 and offered pursuant to SEC Rule 415 adopted under the Securities Act of 1933, as amended." It also exempted issuers permitted to use Form F-10 pursuant to the standards for that Form approved in the Securities Act Release No. 6902 (June 21, 1991).

Said exemption is to be "replaced" by proposed subsection (b)(10)(C), the "Seasoned Issuer Exemption," which provides an exemption for a *company* which meets Form S-3 type criteria, not for an issuer who is qualified to register on Form S-3 such as a majority-owned subsidiaries.

The proposed "Season Issuer Exemption" would require each issuer, *including subsidiary guarantors of an issuer's debt securities*, to meet reporting requirements and require that "the aggregate market value of the company's voting stock held by non-affiliates is at least $150 million or, alternatively, at least $100 million and the stock has had an annual trading volume of at least three million share." Similar market capitalization is required for Form F-3 and Form F-10 filers. Therefore, no wholly owned

[4] Any issuer that is eligible to register a primary offering of its securities on Form S-3 or F-3 and either (1) has $700 million of public common equity float or (2) intends to register only debt securities and has issued at least $1 billion aggregate principal amount of SEC-registered debt securities in the preceding three years.

subsidiary of a "Seasoned Issuer," which is currently filing on Forms S-3, F-3 or F-10, could avail itself of said exemption, and therefore any issuer which proposes to issuer debt securities guaranteed by its subsidiaries would forfeit the advantages that the adoption of Rule 415 was designed to provide.

Subsection 2710(b)(7)(C) should be retained or proposed subsection 2710(b)(10)(C) should be modified to include all issuers eligible to use Forms S-3, F-3 and F-10 under current subsection 2710(b)(7)(C).

4. Proposed Rule 2710(b)(10)(A)(iii)

Proposed Rule 2710(b)(10)(A)(iii) requires a "Subsequent Member Filing" from a "member" that has not already received a no objection opinion under the proposed Rule.

While we applaud the NASDs attempt to provide some structure and efficiency to the approval process, we would request revision be made to the proposal so as to clarify who is a "member" for the purposes of having received a no objections opinion.

Often offerings have numerous syndicate members who change deal by deal or who get added at the last minute. Will the addition of a new syndicate member, no matter how small its participation, require the syndicate manager to obtain a new "no objections" opinion? Will the fact that a member of the previous syndicate is, for the first time, a syndicate manager require a new opinion? What about the case where the syndicate members are the same, but there is an additional participant purchasing from a syndicate member pursuant to an underwriter's re-allowance? Is the "member" required to obtain a no objection opinion the "lead manager or co-managers", such as the "managers" subject to the provisions of Conduct Rule 2711(f)(4), or would the addition of one new syndicate member, no matter how small their participation, trigger the need to make a "Subsequent Member Filing?"

We believe that limiting the requirement to "lead managers" would achieve the goals of the proposed Rule, increase efficiency and, thereby, lessening timing pressures. Limiting the scope of the filing requirements would help remove a "speed bump" which could limit timely access to capital markets.

Proposed subsection 2710(b)(10(A)(iii) of the Rule should be clarified and limited in its scope so as to provide guidance as to when a filing is required and by whom.

5. Proposed Rule 2710(b)(10)(A)(iv)

Proposed Rule 2710(b)(10)(A)(iv) provides for a "Life of Shelf" clearance.

As indicated above, we applaud the NASDs attempt to streamline the system. However, we are once again concerned with the vagueness of proposed subsection (b)(10)(iv)(b) which revokes the "Life of Shelf" clearance if there is a "material change." There is no guidance as to what a material change might be. If a managing member obtained a no objection opinion in connection with a takedown of equity, would it be a "material change" to now offer debt securities? In the case of debt securities with associated subsidiary guarantees, would the addition of a new subsidiary, or the fact that a subsidiary which had previously been a guarantor but is no longer owned by the issuer, and thus will not be a guarantor, be change? What if a managing member provided financial advisory services or a credit facility to the issuer which may be deemed to the compensation but not excessive compensation under the Rule (i.e. 8%)? Is the filing by the issuer of a Form 10-K a material change? Is the release of a change in projected earnings, or an upgrade or downgrade in the rating of the issuer's debt securities a material change?

Proposed subsection 2710(b)(10(A)(iv)(b) of the Rule should be clarified so as to provide guidance to determine what would be a "material change" which would trigger another filing under the proposed Rule.

6. Proposed Rule 2710(b)(10)(C)

Please see comment 2 above regarding the "Seasoned Issuer Exemption."

In addition, we believe this proposed exemption, or current subsection 2710(b)(7)(C), should be expanded. Offering securities from a shelf registration statement pursuant to Rule 415 provides no additional investor protection. Therefore, the exemption should be expanded to provide an exemption for all filers on Forms S-3, F-3 and F-10.

7. Miscellaneous

In cases where an issuer would otherwise have an exemption from the filing requirements of the Rule pursuant to subsection 2710(b)(7), that exemption is lost, and a filing is required, if there is a "conflict" as defined in Conduct Rule 2720.

If a "conflict" exists, Conduct Rule 2720(c)(3) requires the use of a "Qualified Independent Underwriter" ("QIU") to price the offering unless the offering is of a "class of equity securities for which a bona-fide independent market exists"[5] or the offering is of "a class of securities rated BAA or better by Moody's rating service or BBB or better by Standard & Poor's …" The apparent reason that Rule 2720 does not require the pricing of the offering by a QIU is because the availability of sufficient public information about the issuer is in the market place and that the issuer is a sophisticated, well seasoned organization so that the market can efficiently price the offering. In other words, "Seasoned Issuers" and WKSIs.

Other than the collection of a fee of up to $75,500, the only purpose served by such a filing is to ensure compliance with subsection 2720(1), which prohibits any member of the NASD from executing sales subject to Conduct Rule 2720 to any discretionary account without the prior written approval of the customer. It is submitted that reminding NASD members of their obligations in this regard, and obtaining a representation from the member that the member is so aware, is an insufficient justification for requiring such an expensive and time-consuming filing.

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[5] a security which:

(A) is registered pursuant to the provisions of Sections 12(b) or 12(g) of the Act or issued by a company subject to Section 15(d) of such Act, unless exempt from those provisions;

(B) has a market price as of the close of trading on the trade date immediately preceding filing of the registration statement or offering circular of five dollars or more per share, and which has traded at a price of five dollars or more per share in at least 20 of the 30 trading days immediately preceding the filing of the registration statement or offering circular; and

(C) for at least 90 calendar days immediately preceding the filing of the registration statement or offering circular with the department:

(i) has been listed on and is in compliance with the requirements for continued listing on a national securities exchange; or

(ii) has been listed on and is in compliance with the requirements for continued listing on The Nasdaq Stock Market and has had at least two bona fide independent market makers for a period of at least 30 trading days immediately preceding the filing of the registration statement and the effective date of the offering; and

(D) for the 90 calendar day period immediately preceding the filing of the registration statement or offering circular:

(i) has an aggregate trading volume of at least 500,000 shares; or

(ii) has outstanding a minimum of 5,000,000 publicly held shares.

We believe that a "Seasoned Issuer", or a currently exempted Form S-3, F-3 or F-10 filer, should continue to be exempt from the filing requirements of Rule 2710. We also believe Rule 2710 should be amended so as to not require a filing under Rule 2710 if the offering does not require a QIU under Conduct Rule 2720(c)(3) provided that no sales are made by any member of the NASD to a discretionary account without the prior written approval of the customer. While we believe all "Seasoned Issuers" should be exempted, at a minimum WKSIs should be so excluded from the filing requirements of Rules 2710 and 2720.

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The foregoing comments represent the views of the signatory of this letter. We are not providing comments on behalf of any person, including any client or group of clients of this firm.

We would be pleased to discuss our comments with the staff of the Commission. Kindly direct any questions you may have to the undersigned via telephone at 212-455-2000 of via fax at 212-455-2502.

Very truly yours,

Mark T. Lab