

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
NEW YORK, NY

April 5, 1999

Securities and Exchange Commission
450 Fifth Street N.W.
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Washington, D.C. 20549

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

Re: Securities Act Release No. 33-7606A
Exchange Act Release No. 34-40632A
File No. S7-30-98

Attn.: Jonathan G. Katz, Secretary

Ladies and Gentlemen:

We are writing on behalf of the Committee on Securities Regulation of The Association of the Bar of the City of New York in response to Release Nos. 33-7606A and 34-40632A, dated November 13, 1998 (the "Release"), in which the Securities and Exchange Commission (the "Commission") requests comments on proposed rules for the registration of securities offerings under the Securities Act of 1933 (the "Securities Act") and related provisions of the Securities Exchange Act of 1934 (the "Exchange Act"). Our Committee is composed of lawyers with diverse perspectives on securities issues, including members of law firms, counsel to both corporations and investors, academics, and members of the judiciary. A list of our Committee members is attached.

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I. Introduction

The Commission and members of the securities bar have engaged in numerous studies over the years in an effort to improve the securities offering process and the disclosure system forming the basis for the offering and trading of securities in the United States securities markets. The shift of emphasis from the transaction-based disclosure of the Securities Act to the periodic disclosure of information under the Exchange Act, and the integration of disclosure under both statutes, have been reflected in developments such as incorporation by reference, shelf registration and the electronic filing and delivery of documents. With the advent of the universal shelf registration system, the Commission had been moving toward an integrated registration process as the natural evolution of the integrated disclosure system, relying largely on the efficient market theory. In 1995, the Commission created two separate groups to study and recommend improvements in the capital formation and disclosure systems. These groups -- the Task Force on Disclosure Simplification (the "Task Force") and the Advisory Committee on the Capital Formation and Regulatory Processes chaired by former Commissioner Steven M.H. Wallman (the "Wallman Committee") -- issued their reports in 1996. The Wallman Committee proposed the adoption of a registration system based upon the registration of the companies rather than transactions, with greater reliance on periodic disclosure rather than prospectus disclosure.

Some of the problems identified under the existing system included: (1) delays in the registration process caused in part by review of the registration statement by the Commission's Staff; (2) limitations upon the dissemination by issuers of company information during the "registration period," including limitations upon the use by issuers of documents other than the filed prospectus forming part of a registration statement and the use by the underwriting community of research reports; (3) the regulatory underbrush created by what has been referred to as "Securities Act metaphysics" by which certain technical rules which do not appear to have a significant impact on investor protection are being applied in a way that unduly restricts the capital-raising process and imposes unnecessary liability on participants in the process; and (4) a liability system that makes major distinctions between primary and secondary market transactions in situations in which the investor has the same interest in receiving complete and accurate information, including the impact of this system on both issuers and their affiliates and the underwriters who act as "gatekeepers."

The Release attempts to address many of the issues identified by the Wallman Committee, as well as those discussed in the Commission's 1996 Concept Release (Release No, 33-7314). We believe the Release has succeeded in addressing some of those issues. The proposals, if adopted, would: (1) eliminate Commission Staff review of proposed public offerings by large, seasoned companies; (2) allow brokers or dealers who are participating in a public offering to continue to publish research about the issuer during the offering; (3) permit pay-as-you-go offerings for large, seasoned issuers and certain smaller issuers that are also seasoned; (4) ease the strict limitations that currently exist on public communications around the time of a public offering (subject to the assumption of additional liability); (5) clarify how issuers can switch between public and private offerings; and (6) provide underwriters with further guidance on how they can establish a due diligence defense in accelerated offerings.

We are disappointed, however, that the model developed by the Commission to achieve the stated objectives does not continue the trend of the past 15 years to move from a transaction-based system to one that is based to a greater extent on the public availability of company-related information under the Exchange Act, including electronic access. Rather than adopting a conceptual approach comparable to the one recommended by the Wallman Committee and supported in principle by a majority of the securities bar, the proposed registration system may well reduce the desired speed and flexibility of the present capital-raising process and, ultimately, force issuers, particularly those of substantial size and seasoning, to seek other markets. The Release also fails to address many of the recommendations of the Wallman Committee, including those based on the recognition that the explosion of information technology has significantly reduced the need for physical delivery of information, particularly in the context of the sophisticated investor. The Release also fails to resolve many areas of Securities

Act metaphysics. As a result, we believe that, on the whole, the current registration system is preferable to the one proposed in the Release -- and, while there are many advantages to the new system, they are far outweighed by the disadvantages without any apparent benefit to those investors who require the protection of the Federal securities laws.

While some of the proposals, in our view, could form the basis for a workable system, other aspects require significant change. As more fully discussed below, the overall approach for pay-as-you-go and Staff review of filings, the use of research reports and other communications around the time of an offering, enhancements in Exchange Act disclosure, switching between public and private offerings and other aspects of the Release do represent meaningful improvement. On the other hand, the prospectus and term sheet delivery requirements, particularly those relating to registration on proposed Form B, the potential elimination of delayed offerings from the shelf, the practical elimination of at-the-market shelf offerings by large, seasoned issuers and their selling shareholders, the proposed elimination of the Exxon Capital A/B exchange offer procedure and the liability issues impacting the use of "free writing", research reports and related communications would be so disruptive to the capital-raising process that all participants in the process would be better served by continuing to utilize the current Form S-3/Rule 415 shelf registration system. We believe it would be preferable to correct the perceived deficiencies in the current system, as suggested by the Task Force, rather than adopt an entirely new, untested registration process which we believe to be flawed. As we will also explain more fully below, we believe that many of the proposed changes in the liability provisions of the Securities Act would serve only to defeat the utility of many of the potential benefits of the new proposals.

The Framework for a Possible Solution.

There appear to be two concerns that run through the rationale for adopting the transaction-based system embodied in the proposed Form B registration process: (1) whether the prospectus supplement utilized under the current shelf registration procedure is subject to Section 11 liability; and (2) whether investors are receiving sufficient information about the securities being offered prior to the time that an investment decision is made.

With respect to the first concern, although we do not agree with the Commission's position that Section 11 liability attaches to the supplement under current law, we believe this potential problem could be solved by requiring registrants to subject prospectus supplements to Section 11 liability either by rule or by means of an undertaking in the registration statement. Either approach would obviate the need to require that all prospectus supplements be filed as amendments to the registration statement.

With respect to the issue of pre-commitment information, as we discuss more fully below, we believe that the use of a term sheet or other informational document in connection with a takedown off a shelf would rarely, if ever, serve a useful purpose and, more importantly, would unduly inhibit the capital-raising process, particularly the issuance of non-convertible investment grade debt and preferred equity securities. Even in those cases in which additional pre-commitment information for the investor or the public were desirable, such as non-routine transactions involving offerings of voting equity amounting to a large percentage of the existing public float, the issuance of novel and complex securities (so long as they remain novel and complex), or the need to update material company-related information, we believe that the approach contained in one of the recommendations of the Wallman Committee -- the electronic filing of a Form 8-K which would not have to be physically delivered to the investor -- would be far preferable to the physical delivery of a term sheet. Not only would the use of a Form 8-K in limited circumstances eliminate the need for physical delivery of a document, but, as a result of being incorporated by reference into the registration statement and prospectus, it would also eliminate the delays and inconvenience caused by the need for signing and filing an amendment to the registration statement. The information also would become available to the general public at the same time (assuming the EDGAR system can be improved to permit the immediate availability of Form 8-Ks).

Although we would recommend that these procedures be adopted for use under the current shelf registration process utilizing a modified Form S-3, the same procedures could be implemented under the new Form B registration system being proposed in the Release, with changes in the proposed Form 8-K signature requirements, as well as the requirements for forward incorporation by reference, that otherwise would unduly inhibit the process. Regardless of which form is the framework for an enhanced universal shelf system, serious issues involving prospectus filing and delivery and liability would have to be dealt with, as discussed below under "Form B Registration -- Prospectus Delivery Proposals", "Form B Registration -- Mechanics of Registration" and "Liability".

We believe the Commission should consider, or perhaps reconsider, another approach. We have serious doubts that the proposed Form A/B registration process could be modified to address its most serious deficiencies within any reasonable time frame. On the other hand, many of the deficiencies in the present system could be addressed more quickly while the Commission re-examines the conceptual framework for an unproved system. In light of the generally favorable reaction to the Wallman Committee proposals for a "company registration" system, we strongly recommend that the Commission use the model of the Wallman Committee, as revised to reflect those comments to the 1996 Concept Release deemed to be appropriate, as the basis for an improved

registration process. We have attached to this letter as an Annex the Term Sheet for Pilot Company Registration System included in the Report of the Wallman Committee. We urge the Commission to focus again on the recommendations of the Wallman Committee, which were developed over a number of years by a distinguished panel and accepted in principle by a majority of commenters, before proceeding down a path utilizing a transaction-based philosophy that has become an anachronism.

We are setting forth below our comments with respect to specific aspects of the proposals in the Release. We reiterate, however, that we do not believe that the proposed Form A/B registration system is the appropriate model for improving the deficiencies in the current system. Thus, our suggestions for improving the proposed system should not be construed as supporting its adoption; to the contrary, we believe that the proposed system is fundamentally unsound and should not be implemented. Furthermore, our comments are being made in the context of a unified proposal and should not necessarily be viewed as being applicable to the current registration process or to any new model that may be proposed in the future.

II. Form B Registration -- Prospectus Delivery Proposals

The prospectus delivery proposals are among the more troublesome aspects of the Release, and we strongly urge the Commission to reconsider them. By imposing an across-the-board requirement that prospectuses or term sheets be delivered at various times before an offering is priced, these proposals may seriously impede the public offering process, making it slower and subject to greater market risk. As a result, the public offering process is likely to become less efficient and more costly, not only for issuers and underwriters but also for investors.

These proposals are particularly troublesome for offerings of non-convertible investment grade debt and preferred equity securities by large, seasoned issuers. Moreover, we see no need for the use of a term sheet in connection with an offering of common equity. Current shelf registration procedures, under which an offering by a seasoned issuer may be priced and sold before final prospectuses are prepared and delivered to investors, have worked well for 15 years. Those procedures have helped to make our capital markets efficient and competitive, and to our knowledge there is no evidence that they have given rise to widespread (or even measurable) abuse or harm to investors. Indeed, the Commission has cited no such evidence. We do not understand why procedures that have worked so well for so long should be fundamentally changed, at potentially great cost, when there is no evidence that they have created any serious problems.

For the reasons set forth below, we believe that the supposed benefits to be achieved by requiring delivery of prospectuses and term sheets before pricing, as contemplated in proposed Rule 172, are mostly theoretical and of little practical value. We fear, however, that the costs associated with Rule 172 are likely to be very real. With regard to proposed Rule 173, we commend the Commission for proposing to eliminate the requirements for delivery of a final prospectus. However, while we think this reform eliminates a burdensome requirement that has little practical value for investors in today's market, we do not think this step forward justifies the changes contemplated in proposed Rule 172. Overall, we regard the prospectus delivery proposals as a major step backward.

Finally, although we understand the Commission's objective in proposing changes to Rule 174, relating to aftermarket delivery of prospectuses, we think the proposed changes could be better tailored to address the issues on which they are focused.

(1) High Potential Costs

Proposed Rule 172 will require that documentation setting forth the final terms of the securities being offered (other than pricing information) be prepared and distributed to investors before they make a binding investment decision, rather than after they do so, as is the practice under current shelf registration procedures. This means that, before the underwriters can obtain a binding commitment from investors, the issuer and the underwriters will not only have to reach agreement on the principal terms of the securities and their price, but also will have to approve the specific language to be used to describe all the terms in detail. As a result, once an issuer and its underwriters decide to proceed with an offering, they will face a difficult choice between two potentially costly alternatives: Under one alternative, they will have to defer pricing until after they prepare and distribute documentation to investors. Under a second alternative, they can agree on pricing quickly but the underwriters will then have to defer sales to investors until after the documentation is prepared and distributed, thereby carrying the underwriting risk for a longer time.

In the first alternative, the time it takes to implement an offering, through pricing, will be longer; and issuers and underwriters will no longer be able to complete this process in a matter of minutes or hours as is now the case. Indeed, the process is likely to be lengthened by more than a full day under Rule 172.

[Footnote: As proposed, Rule 172 would require that a term sheet be sent so as to arrive "before the date" an investor makes a binding investment decision.

Under current shelf procedures, that decision typically is made at or about the time of pricing. Read literally, then, the rule would require term sheet delivery no later than the day before the pricing date. Given that pricing typically occurs after

the close of trading, this rule is likely to delay the offering process for a full 24 hours, even before taking account of the time needed to prepare and distribute the term sheet. That is a long time in a volatile market. If Rule 172 is adopted, we believe that the period of delay should be shortened, so as to require delivery at any time up until the investor makes a binding investment decision. This could be done by changing the quoted phrase "before the date" to "before the time". We understand that the Commission staff recognizes this problem and the need to make the suggested change.

In any event, if a period of delay is to be imposed, it should not be extended unnecessarily by requiring that underwriters use outmoded delivery methods. If Rule 172 is adopted, we urge the Commission to minimize the delay by expressly providing that delivery of term sheets may be made in any commercially acceptable manner, including by facsimile and e-mail transmission, without having to meet cumbersome technical criteria (e.g., obtaining prior consent of the investor or confirming that electronically delivered materials have been opened). For this purpose, the electronic delivery requirements set forth in Release No. 33-7233 (Oct. 13, 1995) should be simplified.] As a result, issuers will not be able to move as quickly as they currently can to take advantage of favorable market conditions. In this situation, moreover, issuers and underwriters will be forced to disclose their intention to price an offering at least a day before they actually do so. In volatile markets, pricing can be adversely affected by premature disclosure of a pending offering. This is particularly true for offerings involving block trades of equity securities.

In the second alternative, when the issuer and its underwriters agree on pricing but the underwriters defer sales to investors, the underwriters will be forced to assume market (and credit) risk for a longer period. This is likely to result in higher underwriting costs, in the form of larger underwriting discounts paid by issuers, less advantageous pricing terms for investors, or both.

Because of the foregoing, we think the offering process for large, seasoned issuers is likely to become less efficient and more costly for issuers and investors if Rule 172 is adopted, particularly in offerings of non-convertible investment grade debt and preferred equity. We think this is a bad result for both issuers and investors and will harm the competitive position of the U.S. capital markets given the relatively relaxed disclosure practices that already prevail in many foreign markets. In light of the expected consolidation of the capital markets in the European Union, this would not seem to be a good time to impose new burdens on the U.S. capital markets. Moreover, if term sheet delivery is required in Form B offerings, seasoned issuers may choose to rely more heavily on the Rule 144A market, at least in the case of debt offerings. In that event, the offering process would become less accessible to public investors, not more so.

We question whether the Commission has evaluated the potential costs to issuers and investors that adoption of Rule 172 might bring. We think it would be unwise for the Commission to change the offering process in so fundamental a manner without first having studied, in detail, how the change would affect underwriting spreads across a broad range of securities markets. We think the Commission needs to produce hard economic data before making a change such as this.

(2) Limited Potential Benefits

While the Commission's desire to improve disclosure for investors is laudable, we do not think the intended benefits from proposed Rule 172 will justify the resulting costs. We believe that, in most Form B offerings, investors will derive little or no real benefit from receiving a term sheet before making a binding investment decision, for the following reasons.

Under proposed Rule 172, the principal piece of information in the term sheet would be a summary of the material terms of the securities being offered. [Footnote: The other information that the Commission proposes be included in a term sheet is simply not important enough to warrant delay of the offering process. For example, the name of a contact person can easily be provided orally, and we find it hard to believe that investors who want such information are not able to get it easily. With regard to information about material relationships between persons making offers and the issuer, Rule 15c1-5 under the Exchange Act already requires that a broker-dealer disclose a control relationship with the issuer.] In most Form B offerings, however, the terms of the securities will not be an issue and can be easily communicated orally. For example, in offerings of common stock that is already publicly traded, the terms of the securities will be simple and familiar to the market. Indeed, under current practice involving sales off a "secondary shelf", selling stockholders are able to sell stock from time to time delivering no more than the base prospectus (assuming complete information about the selling stockholders). In these cases, a requirement that a term sheet relating to each particular sale be delivered in advance of the transaction would be particularly unnecessary and disruptive.

Similarly, in offerings of investment grade debt, the securities will typically be marketed on the basis of the issuer's credit rating and the interest rate and maturity of the securities. This information, too, is straightforward and easily conveyed orally. This is especially true with regard to sales of medium-term notes ("MTNs") for which prices are often posted and bids are often received on a continuous -- in some cases, daily -- basis. In the case of MTNs sold in response to "reverse inquiry" from investors, a requirement that investors review

a term sheet before their bids can be accepted would be particularly unnecessary.

It is only in offerings of novel and complex securities -- those with which the market is not familiar and which cannot be explained without extensive detail -- that communication of the terms of the securities to investors is likely to be an issue. However, in offerings where investors truly need detailed information about the securities in order to make an investment decision, issuers and underwriters generally now prepare a preliminary prospectus for distribution to prospective investors in advance of the pricing because investors demand this information. We believe this is quite common in offerings involving novel and complex securities. In our experience, when offerings involve a pre-pricing marketing effort, the issuer and the underwriters usually prepare and distribute a preliminary prospectus well in advance of the pricing. In offerings where investors really need the kind of detailed information that the Commission is contemplating, issuers and underwriters have a strong incentive to provide it in the form of a preliminary prospectus and marketing efforts.

In the great majority of offerings by seasoned issuers, however, this kind of information simply is not an issue. We do not believe it necessary to require prior delivery of written information about the terms of securities in offerings where those terms are straightforward and familiar to the market. In our experience, this type of information is really needed in only a relatively small number of offerings by seasoned issuers. We believe that issuers, underwriters and investors already identify those offerings that require disclosure about the terms of the securities through the use of a preliminary prospectus and a marketing effort that are appropriately tailored to that need in the context of the particular offering. In these cases, the preliminary prospectus is usually circulated several days, if not weeks, in advance of pricing. This practice suggests to us that requiring delivery of a term sheet shortly before pricing will serve little purpose. If the terms of the securities really need to be explained to investors in detail, investors will need more than a few minutes to review and understand them. Whether investors need a preliminary prospectus and, if so, how much time they need to review it are matters best left to the issuer, the underwriters and investors to determine in the context of the specific offering.

The type of information that really should be communicated to investors before they make their investment decisions is information about a material change in the issuer's affairs. In the case of seasoned issuers, however, this type of information is routinely communicated to the marketplace, both in Commission filings and under the disclosure rules of the various securities exchanges and trading markets. We note that the Commission has not proposed that this type of information be included in the term sheet contemplated by Rule 172. We think this is a sound approach because it reflects the reality of the U.S. capital

markets: with regard to the affairs of seasoned issuers, investors already receive the information they need in order to make investment decisions about those issuers. The integrated disclosure system has worked well in this regard, and we think the Commission is right to conclude that investors can continue to rely on it to receive timely disclosure about the affairs of public companies.

The Commission has asked whether the term sheet for Form B offerings should include other kinds of information, such as "offering information" or transactional disclosure currently required by Form S-3/F-3. We do not believe that these other kinds of information are important enough to require that they be disclosed in writing before pricing, at least when the issuer is large and seasoned. The most important category of this information relates to material changes in the issuer's affairs, but, as noted above, this type of information is likely to be known to the market already. The same may be said about risk factor information, at least as it relates to the affairs of a seasoned issuer. Insofar as it relates to the terms of the securities, risk factor information is unlikely to be material unless the terms of the securities are novel and complex.

III. Form B Registration -- Mechanics of Registration

We should note at the outset of this discussion that we have no objection to the enhanced eligibility requirements for use by issuers of a more streamlined and flexible registration system than the existing Form S-3. However, to the extent that the deficiencies in proposed Form B discussed in this letter are not remedied, and Form A not made more workable, we would oppose the adoption by the Commission of eligibility standards that would reduce the availability of short form registration by as much as 30%.

A. Delayed Shelf Offerings -- Primary

Under the current delayed shelf registration system, the signature of directors and officers is not required for the filing of Rule 424(b) prospectus supplements. Consistent with the transaction-based approach of the Release, Rule 424(b) prospectuses would not be permitted in Form B offerings, and issuers would be required to file pre- or post-effective amendments to the registration statement. The proposed rules suggest that allowing issuers to use a power of attorney will avoid the considerable inconvenience of obtaining multiple signatures upon the filing of a pre-effective or post-effective amendment; in the alternative, the proposed rules suggest that an authorized representative could sign on behalf of officers and directors without an actual power of attorney. Both of these suggestions are flawed in that they seem to assume issuers would not still need to provide sufficient time for the officers and directors to review each filing prior to signing on their behalf with a power of attorney. This requirement will only add

further delays to the registration process, thereby increasing the costs of capital raising for issuers and investors without an increase in investor protection.

The Commission further notes that it believes that Section 11 liability has always attached to a Rule 424(b) prospectus, but also acknowledges that many commentators disagree on this point. The Release argues that requiring the offering document to be a part of the registration statement at the time of effectiveness would ensure that Section 11 liability attach to such document, thereby codifying the Commission's controversial position. This is a clear benefit to investors (without any benefit to issuers), but we believe the same result could be achieved simply by rule or by requiring issuers utilizing shelf registration to accept Section 11 liability for Rule 424(b) prospectuses through undertakings.

In response to the question as to whether there is a continued need for a delayed shelf concept under Form B, we believe that there is. The Release also requests comment as to whether a two-year limitation on the amount of securities registered under a shelf registration statement is appropriate. There seems to be no benefit to investors in retaining such a rule. While market overhang may be an issue for some issuers, it poses no harm to investors. Issuers should be entitled to evaluate the market overhang factor for themselves and register an amount of securities that they feel is appropriate. In addition, the market overhang issue only arises when an issuer registers common stock. Therefore, at the very least, the two-year limitation should be eliminated with regard to shelf registration statements for debt and/or preferred stock.

Finally, we see no reason why a prospectus that today would be filed under Rule 424(b) to add principally price-related information would have to be filed by post-effective amendment under the Form B registration system proposed in the Release.

B. Filing of Offering Information and Free Writing

The proposal would require issuers to file "offering information" and "free writing" materials used subsequent to 15 days prior to the "first offer" made. However, the proposal does not provide any guidance as to when the "first offer" would occur in a securities offering. This is likely to cause serious difficulties and inconvenience for issuers and their counsel in view of the broad statutory definition of "offer". Also, the requirement that all materials disclosed "by or on behalf of the issuer" be filed and therefore have liability attach is overly broad. We do not believe it is realistic to expect an issuer to control all information distributed by all of the members of the underwriting syndicate. Similarly, no underwriter can be expected to control all information distributed by the other members of the underwriting syndicate. Additionally, from a timing perspective, this would add one more task that an issuer would be required to complete prior

to pricing an offering of securities, thereby increasing the likelihood that the issuer will miss a market opportunity. In view of the large number of participants in the process, both the "first offer" and the "by or on behalf of" standards must be reexamined.

As more fully discussed in Section VI below dealing with liability, the lack of clarity as to what constitutes "offering information" and "free writing", as well as the potential draconian consequences to the participants in the offering process resulting from the failure to file the required information, also raise serious questions that we believe have to be resolved.

C. Limitations on QIB Purchases

The Commission has proposed to make certain QIBs, such as dealers and investment advisors, ineligible to purchase under a Form B QIB-only offering. The Staff's reasoning is that because such QIBs do not generally purchase securities for their own investment, and because securities registered under Form B would be unrestricted, investors and issuers could arrange to use Form B improperly in a public distribution by using the QIBs as conduits. The Commission seeks comment as to whether additional QIBs, other than dealers and investment advisors, should be excluded from purchasing securities pursuant to a Form B QIB-only offering. It also suggests that, unless the securities "come to rest" with the QIBs, the offering would be ineligible for registration on Form B and would result in a violation of Section 5.

We do not believe that the Commission should exclude any QIBs from Form B QIB-only offerings unless there are compelling reasons to do so. Thus, dealers purchasing solely for resale to QIBs and investment advisors purchasing solely for the account of QIBs should be permitted to participate. Excluding dealers would preclude the use of this approach for an underwritten offering. As summarized in Section V.A.2b.i. of the Release, the Commission believes that permitting offerings to QIBs would result in two key advantages that do not currently exist: (a) unlike Rule 144A, securities that are fungible with those that are listed on an exchange or quoted on NASDAQ could be offered under a Form B registration; and (b) unlike Rule 144A securities, it would not be necessary to register a subsequent exchange offering since the securities would generally be freely resalable. To exclude too many QIBs from the Form B QIB-only offering would dilute these advantages. In addition, excluding additional QIBs from a Form B QIB-only offering would result in a different definition of QIB for purposes of Rule 144A than for purposes of Form B. We believe that this would result in unnecessary confusion and, if adopted, should require the Commission to refer to such eligible QIBs by a different term. [Footnote: See Offshore Offers and Sales. Release No. 33-7505; 34-39668. To avoid confusion between the holding period for "restricted securities" under Rule 144 and the "restricted period" under

Regulation S, the term "restricted period" was renamed the "distribution compliance period."]

Finally, as the Commission has recognized with Regulation S and other safe harbor offering exemptions, there is always the danger that any offering, particularly those not subject to Staff review, will be used to make an unregistered public distribution of securities. We believe that excluding certain QIBs from a Form B QIB-only offering would not materially reduce the danger of an illegal public offering.

We also question the desirability of injecting the now abandoned "presumptive underwriter" doctrine into the registration process. Requiring the securities offered to come to rest with the QIBs will mean the securities are not freely resalable, thus eliminating one of the perceived advantages of a QIB-only offering.

The Release seeks comment on whether upward revisions to the dollar thresholds for defining a QIB are necessary to provide continued assurance that QIBs are sophisticated investors with some ability to require appropriate disclosure from sellers and whether such revisions, if any, should be based on inflation or in accordance with market-related measures.

We recognize that inflation since 1990, as well as large increases in the overall value of the S&P 500 and other market indexes, has resulted in the thresholds for QIBs being lower, in real terms, than they were in 1990. We believe that an important purpose of the Release is to simplify the registration process and create greater certainty for issuers, underwriters and other participants in the securities markets. The difficulty with setting new absolute dollar thresholds based on an inflation index is that it would presumably require further revisions after a period of several years or a shorter period if, for example, the United States undergoes a period of high inflation. In addition, we believe that the Staff should be cautious in revising the thresholds to higher amounts in accordance with market-related changes since 1990. Should the securities market suffer a downturn, for example, the Commission may find that it has set the dollar thresholds too high. We believe that, rather than setting the precedent of changing these dollar thresholds, the Commission should encourage greater certainty among participants in the offering process by leaving them unchanged for the foreseeable future.

We also note that as more fully discussed below under "Proposed Elimination of Exxon Capital", the adoption of Form B QIB-only offerings, particularly with the uncertainty of the presumptive underwriter doctrine, should not be the rationale for eliminating the A/B exchange offer procedure.

D. Form B Disqualification

The Commission seeks comment on whether any of the issuers currently included in the four categories of disqualified issuers should be permitted to use Form B. Essentially the same factors are proposed for disqualifying otherwise eligible issuers from utilizing incorporation by reference and expedited effectiveness for Form A registration. We disagree with a number of the proposals for disqualification.

The provisions of Form B General Instructions I.B.6.(g) and (h) and Form A General Instructions II.B.7. and 8. would cover a range of specified violations by the issuer, any executive officer, any director, any general partner, any nominee for any of these positions or any underwriter. We believe that these provisions would create unnecessary uncertainty in the offering process for both issuers and underwriters and should not be adopted in their current form. For example, issuers would, at the very least, have to obtain representations from all underwriters to ensure that no member of the underwriting syndicate was subject to any cease and desist order during the past five years. This requirement would impose unduly harsh consequences upon the issuer and the other underwriters if a "nonqualifying" underwriter became a member of the underwriting syndicate because, through oversight or misrepresentation, such underwriter failed to inform the issuer of its non-qualifying status. Presumably, the issuer's ability to use Form B, or to control the timing of effectiveness of, or to incorporate by reference and deliver under, Form A, could be jeopardized at the "eleventh hour" (considering the fact that the full underwriting group is not assembled until late in the offering process). If such underwriter's non-qualifying status were not discovered until after the completion of the offering, would there be a Section 5 violation, thereby affording investors rescission rights under Section 12(a)(1)? Each underwriter would have similar concerns regarding possible disqualification of the issuer, its executive officers, directors or nominees, as well as other members of the underwriting syndicate.

The Commission also seeks comment on whether it should extend the look-back periods used to disqualify issuers that would otherwise be eligible to use Form B or the more liberal provisions of Form A in order to coincide with the five year look-back period for issuers that have violated the law. Although we recognize that having the same look-back period for all issuers is simple and straightforward, we nevertheless believe that it is preferable to distinguish certain issuers which have violated the law from other issuers. By definition, those issuers which have violated the law are the most egregious, and it is logical that issuers in this category should be barred from the specified advantages. By contrast, for example, the look-back period of only two years for a development stage company seems appropriate, and we believe it serves no real purpose to extend the look-back period for this type of "innocent" issuer to five years; rather,

it seems preferable to have a range of look-back periods depending on the reason why the issuer is being disqualified.

One of the more troublesome eligibility requirements included within those colloquially referred to as the "bad boy" provisions (General Instruction II B10 of Form A and I.B.6.(i) of Form B) would deny eligibility if the issuer had been engaged in an unresolved dispute with the Commission Staff regarding the Staff's comments on a prior Exchange Act filing. These requirements could become an unduly powerful and inappropriate enforcement lever for the Staff and, we strongly recommend their elimination.

E. Secondary Offerings/Shelf Offerings

The Release would eliminate the current distinction between primary and secondary offerings on Form S-3. As a result, offerings by selling securityholders would need to qualify under the same public float or other eligibility criteria as offerings by an issuer.

The Commission solicits comment regarding whether secondary offerings by non-affiliates should be added as a separate eligibility criterion for using Form B, thereby permitting seasoned issuers to register such an offering on Form B without meeting other eligibility criteria. We believe that the addition of this eligibility criterion is warranted. We recognize that to an investor there is very little difference between an offering that is primary or secondary other than the recipient of the proceeds. We also understand the need to prevent issuers from attempting to cast what is actually a primary distribution as a secondary offering by selling securityholders in order to use the short-form registration. Nevertheless, to the extent abuses may exist, we believe that by limiting the use of the Form B registration statement in secondary offerings to those by non-affiliates of the issuer, it is less likely that such registration would be used as a means to avoid what would otherwise be a Form A registration. Given the historical distinction between primary and secondary offerings, at least for non-affiliates, we believe that it would be preferable to continue to recognize this distinction. Moreover, precluding the use of Form B for secondary offerings by affiliates would be appropriate only if Form A is a workable alternative for secondary offerings. In its proposed form, we do not believe it is.

We further recommend that, at least for this purpose, the definition of "affiliate" proposed by the Wallman Committee be adopted by the Commission. Affiliates would include only holders of 20% of the voting power, holders of 10% of the voting power with at least one director on the board, the chief executive officer, inside directors and director representatives of affiliates as so defined.

We note, however, that the application of the mechanics and timing for the filing of registration statements on Form B would preclude the use of at-the-market shelf offerings. First, the requirement of physical delivery of a term sheet or prospectus prior to sale would not be possible (and the problem would exist for at-the-market primary offerings as well). Second, the limitations on incorporation by reference of subsequently filed Exchange Act documents also would seriously impair the utility of the shelf registration process. [Footnote: See Form B Section 3(b) under "Information Required In The Prospectus That Is Part Of The Effective Registration Statement": "You may incorporate Exchange Act documents filed after the time of delivery in accordance with Securities Act Rule 172 only if you otherwise disclosed to investors the information contained in those documents prior to or at the same time as you delivered." Section 3(d) precludes the use of Rule 424 and requires material changes in disclosure to be reflected in amendments to the registration statement.]

This would represent a dramatic change in current practice, particularly as it would affect issuers raising capital in private transactions where resale registration is mandated under registration rights agreements. Not only would the elimination of the at-the-market shelf raise serious transitional issues for those presently parties to registration rights agreements, but it also could dramatically increase the cost of raising capital in the future from traditional investors in companies both large and small. Although non-affiliates would be able to sell limited quantities of securities publicly after a one-year holding period under Rule 144 and to sell unlimited quantities after two years, these limitations would result in the elimination of available capital from a large group of institutional investors and would require issuers to give larger discounts to other investors in private placements. Even if the Commission deems it necessary to maintain the same eligibility requirements for issuers and security holders using short form registration on Form B, we strongly recommend that the necessary changes in the process be adopted to permit at-the-market shelf offerings by selling security holders, including officers, directors and affiliates of the issuer.

F. Review of Form B Registration Statements

The Commission indicates that the Staff will screen Form B registration statements promptly after filing to determine eligibility for use of Form B and for "red flags" concerning compliance with the applicable disclosure requirements. If the registrant is found not eligible to use Form B, the Commission states that the registrant would have violated Section 5 of the Securities Act and the matter would be referred to the Division of Enforcement. If the Staff finds "red flags," it will review the registration statement and "take further appropriate action."

We recognize that the Staff always has been able to review a registration statement after it becomes effective, but we do not understand that to be current practice as a matter of course.

The proposed post-effective review process is extremely troublesome to us, particularly when coupled with the rescission of Rule 401(g) with respect to registration statements that become effective upon filing or at a time determined by the registrant. (The current provision of Rule 401(g) provides that a registration statement that becomes effective is presumed to be on the proper registration form.)

The proposed post-effective review process will create uncertainty for registrants and underwriters and make it more difficult for counsel to provide underwriters with opinions as to compliance as to form of registration statements on Form B. More importantly, a contingent liability may be created if there is a risk of a Section 5 violation. This could affect the registrant's ability to complete the offering.

Although a company can be reasonably certain it is eligible to use Form B, the "red flag" review concept also is extremely dangerous. If, for example, the Staff should disagree with the registrant's accounting for a particular transaction and reviews the registration statement and issues comments before or after an offering is completed, it is difficult to predict what effect that would have on the offering. One thing is clear: the opportunity for immediate access to the capital markets, which is an intended goal of the Form B proposals, would be severely disrupted. Accordingly, we urge that, except in the most egregious circumstances, any Staff comments on Form B registration statements should be solely future-oriented.

The Commission also asks whether its Staff should review offerings of "novel" securities to be registered on Form B and, if so, how "novel" should be defined. We believe that a requirement for Staff review of "novel" securities to be registered on Form B would add uncertainty as to what are "novel" securities and whether a registration statement is required to be reviewed, and eliminate many of the advantages of Form B. Moreover, we believe that, if such a requirement were adopted, however "novel" is defined, issuers of novel securities might be inclined to rely on Regulation D, Rule 144A, Regulation S or another exemption for offerings of such securities, rather than register those securities on Form B.

Finally, the Release does not address review practices with respect to offerings of securities registered on Form A in circumstances where the registration becomes effective on filing and is not subject to pre-effective review. We believe this issue should be addressed.

G. Non-Convertible Investment Grade Securities

We agree with the conclusion of the Commission to continue to permit the use of short form registration for offerings of non-convertible investment grade debt and preferred equity securities by seasoned issuers which are not required to meet the public float requirements. There seems to be no evidence of abuse as a result of this practice. The seasoning requirement alone, when tied to the credit rating standard, should provide adequate protection to investors. Further, we doubt that there are many issuers of investment grade securities that would not also meet the public float/ADTV requirement, other than those which do not have publicly traded equity. We believe those issuers also should have the benefit of short form registration for their investment grade debt and preferred equity so long as they meet the reporting history requirements.

IV. Form A Registration System

A. Incorporation by Reference and Delivery

Under the proposals, a "seasoned" Form A issuer would be entitled to incorporate by reference into the prospectus that is part of its registration statement its previously filed (but not subsequently filed) Exchange Act reports. This would be in lieu of presenting company-related disclosure in full in the prospectus. However, any issuer relying on this option would be required to deliver its latest annual report filed under the Exchange Act and either deliver or include in the prospectus the information in Part I of its most recent Form 10-Q. "Unseasoned" issuers would be required to provide all of the company-related disclosure in the prospectus.

We do not believe that incorporation by reference and delivery for "seasoned" Form A issuers should be adopted as proposed. We suggest that the proposed Form A registration system be simplified to prescribe one registration statement form for all Form A issuers, whereby both "seasoned" and "unseasoned" Form A issuers would present company-related disclosure in full in the prospectus. Our suggestion is based principally on the following considerations:

1. We believe that the option to incorporate by reference, because it is coupled with the requirement to deliver Exchange Act reports, would be of limited utility to issuers. The closest analogue to the proposed registration framework for "seasoned" Form A issuers is Form S-2. [Footnote: Under Form S-2, a registrant may incorporate by reference company information into its prospectus and deliver with the prospectus its Exchange Act reports. If a registrant does not elect to deliver its incorporated Exchange Act reports with the prospectus, it must provide abbreviated company information in the prospectus.] Our experience is

that in practice Form S-2 is rarely used and that issuers prefer to use Form S-1 rather than separately delivering Exchange Act reports. In 1998, fewer than 100 issuers filed Form S-2 registration statements with the Commission. Of these, under one-half elected to deliver their Exchange Act reports separately. Accordingly, we believe that most "seasoned" Form A issuers would elect to provide full company-related disclosure in the prospectus rather than incorporate by reference and deliver.

2. We do not believe that the incorporation by reference and delivery alternative would result in any appreciable cost savings to "seasoned" Form A issuers. In fact, separate delivery could very well increase costs and administrative burdens, at least marginally. For example, issuers would have to reprint copies of their annual and periodic reports separately from the prospectus and, for marketing and presentation purposes, may have to spend time and incur costs conforming disclosure, style, format and table layout among the prospectus, the annual report and the most recent Form 10-Q. Given modern printing technology, the inclusion of company information in full in the prospectus may actually be more cost-effective.

3. While we do not believe that incorporation by reference and delivery would necessarily increase the analytical burden on investors by requiring them to review more than one document, we believe that having company disclosure in one document rather than three would be more user friendly for investors. For example, an issuer electing to deliver its Exchange Act reports would be required to provide in the prospectus updating financial information and describe material changes, in each case from the delivered Exchange Act reports. From the investor's standpoint, we believe that having such updating information integrated into the company-related disclosure in one disclosure document, prepared under plain English principles, would be the better alternative. In addition, we believe that having a consistent, standard disclosure format for all Form A registration statements would be beneficial to investors and the market generally.

4. Finally, for marketing and presentation reasons, we believe that even "seasoned" Form A issuers and their underwriters would in most cases opt to provide full company-related disclosure in the prospectus rather than incorporate by reference and deliver Exchange Act reports.

In summary, we believe that incorporation by reference and delivery would add an unnecessary layer of complexity to the proposed registration system without providing significant (if any) benefits to issuers or investors.

As an alternative, we propose that "seasoned" Form A issuers be entitled to incorporate by reference without delivering selected portions of their reports filed under the Exchange Act. This would provide a real benefit to "seasoned" Form A

issuers. For example, this alternative would allow these issuers to incorporate by reference without delivering certain mandated disclosure -- for example, disclosure mandated by Regulation S-K Item 401, directors and officers; S-K Item 402, executive compensation; S-K Item 403 security ownership of certain beneficial owners and management; and S-K Item 404, certain relationships and transactions. Under this alternative, certain "core" company information, such as risk factors, description of business and MD&A would still be required to be disclosed in full in the prospectus. If this alternative were adopted, we also would recommend that forward incorporation of the same information be permitted for use in shelf offerings.

B. Timing of Form A Offerings and Disqualification.

We agree with the Commission's proposal to allow "seasoned" Form A issuers to choose when their registration statements on Form A become effective, namely, immediately upon filing, at the date and time specified on the front cover of the registration statement or as specified in a later amendment. We believe that this proposal would be advantageous to qualifying medium-sized issuers and their underwriters by providing certainty about the timing of registered offerings. Although we agree with the Commission's proposal overall, we have comments on the following aspects of the proposal:

1. "Recently reviewed" test. We question the necessity and practicality of the "recently reviewed" test for determining the class of "seasoned" issuers that is entitled to control the timing of registration statement effectiveness. For the reasons noted, we suggest that incorporation by reference and delivery be eliminated from the Form A registration system. Of course, if this were done, the "recently reviewed" test would become irrelevant because incorporation by reference would not be a choice. Even if the option to incorporate by reference and deliver were maintained in the Form A registration system, from a practical standpoint, we believe that the number of issuers that would elect to incorporate by reference and deliver their Exchange Act reports would be small, as noted above. In any event, we believe that the number of such "incorporating" issuers that would not meet the \$75 million "public float" test for controlling effectiveness would be smaller still. Accordingly, we believe that the "recently reviewed" test would add a layer of complexity to the proposed Form A registration system without providing a commensurate benefit.

2. Disqualification of Form A issuers. Proposed Form A sets out certain factors that would disqualify otherwise eligible issuers from the benefits of incorporation by reference and expedited effectiveness. Our discussion under "Form B Disqualification" above is equally applicable here.

3. Preliminary Prospectus Delivery in Form A Offerings. The Commission has proposed that preliminary prospectuses be delivered in Form A offerings at least three or seven days before pricing, depending on the nature of the issuer. Here again, we question whether this proposal addresses a real problem. We believe that a very large number of Form A offerings will involve initial public offerings. In our experience, IPOs typically involve a substantial marketing effort, including dissemination of a preliminary prospectus, many days (if not weeks) in advance of the pricing. In IPOs, Rule 15c2-8 under the Exchange Act requires that underwriters arrange for preliminary prospectuses to be delivered at least 48 hours before confirmations are sent, and the Commission Staff routinely requires underwriters to confirm they have complied with this rule before the Staff will declare the registration statement effective.

We believe that this practice is also followed by underwriters in many non-IPOs that would otherwise be Form A offerings. Although Rule 15c2-8 does not apply to non-IPOs, in our experience preliminary prospectuses are prepared and distributed in many offerings that fall into this category. This is because marketing efforts remain important in offerings made by issuers that, while already public, are not seasoned or closely followed in the market. We urge the Commission to examine market practice for this category of offerings carefully to determine whether the market really needs a rule mandating preliminary prospectus delivery. If the Commission concludes that it does, we think that a rule similar to Rule 15c2-8 would be the appropriate response. Rule 15c2-8 has worked well in the context of IPOs, and we see no need to impose a stricter rule in non-IPOs that would qualify as Form A offerings. We note, however, that to the extent at-the-market secondary shelf offerings by securityholders are permitted on Form A, separate provisions would be required since the delivery of a preliminary prospectus would not be feasible. [Footnote: It seems curious that prospectus supplements under Rule 424(b) would be permitted in secondary at-the-market offerings on Form A but not on Form B where they must be filed as post-effective amendments to the registration statement.]

In any event, we strongly object to the requirement in proposed Rule 172 that preliminary prospectuses be delivered at least three or seven days in advance of pricing. That requirement would discourage underwriters from approaching additional investors who had not been contacted at the outset of the offering process, lest pricing be delayed an additional three or seven days. This would hamper efforts to increase the size of an otherwise successful offering. It could also preclude underwriters from selling to investors who contact them late in the offering process and ask to purchase in the offering. In light of current market practice, we believe the number of investors who do not receive preliminary prospectuses well in advance of pricing is relatively small, too small to justify a potential pricing delay of three or seven days for all other Form A offerings.

We believe it is important that any new delivery requirement adopted (whether for term sheets or preliminary prospectuses) should follow the approach taken by Rule 15c2-8, namely, that delivery need be made only to persons "expected to receive a confirmation of sale" and not to every single person who ultimately receives a confirmation. We think it is important to provide the kind of practical flexibility that Rule 15c2-8 currently provides. Underwriters should not be required to recommence delivery of preliminary prospectuses merely because a small number of investors, whose participation was truly unexpected or unforeseen at the outset, have decided to purchase at a relatively late stage of the offering.

V. Other Prospectus Delivery Issues

A. Final Prospectus Delivery Exemption

We support the Commission's proposal, in Rule 173, to provide an exemption for delivery of final prospectuses. We agree that, in today's market, where information is widely disseminated and readily accessible through electronic means, delivery of a final prospectus is much less important than it was in the past. If the Commission decides that final prospectuses should continue to be delivered, we urge it to liberalize the rules regarding appropriate methods of delivery, so that delivery via the Internet and fax machines could be used more readily.

We do not believe, however, that the benefits resulting from eliminating delivery of final prospectuses justify the burdens imposed by requiring delivery of term sheets and preliminary prospectuses under proposed Rule 172. The exemption provided by Rule 173 should not be conditioned on the adoption of the delivery requirements of Rule 172. We believe it is far more important that Rule 172 not be adopted than it is that Rule 173 be adopted.

If the Commission retains a requirement that final prospectuses be delivered, we think current Rule 153 should be retained. The objective, in our view, should be to facilitate prospectus delivery by as many means as are appropriate. Rule 153 enables underwriters and selling securityholders to satisfy the prospectus delivery requirement in situations -- offerings made through the facilities of a securities exchange -- where identification of the ultimate purchaser is often not possible.

B. Aftermarket Delivery of Prospectuses

We understand the Commission's desire to provide expressly, in light of Gustafson, that Section 12(a)(2) of the Securities Act applies with regard to sales

in the after-market for a public offering. We also agree that 25 calendar days is an appropriate length of time for this purpose. However, we believe that the Commission can achieve this purpose without requiring that dealers inform investors in their confirmations of sale where prospectuses can be obtained. We believe that information is readily available to investors and that adding more language to confirmations is of little practical value to investors. Confirmations should be used to communicate truly important information about a transaction and should not be burdened with insignificant matters.

If the Commission believes it is necessary to address the Gustafson issue, we think it should do so directly, in the form of an interpretive rule or other statement. By trying to address this issue with a rule focused on the mechanics of prospectus delivery, the Commission obscures its real purpose and unnecessarily complicates the confirmation process.

In stating the foregoing, we assume that Rule 173 would be adopted and physical delivery of a final prospectus would no longer be required in the aftermarket. If the Commission decides that physical delivery should continue to be required in the aftermarket, we think that the current exemptions for offerings of securities that are newly listed, contained in paragraph (d) of Rule 174, or that are already publicly traded, contained in paragraph (b) of Rule 174, should be retained. As to paragraph (d), we see no reason to require prospectus delivery beyond the current 25-day period. As to paragraph (b), we think physical delivery of prospectuses would serve little purpose when a ready market for the securities already exists and the issuer is already obligated to make periodic disclosure about its affairs to the market. Perhaps the current exemption in paragraph (b) should be narrowed so as not to apply in offerings of securities that are thinly traded and not well followed in the market. (In that event, offerings no longer eligible for the exemption in paragraph (b) should be subject to the 25-day delivery requirement of paragraph (d).) Limiting the exemption in paragraph (b) to securities that meet certain minimum trading volume criteria may be sensible; eliminating the exemption entirely would not.

We also suggest changing the limitation on forward incorporation by reference in the final prospectus used in Form B offerings in order to avoid the need to file post-effective amendments to the registration statement to reflect material changes contained in Exchange Act filings. [Footnote: See Note 4 above where the issue of forward incorporation by reference is discussed in the context of at-the-market shelf offerings.]

C. Prospectus Delivery Record-Keeping

The Commission asks whether broker-dealers should be required, by rule, to keep records of their distribution of information relating to offerings under the

Securities Act. We question whether a rule of this kind is necessary. With regard to prospectuses, broker-dealers have a strong incentive to ensure that they comply with the prospectus delivery requirements under the Securities Act, when applicable, and we would be surprised if most broker-dealers with an active underwriting business did not maintain systems and procedures designed to ensure timely delivery of prospectuses. With regard to other communications, existing SRO rules already require member firms to keep records of a wide range of written materials sent to customers or the public, including research reports, market letters, performance reports or summaries and other forms of sales literature. (See, e.g., NASD Rule 2210 and NYSE Rule 472.)

If the Commission does adopt a record-keeping rule, we strongly urge that it apply so that only the firm that actually distributes the information be required to keep a record of it. For example, while a lead manager of an underwriting syndicate might be required to keep a record of prospectuses delivered on behalf of the syndicate, it should not be responsible for keeping a record of sales materials that an individual syndicate member prepares and sends to its own customers.

VI. Liability

A. Civil Liability Considerations.

The proposals would loosen the strict controls that exist today on written communications to investors and the market around the time of an offering. The Commission's proposed new rules in this area are "designed to increase the amount of information provided to investors." Under the Release, the written communications proposed to be permitted, namely "offering information" and "free writing," would be brought within the civil liability system of the Securities Act. We believe that the application of the civil liability provisions of the Securities Act to these offering communications, as proposed in the Release, would discourage rather than encourage the distribution and publication of these communications. Accordingly, while we do not suggest eliminating from the proposal civil liability for such offering communications, we recommend that the Commission reassess the application and scope of the Securities Act's civil liability provisions in respect of these communications.

Section 11 of the Securities Act imposes liability for offering participants, including the issuer, signing officers, directors and underwriters, for materially false or misleading statements or omissions in registration statements. Section 11 provides offering participants other than the issuer with a "due diligence" defense. Section 12(a)(2) allows purchasers to recover against their sellers (a much more limited class than that covered by Section 11), unless the sellers can

show that they were not negligent in failing to discover false or misleading statements or omissions.

Under the proposals relating to communications during the offering process, Form B issuers would not be subject to communications restrictions before the filing of the registration statement. Written information disclosed "by or on behalf of" the Form B issuer during the proposed "offering period" would constitute either "offering information" or "free writing." "Offering information" would be required to be filed as part of the registration statement and subject to the liability standard of Section 11, as well as Section 12(a)(2) liability. [Footnote: As proposed, "offering information" would consist of a wide range of information, including "risks of the offering," "information regarding the transaction that is material" and "any offering information disclosed by or on behalf of the issuer during the offering period." See Section V.A.I.a.ii. of the Release.] "Free writing" would be required to be filed under proposed Rule 425 and subject to the negligence standard of liability of Section 12(a)(2). [Footnote: "Free writing" is defined to exclude "offering information," factual business communications and limited notices of proposed offerings. Liability would attach to "free writing" whether or not it is filed as required under proposed Rule 425.] Form A issuers would be able to engage in "free writing" in connection with the offering after the filing of the registration statement, which "free writing" would be subject to Section 12(a)(2) liability. Rule 10b-5, of course, would apply to all such communications.

The standard and scope of civil liability under the proposals depend on how a particular communication is characterized, that is, whether it is "offering information" or "free writing." As proposed, we find these terms vague and confusing. How a particular communication is characterized would determine whether such communication is subject to Section 11 or Section 12(a)(2) liability and, accordingly, the class of persons that would be subject to liability for such communication. A determination that materials constituted "offering information" (and not "free writing"), thereby requiring filing as part of the registration statement, would subject the issuer, signing officers, directors and all underwriters to Section 11 liability for false or misleading statements or omissions in such materials. We believe that, before adopting a liability regime for offering-related communications based on these concepts, the Commission should clarify the meanings of these concepts and how exactly they would affect civil liability under the Securities Act. [Footnote: Currently, post-effective written "free writing," if it is preceded or accompanied by a Section 10(a) prospectus, is excluded from the definition of "prospectus" under Section 2(10) of the Act. Accordingly, such "free writing" is not subject to liability under Section 12(a)(2). The proposed rules would require all "free writing" used in connection with the offering after filing of the registration statement to be filed with the Commission, and thus, as proposed, Section 12(a)(2) liability would seem to attach to all such

"free writing." We urge the Commission to consider how current "free writing" practices would be affected by the proposed rules.]

The Release states that a document that contains both "offering information" and "free writing" would be treated as "free writing," if the "offering information" was filed as part of the issuer's registration statement. In this case, the "free writing" materials would be subject to Section 12(a)(2) liability only. If, however, the "offering information" was not filed as part of the issuer's registration statement, the entire document, including the "free writing" portion, would be considered "offering information" and be required to be filed as part of the registration statement. In this case, the same "free writing" materials would be subject to the broader liability provisions of Section 11, as well as Section 12(a)(2) liability. These distinctions raise a number of liability-related inconsistencies and questions that must be addressed. Two examples are illustrative.

If an underwriter, acting (or deemed to be acting) "on behalf of" the issuer, included in supplemental sales materials both "free writing" and "offering information" and the "offering information" had not been filed as part of the registration statement (or if such information is deemed not to have been so filed because it differs in some significant (or insignificant) respect [the Release is not clear on this point] from the "offering information" in the registration statement), the entire document, including such underwriter's "free writing" sales materials, would have to be filed as part of the registration statement and thus be subject to Section 11 liability. As a result, the issuer, signing officers, directors and each underwriter in the offering would potentially be liable under Section 11 for false or misleading statements or omissions in such underwriter's supplemental sales materials. This result is confusing since, by contrast, if such underwriter simply distributed or published the "free writing" portion of the document (or if the "offering information" were filed as part of the registration statement), the broader liability provisions of Section 11 would not apply; only Section 12(a)(2) would apply.

Likewise, an issuer that wanted to avoid the liability standard of Section 11 with respect to particular information could exclude such information from the prospectus, include such information as "free writing" in a document that contains both "free writing" and "offering information" and file the "offering information" portion of the document as part of the registration statement. As a result, the "free writing" information would be subject to Section 12(a)(2) liability only. By contrast, if the "offering information" portion of the document were not filed as part of the registration statement, such "free writing" information would be also subject to Section 11 liability.

In each of the foregoing examples, it is not clear why identical information would be subject to different liability standards. Why should the issuer's (or a

gatekeeper's) liability be higher if a false or misleading statement or omission is made in one context versus the other? What are the policy reasons for the different liability standards?

More generally, we believe that, before adopting the "inclusive" prospectus approach set forth in the Release, the Commission needs to address the related "inclusive" liability approach. In general, under this "inclusive" liability approach, the issuer and each of the gatekeepers in the offering process, such as underwriters and directors, could be liable for the independent actions of any other distribution participant. Under the proposals, in a Form B offering, all "offering information" that is used during the proposed "offering period" would have to be filed as part of the registration statement. As a result, issuers, directors, signing officers and all underwriters would be subject to Section 11 liability for material misstatements or omissions in any such "offering information," Section 12(a)(2) liability would extend to all "free writing," which includes all written information disclosed "by or on behalf of" the issuer, which potentially could encompass a very wide range of materials and distribution participants. [Footnote: For example, as proposed, road show presentation materials would be required to be filed, thus potentially subjecting the issuer and all underwriters to liability in respect of such materials. In pertinent part, the Release states: "We believe that the filing requirement enhances investor protection by reducing selective disclosure. For example, road show materials not generally available to individual investors today would be available to the broader market on a real-time basis after the registration statement is filed."] In the case of offerings marketed and completed in a short period of time, "inclusive" liability would apply retroactively to written communications disseminated before the offering process began.

We believe that this "inclusive" liability approach, if adopted, would discourage the preparation, distribution and publication of the very written communications that the Commission seeks to encourage. We believe that potential liability for marketing materials in addition to the traditional prospectus, whether these materials are characterized as "offering information" or "free writing," and due diligence concerns would likely cause issuers and underwriters to continue to limit offering materials exclusively to the Section 10(a) prospectus. Underwriters and other gatekeepers will understandably be concerned as to whether they can properly fulfill their due diligence obligations in respect of such marketing materials. Under current practice, traditional means of due diligence are applied by gatekeepers and their representatives in respect of the disclosure contained (or incorporated by reference) in the prospectus. Any inaccuracies or omissions with respect to the disclosure can be addressed prospectively. Under the Release, gatekeepers and their representatives would have to review a potentially large array of separate communications, engage in a "look-back" due diligence exercise to determine what communications had been disseminated by

offering participants during the relevant period, determine whether such communications constitute "free writing" or "offering information" for both filing and civil liability purposes, and examine such communications after the fact for false or misleading statements or omissions. Any disclosure problems could not be addressed in the offending communication since it would have already been disseminated to investors and the market. The due diligence efforts of issuers, directors, underwriters and their respective counsels would be made more difficult, which we believe would discourage offering participants from allowing any communications other than the traditional prospectus during the offering period.

To address these issues while at the same time encouraging greater communications to investors and the market, we urge the Commission to clarify the application of the civil liability provisions to communications made around the time of an offering or to consider alternatives to the "inclusive" liability approach set forth in the Release.

In light of the importance to offering participants and investors of the civil liability provisions of the Securities Act, the scope of the definitions of "offering information" and "free writing" need to be clarified as they relate to liability under the proposed system. Both "offering information" and "free writing" encompass all information disclosed "by or on behalf of the issuer," which may be construed to pick up a wide range of written information disseminated by underwriters and other distribution participants. What types of communications and which distribution participants would be covered, and what are the liability consequences to the issuer and the underwriters? Would any communication by any underwriting syndicate member be deemed to be "by or on behalf of" the issuer, thus subjecting the issuer and others to potential civil liability under Section 11 or Section 12(a)(2), or both? Or, would the issuer have to authorize or participate directly or indirectly in the preparation of the communication? Why, as illustrated above, should "free writing" materials be treated differently for liability purposes depending on whether such materials appear in a document alongside "offering information" and whether or not such "offering information" is filed as part of the registration statement? Why should liability extend to the issuer, signing officers, directors and all underwriters for false or misleading statements in any sales materials disseminated by a single member of the underwriting syndicate? In a given case, none of these parties may have the opportunity to perform meaningful, if any, due diligence in respect of such offending communication.

We suggest that the Commission, at a minimum, modify the "inclusive" liability framework set forth in the Release. In general terms, we propose that an issuer or underwriter (or other gatekeeper) should not be subject to civil liability under the Securities Act for a false or misleading communication if such party took all

reasonable steps within its control to prevent distribution or publication of such communications. This standard would be akin to the standard proposed in the context of the "bright-line" 30-day communication safe harbor for Form A registration. Thus, rather than an "inclusive" (or "joint") liability framework, there would be a framework based on "several" liability. We propose that an issuer should not be subject to Section 11 or Section 12(a)(2) liability for offering communications containing false or misleading statements or omissions unless, for example, it disseminated the communication, authorized its release or participated in its preparation, as long as it had taken reasonable steps within its control to prevent distribution or publication of the false or misleading communication. In short, we suggest that the Commission's rules should subject the issuer to potential civil liability only in cases where it has control of or responsibility for the content and dissemination of the communication. Underwriters and other gatekeepers would be treated likewise. [Footnote: We note that the Rule 10b-5 scienter standard of liability would apply to such communications in any case.]

In any event, we recommend that the Commission provide its views as to what would constitute reasonable due diligence by directors and by underwriters and other gatekeepers with respect to "offering information" and "free writing".

We recognize that rules for such an alternative liability approach would have to be carefully crafted in order to ensure investor protection, and emphasize that we are not seeking to eliminate civil liability for offering communications that would be permitted under the proposals. Of course, no issuer or underwriter should be permitted to disseminate false or materially misleading information and escape liability. We believe that an alternative liability approach can be accomplished in a way that is consistent with the Commission's goals of investor protection and of encouraging greater communications to investors and the market generally. Unless the subject of civil liability is adequately addressed, we believe that issuers and underwriters will generally be discouraged from preparing and disseminating meaningful, if any, written communications during the offering period other than the traditional prospectus.

B. Underwriters' Due Diligence

We generally support the Release's identification of various positive factors that a court should consider in determining whether a "reasonable investigation" was conducted under Section 11 or "reasonable care" was used under Section 12. However, we believe that these factors are applicable to virtually all securities offerings and, consequently, we recommend that the factors also be applicable to all offerings of investment grade debt and non-expedited offerings. We question why offerings that are marketed in five days or more are not covered, and the term "marketed" is unclear. Further, the proposals could have the unintended

effect of accelerating the offering process and reducing the level of diligence in order to comply with the rule.

We also note that the sixth factor -- the employment of a research analyst who, *inter alia*, has been consulted by the underwriter in connection with the disclosure -- may in practice not often be utilized. First, some underwriters (particularly smaller firms) may not employ research analysts in the particular industry; consequently, in a given transaction, some underwriters may be able to rely on this factor while others would not. The other factors do not appear to operate this way. Second, because of "Chinese Wall" considerations, some underwriters may be reluctant to consult with their research analysts for fear of restricting the analysts. The use of analysts in offerings today often creates a delicate balance in order to avoid selective disclosure and Rule 10b-5 liability. Proposed Rule 176 would create a "one-way" wall that could raise serious issues for issuers and underwriters. We are also concerned that, notwithstanding the statement in the proposal that the absence of this factor should not be considered definitive on the due diligence/reasonable care issue, the possible absence of this factor in a significant number of cases may be prejudicial to underwriters. Additional issues related to the use of research reports are discussed immediately below.

Given the diversity of issuers' disclosure and reporting practices, we also do not believe that the list of factors should be expanded to include whether there is a management report to the issuer's audit committee.

VII. Research Reports

Rules 138 and 139 currently provide a safe harbor from the definition of "offer" for purposes of both Section 5(c) and Section 2(10) of the Securities Act. Under the proposals, while a research report covered by Rules 138 and 139 would not give rise to Section 5 liability, it could give rise to Section 12(a)(2) liability, particularly in light of the comments in the Release to the effect that Section 12(a)(2) liability would apply to "free writing" materials. Moreover, it is unclear whether a research report could be considered "offering information" (and thereby subject to Section 11 liability) under the proposed regime. Consequently, while the proposals expand the situations in which a broker-dealer may publish research, it is likely that many broker-dealers will not publish if the proposals are adopted, even in situations in which they would be permitted to do so under the current rules, in light of concerns about greater liability. This reluctance to publish research may continue for a longer period of time than under the current rules because of the proposed 25 day "prospectus delivery" requirement for all offerings. Moreover, if research reports are treated as selling documents, the current role of the analyst likely would change with the resultant loss of independence and objectivity.

We recommend that the changes designed to expand the situations in which research may be published be adopted but that the current exclusion of such research from the definition of "prospectus" in Section 2(10) be retained. We also recommend that the proposals clarify that research permitted to be published by Rules 138 and 139 will not be deemed "offering information."

VIII. Integration of Registered and Unregistered Offerings

We applaud the Commission's proposals to provide safe harbors from the integration of certain private and public offerings. The integration doctrine is a concept that has plagued securities practitioners and their clients, and we welcome the Commission's efforts to clarify certain aspects of the doctrine.

However, many of the other aspects of Securities Act metaphysics are not addressed. We suggest, for example, that the Commission go even further and permit private offerings at any time to qualified institutional buyers, as defined in Rule 144A, and perhaps to accredited investors, as defined in Rule 501 of Regulation D. QIBs and accredited investors, by definition, are able to fend for themselves and do not need the protections of registration. The proposed revision of Rule 152, modified in some respects, would serve to provide investor protection in other circumstances. We do not believe any additional conditions are necessary.

We do have certain suggestions that we believe would make the proposed safe harbor rules more workable in practice.

We urge the Commission to make clear in the release adopting these proposals that Rules 152 and 159 are safe harbors and that failure to satisfy their conditions will not automatically trigger the integration doctrine or result in "gun jumping." For example, if circumstances beyond the control of the parties required the terms of the private offering to be renegotiated after a registration statement is filed, that should not result in a per se violation of Section 5.

We recommend that the definition of "private offering" for purposes of proposed Rules 152 and 159 be expanded to cover offerings made pursuant to Rule 505 of Regulation D. The Rules, as proposed, provide adequate safeguards for non-accredited investors, and we note that there can be up to 35 "sophisticated" non-accredited investors in an offering pursuant to Rule 506, which would be covered by Rule 152 as proposed.

Since the proposals on integration are independent from the balance of the Release and in many respects codify existing Staff policies, we urge the

Commission to adopt revised rules in this area as promptly as possible without waiting for resolution of the other proposals contained in the Release.

A. Revised Rule 152 -- Completed Private Offerings Followed by Public Offerings

Revised Rule 152 would provide that an issuer could complete an offering of its securities exempt from registration pursuant to Sections 4(2) or 4(6) of the Securities Act or Rule 506 of Regulation D (a "private offering") and immediately thereafter file a registration statement to register other securities under that Securities Act for sale by it or resale by securityholders who purchased securities in the private offering. An offering of securities underlying convertible securities or warrants sold in an exempt offering would be deemed completed when the offering of the convertible securities or warrants is completed. (In this regard, we suggest that Rule 152(a)(3) be expanded to cover other rights to acquire securities, in addition to warrants.)

Private offerings of securities solely to effect a modification of the issuer's capital structure and not involving "roll-up" transactions also would not be integrated with a subsequent public offering.

The safe harbor, as it applies to securities registered for resale, would not be available for resale of securities by an affiliate of the issuer or a dealer who has purchased securities directly from the issuer or an affiliate of the issuer. We do not understand the need for this limitation, particularly as it applies to affiliates of the issuer, however defined. In the Release, the Commission indicates that there are questions as to whether these transactions are resales or primary offerings. Since a primary offering would be permitted under the same circumstances, we do not view this as an integration issue. Under the current requirement, it is an issue as to whether the securities can be registered on Form S-3 by an issuer that is not eligible to use that form to register securities for a primary offering, not whether the securities can be registered at all. (Since Form B as proposed would not distinguish between primary offerings and offerings by selling securityholders, such a limitation would be unnecessary for that reason as well.)

A private offering would be deemed completed if all purchasers have paid the purchase price or all purchasers are unconditionally obligated to pay the purchase price, which must be fixed and not contingent on the "market" price for the registered securities "at or around the time of the registered offering." The obligation to pay the purchase price, however, may be contingent on other conditions not within the control of any purchaser.

We question the condition that the purchase price in the private offering may not be contingent on the market price at the time of the public offering. We believe

that it could be advantageous to the purchasers in the registered offering if the purchase price in the private offering were contingent on the public offering price, since that could result in less dilution to the purchasers in the public offering. If the Commission retains this provision, we also believe that it should clarify what it means by the phrase "at or around the time of the registered offering."

The Rule should make clear what is meant by conditions within the control of the purchaser and that requirements for the satisfaction of customary closing conditions, such as delivery of opinions and the truth of representations and warranties at the time of the closing, should not prevent reliance on the Rule. We particularly disagree with the example contained in the March 1999 Supplement to the Manual of Publicly Available Telephone Interpretations of the Division of Corporation Finance which refers to "closing conditions in capital formation transactions relating to the market price of the company's securities" as being within the purchaser's control.

B. Revised Rule 152 -- Abandoned Private Offerings Followed by Public Offerings

An abandoned private offering would not be integrated with a subsequent registered offering if no securities have been sold in the private offering and (i) the issuer notifies all offerees in the private offering that the offering has been abandoned; (ii) if the securities were offered to persons not eligible to purchase securities in offerings exempt pursuant to Sections 4(2) or 4(6) or Rule 506, the issuer delays registration until at least 30 days after it notifies the offerees of the abandonment of the offering; (iii) the securities in the abandoned offerings were not offered by general solicitation or general advertising; and (iv) the issuer files any selling materials used in the private offering as part of the registration statement or informs the offerees in the private offering that the prospectus delivered in the registered offering supersedes any selling materials used in the private offering and indications of interest given in the private offering are considered rescinded. [Footnote: We note that non-accredited investors that are "sophisticated" or have purchaser representatives are eligible to purchase securities under Rule 506. Therefore, the Commission should clarify what it means by "ineligible". The same issue arises under proposed Rule 159.]

We believe that these proposed conditions will be difficult to apply in practice. Requiring that issuers notify all "offerees" of the abandonment of the private offering, and that the prospectus supersedes selling materials used in the private offering and any indications of interest are considered rescinded, would be unworkable in practice and serve no useful purpose. The issuer may not be able to determine the identity of all of the offerees, and those not participating in the public offering do not require protection. Since purchasers in the registered

offering will receive a prospectus, a separate notice would appear unnecessary. Underwriters will reconfirm indications of interest for their own protection.

The alternative of subjecting any selling materials used in the exempt offering to liability under Sections 11 and 12(a)(2), we believe, would be unacceptable to issuers and underwriters.

We believe a more practical approach would be simply to require that all offering activity with respect to the private offering be terminated prior to the filing of the registration statement. If a cooling off period is required in certain circumstances, we believe that 30 days is more than sufficient.

Should the Commission retain these conditions, we suggest that the issuer only be required to use reasonable efforts to notify offerees.

The condition that no securities be sold in the abandoned offering raises the fundamental question as to what precisely is an abandoned offering. Is a private offering in which the established minimum amount was raised but the maximum amount offered was not, an abandoned offering? Or partially completed and partially abandoned? Is an offering with no minimum where the maximum was not sold an abandoned offering? We believe the Commission should clarify this issue.

We would not recommend that private offering material be filed pursuant to proposed Rule 425 or as part of the registration statement. Filing would subject those materials to liability under Section 11 or 12(a)(2) when they may not have been prepared with that eventuality in mind.

C. Revised Rule 152 -- Abandoned Public Offerings Followed by Private Offerings

Under the Commission's proposals, an abandoned public offering would not be integrated with a subsequent private offering: (i) if a Form B eligible issuer notifies all offerees in a public offering, in connection with which no registration statement had been filed, of its abandonment or, if after a registration statement has been filed by any issuer, it withdraws the registration statement (Rule 477 would be amended to permit automatic withdrawal on application); (ii) if no securities were sold in the public offering; (iii) if the issuer waits more than 30 days after notification of abandonment or withdrawal of the registration statement, it must notify purchasers in the private offering that the offering is not registered under the 1933 Securities Act, the securities are restricted and cannot be resold unless registered or an exemption for resale is available and the investors do not have the protection of Section 11; and (iv) if the securities are first offered in a private offering within 30 days of the notice of abandonment or

withdrawal of the registration statement, the issuer and "any underwriter" must agree in writing in a manner enforceable by each investor committing to purchase during that 30 day period, that they will be liable for any material misstatements or omissions in the offering documents used in the private offering "under the standards set by" Section 11 and Section 12(a)(2) of the 1933 Securities Act.

We believe that certain of these conditions may be difficult to comply with in practice.

A Form B eligible issuer may have difficulty determining all the "offerees" to be notified of the abandonment of a public offering in which no registration statement is filed. Moreover, one of the advantages of Form B is that eligible issuers will not have to be concerned as to whether their offers prior to filing a registration statement are "public" or "private." We see no useful purpose to be served by such a notification, particularly in view of the notification required to be given to purchasers in the private offering.

We also do not believe assuming Section 11 and 12(a)(2) liability for private offering documents is a viable alternative to the 30-day cooling off period. Issuers and, particularly, underwriters will be loath to assume that liability. If the provision is kept, the term "underwriter" should be clarified. By definition, there are no "underwriters" in private offerings and, as indicated in the Release, the Commission does not propose to impose such liability on the prospective underwriters of the abandoned public offering.

We believe that a 30-day cooling off period is more than sufficient. We note, however, that the notification requirement of Rule 152(c)(3)(i) would literally cover any private offering of the same securities for an indefinite period of time following the 30-day period. We suggest an outside date such as 90 days.

D. Proposed Rule 159 -- Lock-up Agreements

Proposed Rule 159 would permit registration of securities offered and sold in negotiated business combination transactions subject to Rule 145, notwithstanding the fact that some, but less than 100%, of the stockholders of the company to be acquired agree to vote for the transaction prior to the registration statement being filed or becoming effective if: (i) those entering into such agreements are limited to executive officers, affiliates and directors of the company to be acquired, founders of that company and members of their families and holders of 5 % or more of the voting equity securities of that company; and (ii) votes will be solicited from stockholders of the company to be acquired who have not signed the lock-up agreement and who would not be eligible to purchase securities in a private offering.

To avoid uncertainty, we suggest that the term "founder" be defined. The definition of "promoter" in Rule 405 of Regulation C may be a workable definition.

We believe that a similar safe harbor for lock-ups entered into prior to exchange offers and cash tender offers also should be adopted.

IX. Proposed Elimination of Exxon Capital

The Commission has expressed concern with the current status of Rule 144A debt offerings to QIBs that are followed by registered exchange offers of identical securities pursuant to the Exxon Capital no-action letter. For U.S. issuers this market has primarily focused on large offerings of high yield debt securities that result in investors having the benefit of liquidity. For foreign issuers the process has been used primarily to facilitate U.S. tranches of offerings outside the U.S. with a subsequent registered exchange offer to the U.S. investors.

The Rule 144A marketplace has become efficient and cost effective and is dominated by institutional investors and traders. Although the Release stresses the large volume of capital raised through this process, we view this as evidence of the success of the rule as in effect today; there appears to be no empirical evidence that any harm has been caused to investors.

We believe that eliminating the benefit of free marketability through registered exchange offers by rescinding Exxon Capital would significantly disrupt the marketplace (especially the high yield debt market) by forcing issuers and their underwriters to register the initial offerings under the Securities Act. However, the proposed Form B offerings to QIBs would be limited to seasoned issuers and, if the securities are required to come to rest with QIBs, would not be a viable alternative to the A/B exchange offer procedure. Non-seasoned issuers would be relegated to the private placement procedures that have been abandoned for some time, that is, private placement followed by shelf registration on a Form A registration statement. This condition would exclude newly-formed issuers, such as those created to purchase a division or segment of a business, and leveraged buyout transactions, regardless of size or investment quality. It would also reduce the incentive for foreign issuers to access the U.S. capital markets.

Even if the issuer could qualify for the use of Form B on a QIB-only basis, there would nevertheless be significant problems with the new proposals. First, Rule 144A offerings are usually accompanied by side-by-side offerings to a limited number of "institutional" accredited investors that do not qualify as QIBs. Further, the Release suggests that if the securities do not "come to rest" with the QIBs, the offering would be ineligible for registration on Form B. To the extent eligibility

were lost, the removal of Form B from the protection of Rule 401(g) would result in the offering not having been filed on the proper form, with the resultant exposure to Section 5 liability, including rescission. Finally, in our experience, institutional investors are reluctant to rely on shelf registration as compared with exchange registration rights, particularly for issuers not qualifying for short form registration. This reluctance is based on liquidity rather than liability concerns. This problem would be exacerbated, and would likely result in increased costs to issuers, if at-the-market secondary shelf offerings were no longer available or practical on Forms A or B.

We believe that purchasers of high yield debt securities following an Exxon Capital exchange generally are the same types of institutions that purchased the securities prior to the exchange offer. Thus, investor protection would not appear to be a valid reason for eliminating what has become an efficient market. Since a substantial percentage of issuers of securities in Rule 144A offerings are not seasoned and would be ineligible to use Form B, particularly for those Form A issuers raising capital to finance acquisitions, the associated delay incident to registration would force many issuers to turn to more expensive bridge financing or to foreign/offshore securities markets. We do not believe the added cost justifies a regulatory change, especially in the absence of demonstrable harm to investors. In fact, we recommend that rather than eliminating the A/B exchange offer procedure, the Commission codify the practice by adopting appropriate rules.

X. Request for Comments About Investment Company Issuers

The Release requests comment on how any aspects of the proposals affect investment companies and how the proposals should be modified to reflect the circumstances of investment company issuers. As an example, the Release asks specifically whether the safe harbors contained in proposed Rules 167, 168 and 169 should apply to investment companies.

We believe that the proposals as written do not generally affect registered investment companies and that this is the appropriate approach. We have reached this conclusion with respect to both open-end companies (mutual funds) and closed-end companies.

With respect to the Commission's questions, we note that the entire offering process of open-end companies differs from the circumstances addressed in the Release. Open-end companies typically maintain an effective registration statement so that issues of timing of registration and the status of pre-effective communications do not have the significance that these issues have for operating companies. With respect to disclosure content, the Commission

recently completed a comprehensive revision of Form N-1A that is currently being implemented by the mutual fund industry. The disclosure initiatives adopted in March 1998 have been widely approved, and the Committee does not suggest any changes. [Footnote: Securities Act Release No. 33-7512, Investment Company Act Release No. 23064 (March 13, 1998).]

We similarly do not recommend changes in the offering process followed by closed-end investment companies. Closed-end investment company offerings are frequently made on a firm commitment basis and in certain respects resemble offerings by operating companies. However, since the offerings typically are made through use of a preliminary prospectus over a period of several weeks, issues such as pre-filing communications and timing of registration have not generally posed obstacles under the existing process. In addition, we believe that the prospectus delivery procedures permitted for closed-end companies under Rule 434, as proposed to be revised in the Release, are appropriate.

With respect to the questions in the Release concerning proposed Rules 167, 168 and 169, we believe that these rules have limited applicability in the case of registered investment companies and do not believe that the safe harbors need to be made available to investment companies. Rules 167, 168 and 169 relate to communications preceding the filing of the registration statement. We understand that, in light of the nature of offerings by open-end and closed-end companies, protection under these safe harbors is not necessary to facilitate the offerings or improve the nature of communications.

We recommend that the Commission consider changes applicable to registered investment companies in one context not discussed in the Release. This issue relates to analysts' research reports and Securities Act issues that arise where brokerage firms prepare reports on multiple open-end companies they offer to clients. We understand that the investment company industry expects an increase in investment research undertaken with respect to both open-end and closed-end companies. When open-end companies maintain an effective registration statement, brokerage firms distributing research reports on investment companies whose shares they offer have required that a current prospectus of the investment company must accompany or precede the report. These requirements preclude delivery of research reports covering multiple investment companies (such as investment companies with similar objectives managed by different advisers) without delivery of separate prospectuses for each fund, which results in an unwieldy process. In light of the positions taken by the Commission in Section VII.D of the Release concerning the benefits provided by analysts' reports, we recommend that the Commission consider modifying Rule 139 or clarifying that the Rule, as revised, extends to registered investment companies.

XI. Foreign Government Issuers

The Release proposes that Rule 462 be amended to permit certain seasoned foreign government issuers that file registration statements on Schedule B to designate the date and time of the effectiveness of their registration statements. This procedure is similar to the proposals for Form B issuers.

We support any additional flexibility provided to seasoned foreign government issuers. We recommend, however, the offering threshold be decreased from \$250 million as suggested in the Release since this test, unlike the other conditions under the proposed rules, does not appear linked to the underlying policy of providing flexibility to seasoned foreign government issuers.

We believe that it is important that any increased flexibility under proposed Rule 462 not affect the ability of seasoned foreign governments to use shelf offering procedures as permitted under existing Staff interpretations. [Footnote: See Securities Act Release No. 33-6424 (September 2, 1982).] These procedures are utilized by a number of foreign government issuers and, as discussed elsewhere in this letter, we believe that shelf registration procedures offer significant benefits to issuers and should not be limited by the proposals contemplated in the Release.

XII. Offerings of Asset-Backed Securities

We support the Commission's intention to develop disclosure and registration requirements specifically related to asset-backed securities. We believe these efforts are appropriate in light of (i) the differences in the nature of, and the corresponding utility of information regarding, asset-backed issuers as compared to operating companies and (ii) the institutionally-dominated offering procedure, which frequently involves an interactive process among issuers, underwriters and purchasers in structuring the terms of a particular issue.

We endorse continuing to distinguish series and classes of securities on the basis of whether or not they are investment grade securities and expediting offerings of investment grade issues. In that regard, we believe that an offering procedure that allows for the offering and sale of a series of securities without discrete Staff action with respect to that series, such as the existing shelf registration process, provides significant benefits to issuers, underwriters and purchasers and strongly recommend that it be continued.

We believe that a separate registration form (with accompanying instructions) for asset-backed securities would facilitate offerings. Existing Forms and instructions were not developed with asset-backed securities in mind and using them for asset-backed issuances results in the inclusion of certain data that is painstakingly compiled but offers no useful information to an investor.

In keeping with what we perceive to be the sentiment of the Commission, we believe that a primary objective should be to streamline offering documents. Thus, we recommend that issuers be given discretion to include certain types of information only when it is material to that specific offering. We further believe that the description in the core prospectus of the types of assets and the hypothetical cash flow structure should be generalized and shortened, since a much more detailed description of the assets and cash flows will be set forth in the prospectus supplement for a particular transaction. Finally, while the plain English initiative of the Commission has simplified the summary sections of asset-backed offering documents, further guidance from the Staff would be helpful in reducing the sheer length of such summaries.

With regard to communications restrictions and the delivery requirements applicable to asset-backed offerings, we believe it important that differences in the nature of the security and the offering process be kept in mind. The terms of particular series of asset-backed securities are frequently developed in consultation with specific institutional investors to meet their current requirements. As part of this process, these investors may require collateral, structural and analytical materials (collectively, the "Computational Materials") of the types described in the no-action letters issued to certain affiliates of Kidder Peabody & Co. Incorporated on May 20, 1994 and to the Public Securities Association on February 13, 1995. The relevant information contained in the Computational Materials is often either independently determinable by an investor or included in the final prospectus supplement. As a result, we submit that the current practice of filing such materials on Form 8-K so that it may be incorporated into the applicable registration statement is unnecessary. As discussed in other contexts in this letter, we note that such materials need not be filed in order to afford investors recourse based on Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Staff review of asset-backed offerings prior to effectiveness is, in our view, useful in the case of new asset types but unnecessary for asset types such as mortgage loans, credit card receivables and automobile receivables that have been securitized by a broad spectrum of issues for many years. In the event, however, that a procedure for issuing a series of securities without Staff involvement (such as the existing shelf registration process) were unavailable to asset-backed securities issuers, then any review of any offering by the Staff prior to effectiveness would severely limit the ability of asset originators to periodically

liquidate their portfolios to obtain additional lending capital and would impede economic activity in the United States.

Finally, in terms of delivery requirements, we believe that consideration should be given to the specific requirements of asset-backed securities offerings. The delivery requirements proposed for either Form A or Form B offerings may cause structuring difficulties since the final terms are often determined by the underwriters in discussions with institutional investors and it is not practicable to have delivered or filed a final prospectus prior to these discussions. Accordingly, while we believe it may be helpful for the Commission Staff to consider different alternatives in connection with asset-backed offerings, we believe that the present system, or another approach which similarly does not require prospectus or term sheet delivery prior to the time an investment decision is made, may on balance offer the most practical approach.

XIII. Proposals Relating to Exchange Act Issues/Disclosure

Section XI of the Release discusses various proposals the Commission believes will improve the quality and timeliness of Exchange Act disclosure. While we agree in concept with many of these proposals, some do not appear to us to be supported by empirical evidence or logic. Others, if adopted in their proposed form, would present practical compliance difficulties or legal issues that we believe the Commission has not addressed adequately. We also have suggestions to improve the drafting of certain of the proposed requirements.

We understand that the Commission has proposed enhanced Exchange Act reporting requirements, at least in part, as added investor protection, in view of the proposals for the automatic effectiveness of certain registration statements that would be permitted pursuant to the Securities Act registration reform proposals. The Commission's underlying premise is valid only if the registration reform proposals are workable in practice and are available to all companies that would be subject to enhanced Exchange Act reporting. As we discuss elsewhere in our letter, we do not believe that many of these proposals are workable in practice in their present form. Moreover, as discussed below, even if the Commission's registration reform proposal were revised to make them more workable in practice, we believe that practical considerations may result in the perceived benefits of certain of the Commission's Exchange Act reporting proposals being outweighed by the additional burdens these proposals would impose on many companies, including many that would not benefit from the registration reform proposals.

A. Annual and Quarterly Reports

The Commission proposes to require plain English risk factor disclosure in annual reports filed pursuant to the Exchange Act and updates of that disclosure in quarterly reports filed pursuant to the Securities Act and to advance the due dates for annual reports as "filed" for purposes of Section 18 of the Exchange Act. Finally, it has requested comment on a possible requirement for a management report to the audit committee and advanced due dates for all annual and quarterly reports filed pursuant to the Exchange Act by U.S. issuers.

1. Risk Factor Disclosure. The Commission proposes to extend the requirement for risk factor disclosure in plain English to Exchange Act registration statements and annual reports filed with the Commission, including those filed by foreign private and governmental issuers, and to require U.S. issuers to update that disclosure. The Commission also has asked whether plain English disclosure requirements should be extended to other portions of these Exchange Act disclosure filings.

(a) Exchange Act Plain English Risk Factor Disclosure. In our experience, many companies currently include risk factor disclosure in their Exchange Act filings. Where appropriate, we believe this is a good practice and in the interest of issuers and investors, particularly since Exchange Act reports often are, and under the Commission's proposals would be, incorporated by reference in Securities Act registration statements to satisfy their disclosure requirements. Since risk factor disclosure in Securities Act prospectuses is required to be made in plain English, we do not believe it would impose any significant additional burden to require risk factor disclosure in Exchange Act filings to be made in plain English by companies for which risk factor disclosure is applicable.

We also believe that it would be appropriate for the Commission to adopt a requirement for U.S. issuers to update these disclosures on a quarterly basis where there have been material changes in these risk factors or new material risk factors have come to the attention of the issuer.

The Commission also has asked whether it should require risk factor disclosure about matters in addition to those currently enumerated in Item 503 of Regulation S-K. We do not believe that the Commission should attempt to identify additional risk factors. Risk factor disclosures are too issuer specific. Accordingly, we believe the Commission should rely on a general standard and the examples in its current rules.

(b) Extension of plain English Requirements. We believe it would be premature to require other portions of Exchange Act filings to be prepared in plain English. Plain English requirements have been mandated only since October 1, 1998. We believe that the Commission should wait until preparers of disclosure documents and the Commission's Staff have gained experience with

the current plain English requirements before considering extending those requirements.

2. Due Dates for Annual Reports of Foreign Private Issuers. The Commission proposes to advance the due dates of annual reports filed by foreign private issuers on Form 20-F from within six months after the end of the issuer's fiscal year to within five months after the end of its fiscal year. The Commission also has requested comments on the possible advancing of these due dates to within four months of the end of the fiscal year. The Commission further has proposed corresponding due dates for transition reports when a foreign private issuer changes its fiscal year.

The Commission cites no convincing empirical evidence that supports the proposition that all foreign private issuers could prepare the detailed disclosure and financial statements, reconciled to United States generally accepted accounting principles ("GAAP"), within the time limits proposed. In footnote 511 to the Release, the Commission refers to the practice of some foreign issuers announcing their annual earnings in press releases within two, three or four months of the end of their fiscal years. That footnote does not indicate the percentage of foreign private issuers required to file reports on Form 20-F that issue these early earnings releases or if any of them file their Forms 20-F within these time frames. Moreover, the footnote does not indicate whether the earnings announced in these releases are reconciled to GAAP.

Some foreign private issuers may be in a position to issue preliminary earnings results based on generally accepted accounting principles applicable in their home jurisdiction within two to four months of the ends of their fiscal years. They may not be in a position, however, to prepare the audited financial statements, reconciled to GAAP, and the other detailed disclosure, such as the market risk disclosure required by Item 9A of Form 20-F and the management's discussion and analysis required by Item 9 of that Form, or any required business information within these time frames. [Footnote: We note that the Commission's proposals in Release No. 33-7637 to adopt international disclosure standards for Form 20-F would adopt international disclosure standards similar to the MD&A requirements but would retain current market risk disclosure and GAAP reconciliation requirements.] Foreign private issuers also may face the added delays of translating their reports into English and having their reports reviewed by their U.S. securities counsel.

Moreover, as noted in footnote 511 to the Release, earnings reports of foreign private issuers are widely available from commercial sources. Since the Exchange Act reports of these issuers currently are not required to be filed via the Commission's EDGAR system, these reports, lodged in the Commission's paper files, may not be as widely available as those earnings releases.

In our experience, foreign private issuers often are reluctant to subject themselves to our disclosure system due to concerns about the burdens of Exchange Act reporting. On the other hand, the Commission previously has made efforts to encourage these issuers to access our capital markets and facilitate the free flow of capital across national borders. We believe adopting proposals for marginal improvements in the timeliness of annual reports by foreign private issuers could frustrate these important goals. Moreover, many foreign issuers may not be able to comply with those proposals in practice.

We believe it would be far better for the Commission to wait until it determines whether to accept the body of International Accounting Standards ("IAS") being developed by the International Accounting Standards Committee before it considers advanced due dates for annual reports of foreign private issuers. If and when the Commission does determine to accept IAS, foreign private issuers then might find it easier to prepare more timely annual reports in accordance with the requirements of the Commission.

In the interim, adoption of the proposals for enhanced reporting by foreign private issuers on Form 6-K could improve the quality and timeliness of the information about foreign issuers available to U.S. investors. For example, the Commission could include earnings releases among the types of public disclosure required to be reported in Form 6-K filings.

3. Treating Certain Quarterly Information as "Filed." The Commission proposes to treat Parts I of Forms 10-Q and 10-QSB, except for the market risk disclosure required by Item 305 of Regulation S-K, as filed under the Exchange Act. If adopted this would subject to liability under Section 18 of the Exchange Act issuers and those who cause statements in Parts I of these filings, principally unaudited interim financial statements and the MD&A, that at the time they were made and under the circumstances under which they were made false or misleading with respect to any material fact. A person asserting such liability would have to prove that the security was purchased in reliance upon such statement at a price which was affected by such statement. Currently, it is generally believed that the "unfiled" portions of these reports are subject to liability under Sections 10(b) of the Exchange Act and Rule 10b-5 and, if incorporated by reference in Securities Act registration statements, liability under the Securities Act.

Due to the perceived difficulty of establishing liability under Section 18 (see generally, Louis Loss and Joel Seligman, *Securities Regulation*, 3d Ed. (Aspen Law & Bus.), Vol. IX, C.1t, 4296-4300.), we believe adoption of this proposal might result only in a marginal increase in the liability exposure of persons who

could be liable under that Section. On the other hand, the benefits of adopting the proposal also might be marginal.

4. Management Report to Audit Committee. The Commission has asked whether it should require the filing, as an exhibit to Exchange Act annual reports, of a management report to the audit committee describing procedures, if any, established to assure the accuracy and adequacy of Exchange Act reports. [Footnote: The Commission also has asked whether an underwriter's review of such a report should be considered a factor in evaluating the underwriters' due diligence. We address that request elsewhere in this letter.] Companies would be required to update these exhibits to reflect material changes in these procedures. The Commission also asks whether these reports would enhance the quality of disclosure in Exchange Act reports.

We believe such reports would be matters of good practice and could enhance the oversight role of the board of directors. However, we are reluctant to endorse a proposal that would require universal adoption of such a practice and require these reports to be filed with the Commission. We believe that requiring these reports to be filed with the Commission, and the resulting liability concerns, might chill open communications between management and the audit committee on these matters. Moreover, we are aware of no universally accepted standards for procedures to ensure compliance with the Exchange Act reporting requirements, and the legal responsibilities of directors to oversee their companies' disclosure systems is an evolving area of the law. [Footnote: Cf. *Caremark International Inc. Derivative Litigation*, Del Ch. Cons. C.A. No. 13670, 1996 Del. Ch. LEXIS 125 (September 25, 1996).]

Should the Commission adopt the proposed signature and certification requirements for Exchange Act reports discussed below, that could lead to the development of procedures for review of Exchange Act reports, either on a company-by-company basis or more generally. Accordingly, we believe that it would be premature for the Commission to require such reports at this time.

We also note that the Commission likely will be releasing rulemaking proposals in the near future to improve the effectiveness of Audit Committees that, in our view, would have greater merit than the proposed management report. We refer particularly to Recommendations 5 and 9 of the "Report and Recommendations of The Blue Ribbon Committee on Improving The Effectiveness of Corporate Audit Committees" which relate to the disclosure of the Audit Committee's charter and compliance therewith as well as matters involving the quality of a company's financial statements. [Footnote: The Blue Ribbon Committee, which issued its report in February 1999, was sponsored by the New York Stock Exchange and the National Association of Securities Dealers at the request of Chairman Levitt. The Committee was co-chaired by Ira M. Millstein and John C. Whitehead.]

B. Reports on Form 8-K

The Commission proposes to require reports of selected financial data on Form 8-K within 30 days of the end of each quarter and 60 days of the end of the fiscal year. The Commission also has asked whether quarterly and annual Exchange Act reports of U.S. issuers should be filed within those time frames. In addition, the Commission proposes to add substantive disclosure items to Form 8-K and to advance the due dates of reports on that form.

(1) Reports of Selected Financial Information. The Commission states in Section B.1.a, footnote 526, of the Release and the accompanying text, that "hundreds" of public companies issue press releases to announce quarterly and annual earnings well before they file their annual and quarterly reports with the Commission. [Footnote: We note that footnote 650 to the Release indicates that a 1998 survey of its members by the American Society of Corporate Secretaries indicates that approximately 90% of its members file earnings press releases within 30 days of the end of their fiscal quarters. The Release does not reflect what percentage of all U.S. Exchange Act reporting companies this represents.] The Commission also states that not all investors subscribe to publications that carry these earnings releases and that these publications may not carry every company's earnings releases or all the information in those earnings releases and that the content of those releases may vary from company to company. Accordingly, to ensure uniform disclosure, the Commission proposes to require domestic reporting companies to report selected financial data on Form 8-K within the earlier of the date they issued an earnings press release or 30 days after the end of each of the first three quarters of their fiscal years and 60 days after the ends of their fiscal years. [Footnote: We comment on this "same day" filing requirement elsewhere in this letter. We note that these reports would not be available on EDGAR until the next Commission business day after filing.]

The Commission does not indicate that investors who do not subscribe to publications that carry earnings releases have access to, or would access the Commission's EDGAR system to obtain, reports on Form 8-K containing selected financial data. Moreover, since investors would have no notice of these filings, they would have to search the EDGAR files on a daily basis to access them.

The failure to subscribe and failure to publish issues could be addressed in a less draconian manner by merely requiring earnings releases to be filed on Form 8-K within a reasonable time, such as two business days, after release.

However, we do not believe that the Commission has supported a requirement to file selected financial data within 30 days after the end of each of the first three fiscal quarters or 60 days after the end of the fiscal year. There could be a

significant number of companies that would not be in a position to meet these due dates. If a Company did not timely file such a report (Rule 12b-25 does not provide for extension of time to file Form 8-K, nor has the Commission proposed to provide for such extensions), the consequences could be serious. The delinquent company would lose its eligibility to use the new registration procedures proposed by the Commission or to use Form S-8 for offerings to employees. The company's security holders could not resell securities pursuant to Rule 144 until the report was filed. Moreover, the company would face possible enforcement action by the Commission.

Thus, the Commission's proposal creates additional burdens and simply does not address the principal problem that the Commission seeks to address by these proposals.

In the introduction to Section XI of the Release, the Commission raises the issue of analyst conference calls after the issuance of earnings press releases. The Commission believes that small investors are the last to receive the benefits of securities analysts in filtering and passing on company information. The Commission makes a point that the small investor is disadvantaged when companies do not file material information when they issue earnings press releases "or communicate by conference calls to analysts." The Commission believes that its proposals to accelerate reporting of quarterly and annual data will decrease the amount of time during which there is a trading advantage for those who have access to these analysts calls. To us, this proposition does not seem to logically follow, nor is it consistent with relevant judicial opinions [Footnote: See, e.g., *Dirks v. SEC*, 463 U.S. 646 (1983); *Basic, Inc. v. Levinson*, 485 U.S. 224, 227 (1988). Courts may not find that filings with the Commission have the same impact on the public as other forms of disclosure. See, e.g., *In re Credit Suisse First Boston Corp. Securities Litigation*, [Transfer Binder] Fed. Sec. L. Rep. (CCH) 190, 306 (S.D.N.Y. 1998) (reasoning that material from SEC filings may not have reached the public with sufficient intensity and credibility to counterbalance brokers' market letters).] or pronouncements by the Commission and its Staff, concerning the importance of the efficient market theory and the contributions of securities analysts. [Footnote: The Commission in adopting the integrated disclosure system in 1982 relied, in part, upon the efficient market theory. See, *Securities Act Release No. 6383* (March 3, 1982). Moreover, in proposing Form B, the Commission relied heavily upon the number of analysts following certain categories of companies in establishing the eligibility criteria for that Form.]

If a company with an analyst following releases its earnings and explains those earnings to analysts, under the efficient market theory that information will be reflected in the market prices for the company's securities. [Footnote: We note, for example, that the major stock exchanges and the Nasdaq Stock Market find

the mere release of earnings sufficient for their markets.] It does not follow that the availability of selected financial data on EDGAR, even one business day after the earnings release, would significantly improve the lot of the small investor under these circumstances. The small investor still would not have access to the information provided to the analysts. More importantly, the small investor may not have access to the analysts' analyses and, perhaps, even to EDGAR.

We recognize that analyst conference calls raise important disclosure and policy issues. However, the Commission's proposal does not address those issues. Its proposal is only that generally widely disseminated earnings information be filed in a possibly different format. It is hard to see how this will significantly reduce the information gap between small "have-not" investors and other "have" investors. The proposal, if adopted, however, could impose significant burdens on some companies.

(2) Acceleration of Due Dates for Quarterly and Annual Reports. The Commission also has asked whether Exchange Act quarterly reports of U.S. reporting companies should be filed within 30 days after the end of their first three fiscal quarters and whether their Exchange Act annual reports should be filed within 60 days after the end of their fiscal years. We do not believe the Commission has demonstrated either a significant need to advance the due dates of these reports or that there are not a significant number of companies who would not be in a position to file their reports within these proposed due dates. It is one thing to release earnings within 30 days after the end of the quarter or 60 days after the end of the year or even earlier, although not all reporting companies are able to do this. It is quite another thing to mandate reports that require ever increasing detailed financial and other information to be filed within those time frames.

The Commission now requires quarterly reports on Form 10-Q and Annual Reports on Form 10-K to include quantitative and qualitative disclosures about market risk, pursuant to Item 305 of Regulation S-K, disclosure about year 2000 readiness, pursuant to Rel. 33-7558, and more information on business segments. Moreover, the Commission proposes to add requirements for disclosure of other material risks in these reports. Financial reporting in accordance with GAAP is becoming increasingly more complex, particularly with respect to financial statements, accounting for business segments and accounting principles requiring estimates of future cash flows and fair values. The Commission is placing more pressure on auditors to avoid even negligent audit failures (see, e.g., recent amendments to Rule 102(e), Rel. 33-7593) and on companies to avoid managing their earnings. [Footnote: See, e.g. speech by Commission Chairman Arthur Levitt at New York University (September 28, 1998).] In addition, many companies with international businesses must gather information from far flung operations overseas. These companies also may have

difficulty preparing reports by the proposed due dates. To expect that many companies, including those which have problems filing within the current 45 and 90 day due dates for Exchange Act quarterly and annual reports, would not have problems with earlier due dates in light of these new and existing disclosure requirements and with more to come, appears to us to be unsupported.

Given the risk of loss of eligibility to take advantage of proposed registration process reforms, or even of existing short form registration statements, loss of the ability of securityholders to use Rule 144 and the risk of enforcement action, the marginal improvement in the timeliness of quarterly and annual Exchange Act reports, as proposed by the Commission, does not seem to us to outweigh these added risks and burdens.

The Commission must strike a better balance between the need for detailed, reliable information and more timely information than is reflected in these proposals. We note that, in Section IV of the Release, the Commission states that: "[t]he next step in our ongoing process will be to revisit the quantity and quality of required disclosure." We find this ominous in the context of consideration by the Commission of advancing the due dates of Exchange Act reports. Should the Commission contemplate a substantial increase in the information required in Exchange Act reports, we believe it would be unfair to advance the due dates of these reports without allowing opportunity for comment on the impact of such additional disclosure requirements on the ability of companies to prepare their reports within the proposed time frames.

(3) Additional Reporting Events Pursuant to Form 8-K. The Commission has proposed to add five disclosure items to Form 8-K: (i) material modifications to the rights of security holders; (ii) departures of CEOs, CFOs, COOs or presidents; (iii) material defaults on senior securities; (iv) inability to rely on prior audit reports; and (v) company name changes. The Commission proposes that reports in response to these items be required more promptly than reports in response to most current items of Form 8-K. The Commission also asks whether other items should be added to Form 8-K.

We generally agree that these five events should be reported in a more timely manner, although we do not agree with the scope of certain of the items. However, we generally disagree, for practical reasons, with the proposed due dates for these reports.

(a) Material Modifications to the Rights of Securityholders. Companies also would have to report pursuant to this Item material modifications in the rights of security-holders resulting from the issuance of another class of securities. In addition, working capital restrictions and limitations on payment of dividends would be required to be reported. [Footnote: The instruction to proposed Item 10

indicates that this information is required to be reported pursuant to Item 9. There is no proposed amendment to Item 9, which related to disclosure of sales of equity securities pursuant to Regulation S and was eliminated, as of January 1, 1999. We assume this will be corrected and that some materiality standard will be included.]

We generally agree that material modifications in the rights of security-holders should be reported in a more timely manner. [Footnote: The Commission states, in Section XI.B.2.a of the Proposing Release, that "any" modification of the instruments that define securityholder rights would be required to be disclosed. However, the proposed amendment to Form 8-K to add Item 10 relates only to material modifications. We assume the latter is what the Commission intended.] We believe that five calendar days after the event should be sufficient time to prepare and file the report.

The Commission asks whether other specific events which could materially affect rights of securityholders, such as reincorporation in another state, elimination of preemptive rights, or adoption of an anti-takeover plan, should be required to be reported on Form 8-K within five calendar days of the event. We believe that elimination of preemptive rights generally would require an amendment to the governing instruments, such as the charter or by-laws, defining the rights of securityholders. Elimination of similar rights provided by contract generally would require agreements, consents or waivers from the parties. Reincorporation generally would require a vote of securityholders. Therefore, a separate report on Form 8-K would appear unnecessary.

Accordingly, it appears to us that only adoption of anti-takeover measures, such as a shareholder rights plan, should be considered for a possible requirement for an additional report on Form 8-K. [Footnote: We note, however, that the rights to be issued under these plans generally would be required to register under the Exchange Act, thus providing notice of their adoption.] However, in our experience, most issuers voluntarily report the adoption of those plans on Form 8-K.

(b) Departure of Executives. The Commission proposes to require a report on Form 8-K if a company's chief executive officer, president, chief operating officer, chief financial officer, or any persons serving equivalent positions have ceased serving the company in that capacity. The report would be required within one business day of the executive officer's ceasing to serve in that capacity. The report would require the date of the event, the reasons for the officer's departure, and the name of any replacement or proposed replacement, if known.

We generally are in agreement that departures of the enumerated executives, if material, should be reported on a timely basis. As securities lawyers, we often

are called upon to advise clients on disclosure issues relating to departures of important executives, and we welcome this guidance from the Commission.

However, as a practical matter, we disagree with a requirement to report these events, or any other events, within one business day. We would propose, as an alternative, that, generally, any report proposed by the Commission to be filed within one business day of the reportable event, instead be filed within two business days of that event and that the EDGAR submission of the report be permitted up to 10:00 p.m. Eastern time on the second business day. The need to locate the additional signatures proposed by the Commission and to consult advisors on the necessity of reporting and the content of the report and to EDGARize the report could well extend beyond the EDGAR cut off time on the first business day after the event.

We believe that consideration should be given to providing more guidance as to what event should trigger filing those reports. An executive may cease serving some time after resigning. However, the executive's resigning or other termination may be as material an event as the executive's ceasing to serve.

In addition, we object to the proposed requirement to disclose the reasons for an executive ceasing to serve. Often the reasons are mixed, highly personal, or the result of sensitive negotiations and are not generally the subject of public disclosure. It should be sufficient to disclose the fact that the executive is no longer serving. Otherwise, arrangements for replacing executives may become much more difficult to conclude. Moreover, we are concerned that, in some instances, in an effort to state reasons for an executive's departure truthfully, a company may be exposed to claims of libel, slander or similar liability. We do not believe the Commission should mandate this type of disclosure. [Footnote: We note that current Item 6 of Form 8-K requires a report of a director's resignation only if the director disagreed with the registrant on matters relating to the registrant's operations, policies or practices and the director provided the registrant with a letter describing the disagreement and requesting that it be disclosed.]

As to requiring disclosure of replacements, we suggest that, if the Commission considers this information to be material, it should consider requiring a report of all newly hired CEOs, CFOs, COOs and presidents.

The Commission asks whether the proposal should be expanded to cover individuals other than the enumerated executive officers, such as the five most highly compensated executive officers, or key personnel, such as a chief technology officer, head of information systems, scientists, researchers or head of marketing or production. We believe that compensation should not be the determinant of the materiality of an executive to a company for current reporting

purposes. We suspect that there might be general agreement as to the materiality of the departure of a CEO, COO, or president and, under limited circumstances, the CFO. The materiality of the other categories of persons mentioned by the Commission generally would vary from company to company. To require reports of their departures, given the mobility of corporate employees in today's business environment, could lead to a flood of immaterial reports, thus diluting the significance of the material reports.

(c) Material Defaults on Senior Securities. The Commission proposes to require a report on Form 8-K within one business day of any material default by the registrant or any of its significant subsidiaries in the payment of principal or interest or any other scheduled payment on indebtedness exceeding 5% of the total assets of the registrant and its consolidated subsidiaries and material arrearages or delinquencies in payments on specified classes of preferred stock of the registrant or any of its significant subsidiaries.

The proposed items would also require a report of "any other material default" on indebtedness, other than a payment default, that has become a default under the "governing instruments." This means, according to the proposed instructions, after the expiration of any grace period and compliance with any notice requirement. [Footnote: We note that the current requirement in Item 3 of Form 10-Q refers to other material defaults not cured within 30 days and has a similar instruction. The Commission has not explained the elimination of the 30 day cure period.]

We agree that these events should be reported promptly, if known. However, as indicated above we believe it may be impractical to file a report within one business day. We suggest, as an alternative, two business days, with an extension of the EDGAR filing cut off to 10:00 p.m. Eastern time on the second business day.

The Commission asks whether other items should be added to Form 8-K. We believe the Commission has identified significant items, several of which are currently required to be reported on Form 10-Q. We generally do not favor laundry lists of material items and would not suggest adding items to Form 8-K.

(d) Reliance on Prior Audit Reports. The Commission proposes to require a report on Form 8-K within one business day of a company receiving formal notice from its independent accountants that the company can no longer rely on a previously issued audit report on the company's financial statements or that the auditor will not consent to the use of a prior audit report in a Securities Act registration statement.

We agree that these events should be reported more promptly. For the reasons stated above, however, we believe it may be impractical to file these reports within one business day. We suggest, as an alternative, filing these reports within two business days, with the EDGAR filing cut off extended to 10:00 p.m. on the second business day.

The Commission has asked whether the engagement of another auditor to reaudit a prior audited period or "other events concerning an auditor's report" should be required to be reported on Form 8-K. We do not understand what the Commission means by "other events concerning an auditor's report." Accordingly, we have no comment on that request. Whether an engagement of another auditor to reaudit a prior audited period is material would depend upon the circumstances and the Commission does not provide any reasons for requiring such a report, assuming that the requirement to report such an event is not subsumed by the reports of changes in accountants required currently. Accordingly, we are unable to comment on that request either.

(e) Name changes. The Commission proposes to require reports of changes in a company's name within five calendar days of the effectiveness of the change. We have no particular objection to requiring such a report within five calendar days. We note, however, that name changes, at least with respect to corporations, may require amendments to their charters. Their security holders, therefore, generally would be aware of them, since they would have to approve the amendment. [Footnote: We further note that, as a part of its recent elimination of unnecessary forms, the Commission rescinded old Form C, which had required disclosure of name changes of companies whose securities were admitted to quotation on the Nasdaq Stock Market.]

(f) Due Dates for Reporting Events. In addition to the proposed due dates for the new reportable events to be added to Form 8-K, the Commission has proposed advancing the due dates for reporting certain current Form 8-K items. Changes in independent accountants would be required to be reported within one business day of the change. As indicated above, we do not believe any requirement to file within one business day is practical and suggest a two business day alternative, with the EDGAR filing cut off extended to 10:00 p.m. on the second day.

All other current items of the Form 8-K would be required to be reported within five calendar days, except for Item 5 for voluntarily reporting other material events, which could be filed any time. We generally do not object to a requirement to report these events within five calendar days, except for acquisition or disposition of assets required to be reported under Item 2, Where the acquisition involves the acquisition of a business and audited financial statements of the acquired business and pro forma financial information are

required to be included in the report, the maximum period for filing those financial statements would be shortened from 75 to 65 calendar days. As the Commission has recently relaxed these requirements in an effort to encourage registration of securities rather than reliance on Regulation S, we fail to understand the need to shorten that period.

We also believe that companies reporting dispositions that are required to include pro forma financial information in their reports and companies emerging from bankruptcy may need more than five calendar days from the date of the event to prepare and file their reports.

C. Signatures.

The Commission proposes to require persons signing Exchange Act registration statements and reports, including registration statements and reports of foreign private issuers on Forms 20-F and 40-F, to certify that they have read the registration statement or report and that to their knowledge that document does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. [Footnote: This certification appears to be based on Rule 10b-5(b). Persons signing Securities Act registration statements also would be required to provide a certification, but the certification for Securities Act registration statements is worded differently and appears to be based on Section 11 (a) of that Act.]

The Commission does not discuss in the Release the meaning of "knowledge" in this context or whether the Commission intends to impose any due diligence obligation beyond reading the registration statement or report. Moreover, the Release does not discuss whether by signing such a certification, a signatory would be exposed to greater liability risk under the Federal securities laws than that person would be exposed to as an executive officer or director of the issuer. We do not believe that the Commission should adopt the proposed signature and certification requirements without a thorough analysis of these liability issues in a form subject to public comment.

The Commission also proposes to require the principal executive officers of the registrant and a majority of its directors to sign Forms 8-A, 10, 10-SB, 20-F, 40-F, 10-Q, and 10-QSB. Given the limited information content and use of Form 8-A, we can find very little basis for imposing the proposed multiple signatory requirement, with the proposed certifications, on Form 8-A filings.

(1) Certification. We believe it is good practice for senior executives and directors to read important disclosure documents. In our experience, this is a

practice followed by many issuers, although these documents may be reviewed in draft form, rather in final form, for practical reasons.

We note that signatories will be required to certify that they have read "this report". In our experience, signatories, and in instances where directors review reports, directors, often review reports in draft form, not final reports. If the Commission does not permit review of reports in draft form to satisfy the proposed certification requirements, we believe it may create a situation where a company may not be in a position to file required reports in a timely manner. A signatory who has only read a draft of a report, which may be the only practical alternative, and certifies that he or she has read "this report," in theory, could be subject to civil, administrative or even criminal penalties for making a false statement in a report to a Federal agency.

We further note that the Commission has not proposed to amend Rule 12b-15, which permits amendments to Exchange Act reports to be signed only on behalf of the registrant and contains no certification requirement. Presumably, the Commission adopted that rule in light of the practical concerns about obtaining signatures for amendments.

Moreover, the Commission's proposals do not address the effects of the proposed certification requirement on the permissible practice of granting, for practical reasons, powers of attorney to sign Exchange Act and Securities Act filings, including amendments to Securities Act registration statements. Particularly with respect to time sensitive filings, such as amendments to Securities Act registration statements, this practice has been useful, as the collecting of multiple signatures may be impractical. [Footnote: The Commission has proposed to permit certain post-effective amendments on Form B to be signed pursuant to a power of attorney or solely by an authorized representative of the registrant. In the latter case, the otherwise required signatories would be deemed to have signed the amendment and to have provided the required certifications. This deemed certification defeats the purpose of permitting a report to be signed on a person's behalf.] If the Commission were to prohibit this practice and require certification from all signatories that they have read the amendment, these practical concerns would be exacerbated. Further, to deem these persons to have read those amendments and to have provided the required certification could subject signatories to liability where there is no practical alternative to use of a power of attorney.

Accordingly, we urge the Commission not to amend Rule 12b-15 to require multiple signatures with the proposed certification with respect to amendments to Exchange Act reports, not to prohibit the use of powers of attorney to sign Exchange Act and Securities Act filings, and not to deem persons on whose behalf a document has been signed to have provided the proposed certification.

We understand the Commission's goal in proposing the certification requirement. We take no position as to whether that goal would be achieved if the requirement is adopted, but we believe that practical considerations could outweigh the perceived benefits of such a requirement. We also suggest that by adopting the certification requirement the Commission may be regulating the internal governance of corporations and other entities that, under the laws of their jurisdictions of organization, permit directors to delegate responsibilities to executives and others. In addition, we believe signatories should be permitted to read drafts of the reports they sign, as is the widespread current practice. We further believe that the Commission should not attempt to specify which iteration of several drafts signatories would be permitted to read.

We take no position as to whether, by signing an Exchange Act report and giving the proposed certification, the signatory would have liability exposure beyond that exposure, if any, that person would have under current rules. They should not, but we are confident that plaintiffs' counsel will seize on the certification in an effort to establish the signatory's liability.

(2) Multiple Signatories of Quarterly Reports. We believe that there may be practical considerations in obtaining signatures from a majority of a corporation's directors on a quarterly report, particularly if they are required to certify that they have read the report, rather than a draft of the report. We believe that these practical difficulties could outweigh the benefits perceived by the Commission. If the Commission were to advance the due date of quarterly reports to 30 days after the end of the quarter, and not permit signatories to read drafts of those reports, these practical concerns would be further exacerbated.

(3) Forms 6-K and 8-K. Directors would not be required to sign Forms 8-K or 6-K, but each of the persons signing those reports would be required to certify that he or she has provided a copy of the report to the registrant's board of directors. The Commission believes that this certification "should encourage board participation in the disclosures required to be made on these Forms...", "increase director awareness of the disclosure in the reports..." and "help ensure that the board is quickly informed about material current developments or events that concern the registrant."

Footnote 550 to the Release states that the Commission is not proposing to amend Forms 6-K or 8-K to require additional signatures. However, proposed General Instruction C.2 to Form 6-K and proposed General Instruction E to Form 8-K would require these reports to be signed by the principal executive officer or officers, the principal financial officer and the controller or principal accounting officer. [Footnote: The instructions to Form 8-K state "controller or principal financial officer". We assume this typographical error will be corrected.] The

signatories would be required to provide the proposed certification that they have read the report and know of no untrue statements of material fact or omission to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not materially misleading and that each signatory has provided a copy of the report to each of the directors.

The current requirements are that these reports be signed only on behalf of the registrant. The text of the Release does not mention these proposed instructions. In fact, the text implies that no such requirement is proposed.

The Commission provides no discussion, let alone any reasons, for these proposals. Accordingly, we object to imposing these additional signature and certification requirements with respect to filings on Forms 6-K and 8-K. [Footnote: We discuss our views as to other proposals relating to Form 6-K in greater detail under Section XIII.D. of this letter.]

Moreover, we question the need for a requirement that each signatory certify that he or she has provided a copy of the report to the directors.

D. Form 6-K.

The Commission proposes to add an instruction to Form 6-K to encourage foreign private issuers to submit voluntarily current information that the issuer considers to be important to its security holders. We support that proposal. However we believe the proposed signature and certification requirements, discussed above, if adopted could discourage these voluntary filings.

The Commission also proposes to add four items to the information required to be included in a Form 6-K if disclosed pursuant to the requirements of foreign jurisdictions: (i) changes in the issuer's name; (ii) material modifications to the rights of securityholders; (iii) material payment defaults and other material delinquencies; and (iv) departures of important executives. We support this proposal.

In addition, the Commission asks whether it should mandate disclosures on Form 6-K reports not required under applicable foreign requirements, such as the risk factor disclosure proposed to be required in Form 10-Q.

Previously, the Commission has endeavored to strike a balance between accommodating disclosure requirements and practices in a foreign issuer's home jurisdiction and the protection of U.S. investors. Form 6-K represents one of these accommodations. Accordingly, except perhaps for earnings releases, as discussed above, we do not believe the Commission should mandate periodic disclosure or other disclosure by foreign private issuers that is not required by the

requirements or practices in their home jurisdictions. For these same reasons we do not believe that the Commission should require additional signatories for Form 6-K reports or certifications by signatories of those reports, such as those proposed for signatories of reports by U.S. companies.

E. Review of Exchange Act Reports/Staff Review Policy.

We find the discussion of Staff review policy in the Release helpful. However, we also find some troublesome aspects of that policy.

We are pleased with the proposal that the Staff will notify an issuer when its Exchange Act filings are selected for review and as to approximately when comments, if any, could be expected to be communicated. This should be helpful in scheduling offerings.

The Commission also has proposed that the Staff will consider requests for review of Exchange Act annual reports when the issuer is planning an offering in the near future of securities to be registered on Form A in circumstances where the registration statement will become effective upon filing if the Exchange Act annual report incorporated by reference in the filing recently has been reviewed and any Staff comments satisfied.

This procedure, in practice, seems little different in substance than a pre-effective Staff review of a Securities Act registration statement and could be subject to much of the delay and uncertainty currently involved in such reviews. Requiring review of a Form 10-K and satisfaction of Staff comments before filing a registration statement on a form that becomes immediately effective, in terms of timing, may not differ greatly from filing a registration statement and going through the review process. Registrants and underwriters would not be in a position to control the timing of the offering any more than they are under current Staff review practices. The only real advantage would seem to be a delay in paying a registration fee or the saving of that fee if the offering is abandoned.

We recognize that if the Staff is unable to accommodate a request for review, it would so inform the issuer and would not select the report for "routine" review until 30 days thereafter. However, we are not sure of the purpose intended for that 30 day period or what advantage the Commission believes that such a "window" would provide to registrants.

XIV. Proposals Relating To Small Business Issuers.

The Commission's proposals would affect Small Business Issuers in several respects.

A. New definition of "Small Business Issuer." The Commission proposes to raise the revenue ceiling for determining Small Business Issuer status from \$25 million to \$50 million and to eliminate the public float test. We have no objection to this proposal.

B. Proposed Changes to Form SB-2. The Commission proposes to permit "seasoned" Small Business Issuers to incorporate previously filed Exchange Act reports to satisfy certain of the disclosure requirements of Form SB-2. (Forward incorporation by reference would not be permitted.) To be considered seasoned for these purposes, a Small Business Issuer would have to have been subject to the Exchange Act reporting requirements for at least a 24-month period, have timely filed all of its Exchange Act reports during the 12 months immediately preceding the filing of the registration statement and have filed at least two Exchange Act annual reports.

These issuers would be subject to the same requirements to deliver Exchange Act reports to investors as Form A issuers relying on incorporation by reference of Exchange Act reports. [Footnote: In discussing its reasoning for not permitting delivery of an annual report to security holders rather than an Exchange Act annual report, the Commission indicates that annual reports to securityholders do not include complete information about management, executive compensation, security ownership and related party transactions, while Exchange Act annual reports include that information. We note that Exchange Act annual reports generally incorporate this information by reference. Therefore, this information would not be included in the materials delivered to investors. Accordingly, we do not believe that the Commission has adequately supported this proposed delivery requirement.] As in the case of Form A issuers, we believe that seasoned Small Business Issuers should be required either to include company-related disclosure in full in the prospectus or, as an alternative, be permitted to incorporate by reference without delivering certain mandated disclosure, (See "Form A Registration System" above).

The Commission has asked whether the "seasoning" period should be shortened to 12 months, for example. As the Commission has indicated in its Release, Small Business Issuers are less likely to be followed by securities analysts. Accordingly, we do not believe a "seasoning" period shorter than 24 months would be appropriate.

"Seasoned" Small Business Issuers would be subject to the same disqualifications as issuers filing registration statements on Forms A or B. Our discussion under "Form B Disqualification" above is equally applicable here.

The Commission also asks if the requirement to deliver Exchange Act reports should be expanded to require delivery of all Exchange Act quarterly reports and reports on Form 8-K filed by the Small Business Issuer since the end of its latest fiscal year. We believe that, if incorporation by reference plus delivery is adopted for seasoned Small Business Issuers, requiring delivery of these additional documents would be unnecessary and potentially confusing to investors and would increase the costs of registration to Small Business Issuers without a corresponding benefit. The value of earlier quarterly reports is questionable, since year-to-date interim financial statements would be included in the latest Exchange Act quarterly report, for example. Also, as the Commission has indicated elsewhere in the Release, investors would have access to the other quarterly reports and reports on Form 8-K through the Commission's EDGAR system.

C. Form SB-3. The Commission proposes a new Form SB-3 for registration of securities of Small Business Issuers to be issued in exchange offers or business combination transactions. The prospectus included in the registration statement also could serve as a proxy or information statement, if required. Seasoned Small Business Issuers could incorporate Exchange Act reports in these registration statements in the same manner and on the same conditions as those discussed above with respect to Form SB-2. The proposals involve little substantive change from the current provisions of Form S-4 applicable to Small Business Issuers. Accordingly, we have no objection to their adoption. The proposal also would have the advantage of not cluttering Form C with special provisions for Small Business Issuers.

D. Rule 504. The Commission proposes that securities issued by an Exchange Act reporting company upon the conversion of convertible securities or exercise of warrants that were offered pursuant to the exemption from registration provided by Rule 504 of Regulation D before the issuer became an Exchange Act reporting company would be exempt from registration pursuant to that Rule. Any offers of such underlying securities occurring after the issuer became an Exchange Act reporting company also would be exempt. As a condition to the availability of this relief, the convertible securities or warrants, when issued, must have been immediately convertible or exercisable or first convertible or exercisable within one year of issuance. We have no objection to this proposal, which, in some respects, is similar to the treatment of convertible securities and warrants issued under the exemption from registration provided by Section 1145 of the Bankruptcy Code.

The Commission asks whether the exemption should be available regardless of when the convertible securities or warrants first become convertible or exercisable. The one year cut-off is consistent with positions taken by the Commission's Staff in other contexts. [Footnote: See, e.g., Release footnote

237.] Moreover, one year after issuance investors may need additional information about the issuer before making a decision to convert or exercise.

The Commission also asks whether the exemption should be available to an issuer who issues convertible securities or warrants pursuant to Rule 504 at a time when it could have foreseen that it was about to become an Exchange Act reporting company. We believe that such a condition would inject unnecessary uncertainty, require analysis of difficult factual issues and raise questions as to the availability of the Rule 504 exemption for the underlying securities once the issuer becomes an Exchange Act reporting company. The impact on investors is the same whether or not the issuer could have foreseen it was about to become a reporting company.

E. Registration Fees. The Commission proposes to permit Small Business Issuers to pay their registration fees shortly before the effectiveness of their registration statements rather than upon filing of their registration statements. The Commission believes that this would ease Small Business Issuer's liquidity concerns. However, the Commission, in its Initial Regulatory Flexibility analysis, estimates that the savings in interest or funds that otherwise would be used to pay fees would be approximately \$166 per filing. We leave it to the Commission's judgment as to whether that amount of savings justifies its proposal when viewed against the added cost to the Commission and taxpayers for administering two different fee payment systems.

We do believe, however, that the Commission should consider permitting all issuers to defer payment of filing fees in the manner proposed.

F. Other Proposals Affecting Small Business Issuers. The Commission proposes to permit seasoned Small Business Issuers, other than Transitional Small Business Issuers, to use Form B for offerings solely to QIBs, certain offerings to existing security holders, offerings of non-convertible investment grade securities and market-making transactions by affiliated market makers. While we have no objection to these proposals, our experience leads us to doubt that many Small Business Issuers offer investment grade securities or have market makers as affiliates or, as a practical matter, are able to make offerings solely to QIBs.

The Commission also proposes to permit Small Business Issuers that are the subject of an offering registered on Form C to provide the information about themselves required by Form SB-3. We believe this proposal is consistent with the Commission's treatment of Small Business Issuers generally.

In addition, the Commission asks whether issuers more likely to be identified with microcap fraud also should be disqualified from using Form B and how these

issuers might be identified. We are unable to comment on this request. However, we do not believe the Commission should adopt rules excluding certain Small Business Issuers from the benefits of certain of its proposals without the benefit of public comment as to the criteria the Commission proposes to use to exclude these issuers.

* * * * *

Members of our Committee would be pleased to meet with members of the Staff of the Commission to discuss the comments in this letter.

Respectfully submitted,

Stephen J. Schulte,
Chair of Securities Regulation Committee

Gerald S. Backman,
Chair of "Aircraft Carrier" Task Force

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Annex

SECURITIES AND EXCHANGE COMMISSION ADVISORY COMMITTEE ON THE CAPITAL FORMATION AND REGULATORY PROCESSES

TERM SHEET FOR PILOT COMPANY REGISTRATION SYSTEM

Goals

The goals of the company registration system are to:

- (i) maintain and enhance the protection of investors in the primary markets;
- (ii) eliminate unnecessary regulatory costs and uncertainties that impede a company's access to capital;
- (iii) eliminate complexities arising from the need to distinguish between public and private, domestic and offshore, and issuer and non-issuer transactions; and
- (iv) enhance the level and reliability of disclosure provided to investors in the secondary markets on an ongoing basis, not just when the issuer conducts a public offering.

Concept

Registration is company, not transaction-based (except for IPOs and other specific transactions). Once meeting eligibility standards, companies register with the SEC and file periodic reports. Routine financings, as well as resales by affiliates and resales of what are currently known as restricted securities, could

be consummated without the current SEC review and registration process. Information provided to investors in the marketing of these routine financings would be based on what the market demands and on company and transactional information required to be filed as part of the issuer's periodic reports. The principal distinctions currently existing between public and nonpublic offerings by registered companies (with the resultant formalities and restrictive concepts such as gun-jumping and integration) would be eliminated, because offers and sales by companies already registered with the SEC generally would not be subject to additional transactional registration requirements.

Essential Elements of the Pilot System

1. Disclosure

(a) Company Registration Statement. An eligible company may file a Form C-1 registration statement disclosing plans to make offerings from time to time on a company-registered basis and registering all sales of all securities. [Footnote: A company could effect its transition to the company registration system from the current system simply by electing to be governed under and complying with the company registration system requirements. To the extent the company currently has restricted securities outstanding, the company could elect, as part of its transition to a company regulation system, to register any or all of its outstanding restricted securities for resale on the Form C-1 (and pay the applicable fee and execute a qualified indenture in the case of debt securities at that time) or merely allow the restricted securities to retain that status until the expiration of the Rule 144 restricted periods (three years, but recently proposed to be shortened to two years; limited resales allowed after two years, recently proposed to be shortened to one year).] Form C-1 generically registers the types of securities and offerings (including resales by affiliates and statutory underwriters, see Section 1(e) below) that are contemplated and incorporates all existing and future periodic reports. Certain exemptions or exclusions from the registration form would be available (see Section 3(b) below). Amendments can be filed to reflect changed plans as appropriate (e.g., where a company changes the manner of financing or amends its charter to authorize a new class of securities). The Form C-1 registration statement also is updated automatically by each filing under the Exchange Act. Only a nominal registration fee would be paid at the time of filing, with the issuer undertaking to pay a fee upon the sale of securities (i.e., pay as you go). [Footnote: There are various mechanisms to achieve this result within the current statutory framework: Once the Form C-1 has become effective, it could serve as an evergreen registration statement for offers and sales of securities. Alternatively, the effective date of the Form C-1 with respect to a specific offering could be delayed until an amendment is filed regarding that transaction. Another alternative would be to have the Form C-1 go effective upon filing, but require

another abbreviated registration statement to be filed at the time of the transaction. In any case, the Form C-1 could serve as the basis for multiple offerings, applicable statutes of limitation periods would run commencing from the time of sales made under the form, and the fee would be paid at the time of the particular sale.]

(b) File and Go. Sales could be consummated upon the filing with the Commission of disclosure regarding the specific offering of securities and the payment of a transaction-based fee. (Prospectus delivery requirements are discussed below.) The transactional information would consist of the following, to the extent material and otherwise not previously disclosed:

- description of securities/pricing
- plan of distribution, experts, and underwriter information
- summary financial and dilution information/pro formas
- actual use of proceeds
- risk factors
- material changes

Thus, at least the same level of public disclosure on file with the Commission concerning registered offerings that currently exists today for seasoned issuers would be maintained under a company registration scheme.

The manner in which the transactional information could be filed with the Commission will depend on the nature of the offering. In equity offerings (including offerings of convertible debt and warrants) over the specified threshold (e.g., 3 percent of public float), the issuer would file a Form 8-K, which would be incorporated into the registration statement. The Committee recommends that this requirement apply to non-de minimis equity shelf offerings by noncompany registrants as well. The purpose for the Form 8-K filing is to facilitate due diligence inquiries by underwriters and other offering participants, and to ensure full coverage of Section 11 statutory liability to this information, which would automatically be incorporated into the registration statement. The Form 8-K would be filed a reasonable time in advance of the offering (as specified by Commission rule, e.g., one to three business days), where necessary to provide the market with adequate notice of material developments. The transactional information need not be filed on a Form 8-K until the time of the offering.

With respect to all other offerings, the issuer will have a choice regarding the manner in which the transactional disclosure will be filed with the Commission. The issuer could voluntarily file a Form 8-K, as described above; alternatively, the issuer could merely file the prospectus supplement containing the required information when that information is delivered to investors. The information contained in the prospectus supplement normally would not be part of the

registration statement. This latter method of filing is consistent with practice under shelf registration today. Neither the Form 8-K nor the prospectus supplement normally would be subject to prereview prior to the commencement of the offering.

Consistent with current practice relating to shelf offerings, information representing a fundamental change in the information regarding the issuer previously disclosed by the issuer would be made by an amendment of the Form C-1 or by a Form 8-K or other Exchange Act filing; a prospectus supplement disclosing the fundamental change alone would not suffice. Other types of material developments, however, could be provided either in the Form 8-K Exchange Act filing prior to the offering or as part of the prospectus supplement, as described above. In either case, the issuer's public disclosures must be current at the time of the offering.

(c) Auditor's Consent. Consistent with current practice under the shelf registration system, an auditor's consent would not have to be filed with each sale or takedown off the company registration statement. An auditor's consent to the use of its report would be dated as of or shortly before the effective date of the registration statement (as updated for the filing of audited financial statements on Form 10-K or other fundamental changes) and would have to be on file at the time of the offering. The auditor could consent to incorporation of its audit report into the company registration statement at the time the Form 10-K containing its audit report is filed by including a currently dated consent in the Form 10-K. That consent (as of the registration statement's effective date), unless withdrawn by the auditor, would be applicable to all offerings pursuant to the Form C-1 until the issuance of a new set of audited financial statements or other fundamental changes that update the effective date of the registration statement. Alternatively, the consent could be filed and currently dated for a specific issuance of securities or conditions could be attached to its use.

(d) Prospectus Delivery. Delivery of the transactional information could be accomplished either by incorporation by reference or by actual delivery, depending on the size of the offering and other factors. The prospectus would not be subject to prior Staff review except in the case of "extraordinary securities transactions," as defined below. These different levels of transactions essentially fall into three tiers:

Tier One:

In "routine" transactions, an issuer could incorporate information contained in the Form C-1 registration statement and filed reports, including the transactional information filed on a Form 8-K, into a document serving as the prospectus, such

as the confirmation or selling materials, that is then distributed to investors, thereby satisfying in any of these cases the prospectus delivery requirement.

Any material company developments to be incorporated must be filed on the Form 8-K a reasonable time prior to the dissemination of the prospectus incorporating the information (e.g., one to three business days) to provide the market an opportunity to absorb the information. Otherwise, as today, the information must be delivered physically as part of the formal prospectus, which is filed simultaneously with the Commission.

Tier Two:

In "nonroutine" transactions, the issuer would be required to prepare and deliver a formal prospectus containing transactional and, where appropriate to update disclosures, company information. The prospectus would be filed (in addition to or as part of the mandated Form 8-K in non-de minimis equity offerings) with, but would not be subject to registration or prior review by, the SEC. [Footnote: However, other than in the case of underwritten offerings for cash, exchange listing requirements would require shareholder approval of these offerings, thus creating an opportunity for SEC review of the disclosure materials under the proxy rules.] Information previously provided in selling materials or in a formal prospectus need not be redelivered.

Nonroutine transactions would consist of any single transaction increasing, or potentially increasing, the issuer's outstanding voting securities by more than 20%.

The Commission could adopt a similar standard for offerings of other equity and senior securities.

The offering of a new class of securities would require actual delivery of information specific to that security (e.g., terms and description of the security, investment risks specific to that security).

Actual delivery of information generally of interest only to purchasers in the offering and not the market (such as underwriter discount information or security specific information) could be provided as part of the confirmation.

In those cases where formal prospectus delivery is mandated, the prospectus must be delivered prior to the investor's agreement to purchase.

To the extent written selling materials that do not satisfy prospectus disclosure requirements are distributed to investors in the course of the offering, a prospectus containing the mandated information would have to be delivered prior

to or simultaneous with the selling materials, consistent with current statutory and regulatory requirements. An issuer could avoid delivery of a statutory prospectus by either including or incorporating the required information into the selling materials and treating the selling materials as the statutory prospectus. That approach, however, would subject those materials to liability under Section 12(2) of the Securities Act.

Actual delivery of the prospectus information would not be required in the case of sales to accredited investor purchasers, with the expectation that these investors will demand the information they require. This would be consistent with the requirements under Regulation D and Rule 144A today.

Tier Three:

In "extraordinary transactions," a post-effective amendment to the Form C-1 would be required and would be subject to SEC Staff review of the transactional information. The same prospectus delivery requirements as in Tier Two transactions would apply.

These transactions would include any financing, merger, material acquisition or other restructuring transaction involving a company's issuance of securities that results in an increase, or potential increase, of at least 40% of the outstanding voting securities.

(e) Affiliate and Underwriter Sales. In cases where all sales by an issuer are registered on the Form C-1, there is a far reduced concern about the potential use of conduits as a means to distribute unregistered shares into the market. Accordingly, in the case where an issuer elects to cover all sales under the company registration statement, a more narrow application of the registration and resale requirements would apply. [Footnote: An issuer also may elect to maintain the current private placement exemption for sales of equity securities (see Section 3(b) (iii) below). If an issuer elects to maintain such exemption, the current applicability of the affiliate and statutory underwriter resale limitations, as opposed to the narrower approach as described herein, would continue to apply.]

- The class of persons subject to the affiliate resale limitations would include only the CEO and inside directors and, as a rebuttable presumption, perhaps holders of 20% of the voting power, or 10% of the voting power with at least one director representative on the board, and any representatives of such holders.
- These affiliates could continue to sell without registration under the existing provisions in Rule 144 for affiliate sales. Sales by these affiliates exceeding the Rule 144 limits would be registered as resales under the Form C-1. An issuer could control the sales of affiliates by declining to file a prospectus supplement or

a Form 8-K to complete the registration process at the time of the secondary offering (just as an issuer can refuse to grant registration rights under the current system). Significant shareholders could resell without restrictions if they can rebut the presumption of control arising from their holdings. Contractual resale restrictions also would provide a means for an issuer to control resale activities of its insiders and significant shareholders.

- Resales by statutory underwriters for issuers and affiliates would be registered under the Form C-1. A statutory underwriter for the purpose of offerings registered under the Form C-1 would consist of a person engaged in the business of a broker-dealer (regardless of whether or not registered as such) acting on behalf of an issuer or affiliate in a distribution.

2. Eligible companies

The system would be phased in and made available on an experimental basis. The pilot would be voluntary; eligible companies could elect to opt in as desired. It would begin with larger, more seasoned issuers eligible to elect to be covered. Once the election is made, a company can opt out by withdrawing the Form C-1, but would not be eligible to use the Form again for a period of two years. During the pilot stage, eligibility would be limited to a senior class of S-3 companies [Footnote: S-3 companies generally include only those that have a \$75 million public float; one-year reporting history; and are current with respect to their reporting requirements and certain fixed obligations.] that have a

- (a) Public float of \$75 million;
- (b) Reporting experience of two years; and
- (c) NYSE, Amex or NMS listings.

This final requirement would provide the benefit:

- (i) of adding an overlay of listing standards, including the agreement to provide prompt disclosure of material developments; and
- (ii) of minimizing the amount of coordination with the states necessary to implement the pilot stage due to the common Blue Sky exemption for offerings by listed companies.

These standards collectively reduce the number of companies eligible to use the Form C-1 during the pilot stage to approximately 30% of public companies.

A subsidiary of an eligible company could issue debt that is guaranteed in full by the parent under the parent's Form C-1.

Closed-end investment companies would not be eligible.

Foreign issuers would be eligible for the pilot if they undertake to file the same forms and meet the same requirements as domestic companies. The Commission should consider whether reconciled interim financial filed on Form 6-K on a semi-annual basis should suffice (this is the current practice for foreign issuers using the shelf on Form F-3).

To be eligible, issuers must undertake to adopt measures that would enhance secondary market disclosure (as discussed below in Section 4). Noncompliance with the conditions as of the time of the Form 10-K update would result in the loss of eligibility (for two years) to make offerings pursuant to the Form C-1. In addition, the issuer must be current with respect to its Exchange Act filing obligations before commencing an offering off the Form C-1.

Eventually, the system would be made available to all publicly held companies (that have engaged in an IPO), but with additional enhancements or conditions, including prospectus delivery, pre-sale notice or filing requirements, prerule annual financial information, etc.

3. Transactions Covered

As noted, the Form C-1 registration statement would register all sales of all securities made by the issuer or its affiliates (subject to exceptions and exclusions as discussed below, see in particular Section 3(b) below). [Footnote: To the extent relevant during the transitional stages, secondary offerings of restricted securities by existing security holders could be made pursuant to the system as well.] Since sales made subject to the Form C-1 would be registered, the securities would be freely tradable.

- Thus, under the proposed system, registered companies would waive transactional exemptions such as those for private offerings (§4(2), and Reg. D (Rules 505 and 506)), intrastate offerings (§3(a)(11) and Rule 147), issuer exchange offers (§3(a)(9)), and transactions pursuant to fairness hearings (§3 (a) (10)). [Footnote: It may be necessary to preserve the Section 3(a)(10) exemption for involuntary distributions pursuant to court orders, such as settlements of class actions.]

- The inclusive nature of the Form C-1 registration statement ensures that issuers could not use conduits to avoid liability that results from registration of securities. Treating all sales as registered generally eliminates the need for concepts of

restricted securities, integration, general solicitation, flow back, etc., with respect to securities issued by companies opting into the system.

Where an issuer is not prepared to disclose publicly a material development or other material information that would otherwise be required to be disclosed in a registered offering, the issuer still can sell pursuant to the Form C-1 by providing the information to the purchaser(s) on a confidential basis with a lock-up agreement. The Commission would provide a full or partial exemption from its filing requirements for these limited placements if made to sophisticated investors, and accompanied by measures to ensure that those securities are not traded until full disclosure is provided to the public (as would be necessary under Rule 10b-5).

In this manner, once the issuer makes public disclosure of the otherwise confidential information or the information is no longer material, the purchaser would have freely tradable securities without any additional holding period or registration requirements. In addition, unlike an exempt offering, the liability provisions of the Securities Act would attach to the securities originally issued in the limited offerings.

(a) Exclusions:

(i) IPOs: Only companies that have conducted a registered public offering of debt or equity would be eligible to use the company registration form.

(ii) Complex securities not valued on the basis of the issuing company's business and financial information, such as asset backed or special purpose issuers. Complex securities that are valued in part on the basis of the issuer's performance, such as structured securities or tracking securities (e.g., GM Series H) could be made eligible subject to special disclosure requirements.

(iii) Exempt securities such as commercial paper and bank guaranteed debt.

(b) Voluntary Exclusions:

(i) Offshore offerings of any securities to non-U.S. persons could be excluded from the Form C-1. However, equity securities would be registered (and a fee paid with respect thereto) on the Form C-1 for purposes of any resales of the securities into the United States as a result of flowback transactions (the fee would be based upon the amount reasonably estimated to flow back into the United States); thus, U.S. purchasers of equity securities initially offered overseas would benefit from the statutory protections to the same extent as if the securities were initially sold in the United States. The statute of limitations would run from the time of the initial overseas sale by the issuer.

(ii) Placements of non-convertible debt to institutional investors could be excluded from the Form C-1.

(iii) Modified Company Registration -- "Company Lite" The issuer could elect a modified form of company registration that would continue to permit private placements of any of its securities, including equity securities, as well as reliance on the other transactional exemptions.

So long as the issuer undertakes to adopt the enhanced disclosure practices, the issuer would have the benefits of the file and go registration process for its public offerings, the payment of filing fees at time of sale, and most of the other benefits of company registration. Exempt sales would not be integrated with registered sales made pursuant to the Form C-1.

However, the securities sold in the private placement would be restricted securities subject to current holding periods and resale limitations. In addition, the new, limited application of affiliate resale restrictions would not apply to securities sold by that issuer -- the current restrictions on affiliate resales would continue to apply. Likewise, the statutory underwriter concept for resale purposes would not be limited to broker-dealer firms in connection with these private placements. This approach would permit issuers to weigh the benefits of registration of all equity sales against the benefits of a continued private placement exemption, including the absence of Section 11 liability for sales made pursuant to such exemption.

4. Disclosure Enhancements

Complementing measures to ease issuer access to the market would be measures to improve the level and reliability of secondary market disclosure. The Commission, following the pilot stage, should consider reviewing the enhancements to determine whether it would be desirable to make them applicable to all issuers, or at least those issuers using the shelf registration procedure, rather than having separate requirements applicable only to registered companies.

(a) Top Management Certifications. Certification to the Commission (not a filed document) would be required of two of the following four officers that they have reviewed the Form 10-K, the Form 10-Qs and any Form 8-Ks reporting mandated events, but not for voluntarily filed 8-Ks, and are not aware of any misleading disclosures or omissions: the CEO, COO, CFO, or CAO. The attestation would be required upon the filing of each such document with the Commission.

(b) Management Report to Audit Committee. A report prepared by management and submitted to the audit committee describing procedures followed to ensure the integrity of periodic and current reports and, in light of the new narrow application of affiliate resale restrictions, procedures instituted to avoid potential insider trading abuses (e.g., any requirement that company insiders clear trades with the general counsel's office). This report would be made public as an exhibit to the Form 10-K; the report need not be resubmitted if the described procedures are unchanged.

(c) Form 8-K Enhancements. Expansion of current reporting obligations on Form 8-K under the Exchange Act to mandate disclosure of additional material developments:

(i) Material modifications to rights of security holders (current Item 2 of Form 10-Q);

(ii) Resignation or removal of any of top five executive officers;

(iii) Defaults of senior securities (current Item 3 of Form 10-Q);

(iv) Sales of significant percentage of the company's outstanding stock (whether in the form of common shares or convertible securities);

(v) Issuer advised by independent auditor that reliance on audit report included in previous filings is no longer permissible because of auditor concerns over its report or issuer seeks to have a different auditor reaudit a period covered by a filed audit report.

For the above items that are required now to be filed on a Form 10-Q, the information therefore would be provided on a current, rather than a quarterly, basis. Moreover, the period within which a Form 8-K must be filed following any mandatory event specified in that form would be accelerated from 15 calendar days to 5 business days.

(d) Risk Factors. Risk factor analysis disclosure requirements currently required in all Securities Act filings would be added to the Form 10-K (and would thereby be capable of being incorporated by reference). The caption could be modified to be "Significant Considerations in Connection with Investing in Company Securities," instead of "Risk Factors," when the analysis is presented in the Form 10-K.

(e) Other Action (Voluntary). Companies under the company registration system also may voluntarily adopt measures such as the creation of a disclosure committee of outside directors, and the obtaining of SAS 71 reviews. Such

measures would be included within the list of relevant factors for assessing the adequacy of due diligence in current Rule 176 (see below).

5. Liability

Section 11 Liability. The issuer would be subject to strict Section 11 liability to purchasers of securities sold under the company registration statement for materially false or misleading information in the Form C-1 (including all incorporated information such as transactional information filed as part of the Form 8-K). Officers, directors, experts and underwriters likewise would be liable for materially false or misleading statements in the Form C-1 (including the transactional and updating information filed on the Form 8-K and incorporated into the Form C-1) and any post-effective amendments thereto (with the due diligence defenses afforded under current law).

This approach does not represent a change in the liability system for public offerings (with the exception of sales by persons who would no longer be subject to resale restrictions and thus who would not have liability under Section 11 for their resales), but represents an expansion of liability to the extent transactions that would otherwise be exempt private placements or flowback from overseas placements are covered by the Form C-1. In addition, because in many offerings the transactional information will be filed on a Form 8-K and made part of the registration statement, rather than merely part of a prospectus supplement as is the practice in shelf offerings today, Section 11 will apply to that disclosure when it has not been applicable under the current scheme.

- Similar to current law, the Section 11 remedy would extend to all purchasers of securities sold initially under the Form C-1 (subject to statute of limitations and the ability of purchasers to trace securities to the misleading registration statement). Thus, issuers and affiliates cannot avoid liability by placing securities with conduits for resale to the public. Indeed, sham transactions involving strawmen would be deemed registered issuer (or affiliate) sales.

Section 12(2) Liability. Rather than merely fraud liability, negligence liability for sellers in public offerings would apply to any selling materials serving as a statutory prospectus (i.e., no formal prospectus has been previously delivered) and incorporated documents (in addition to any Section 11 liability that might be applicable to those documents). Likewise, oral communications will continue to be subject to Section 12(2) liability.

Exchange Act Liability. Liability under Sections 18 and 10(b) of the Exchange Act and Rule 10b-5 thereunder, would remain applicable for material misstatements or omissions in filed reports or made in connection with the purchase or sale of securities.

Due Diligence Guidance. To provide incentives for the adoption of improved disclosure practices and to address the expanded Section 11 liability exposure of officers and directors of registered companies, guidance setting forth the criteria for evaluating the adequacy of a non-issuer defendant's Section 11 due diligence in connection with a particular offering would be provided. The goal is to enhance the quality of disclosure and to provide more meaningful guidance regarding the satisfaction by underwriters and directors of their ("reasonable investigation") due diligence responsibilities. Rule 176 currently specifies that a relevant factor is reasonable reliance on officers, employees and directors whose duties should have given them knowledge of the facts.

Guidance would be provided to clarify as well the relevant factors that may be considered when such defendants attempt to establish a defense of "reasonable care" to a Section 12(2) negligence claim.

(a) Both underwriters and outside directors could take into account (i) the certifications of senior management (e.g., CEO, COO, CAO and CFO) discussed above, and (ii) the Management Report to the Audit Committee discussed above.

(b) Underwriters and outside directors also may consider whether other professionals have reviewed the documents, such as a review of the issuer's interim financial statements by the company's auditors in accordance with SAS 71 or other more detailed procedures, subsequent event reviews consistent with SAS 37, and a "comfort letter" under SAS 72, or whether the board or a committee of the board received a Rule 10b-5 opinion letter from counsel regarding non-financial and non-expertized portions of the periodic reports and Form C-1.

- Use of these measures by the issuer is voluntary and the fact that an issuer does not adopt such practices is not indicative of an inadequate review by offering participants.

(c) Underwriters also may consider the extent of their access to analysts (either their own or outside analysts, and consistent with appropriate "Chinese wall" procedures) that have followed the issuer for a significant period of time in determining how much additional due diligence must be performed by the underwriter in order to satisfy the applicable due diligence standard.

(d) Underwriters also may consider whether a Disclosure Committee (see below) was established and may take into account the scope of the review engaged in by the Disclosure Committee.

(e) These additional factors may be interpreted as indicia of

"reasonable investigation"/"reasonable care," but such factors will be illustrative, not exhaustive or conclusive. The degree to which any of such factors will serve as indicators will depend upon the particular facts of the offering (including whether the offering is a routine financing).

Need to Monitor Developments The Commission should solicit comment, and monitor developments regarding the due diligence practices of underwriters during the pilot stage, to determine if offering techniques developed under the company registration system adversely affect either investor protection or an underwriter's ability to perform due diligence or create an unreasonable risk of liability for underwriters. The Commission then could consider whether the proposed new rule could be strengthened consistent with the protection of investors, premised perhaps on the underwriter following specified procedures to identify disclosure problems.

- After experience with the company registration system, consideration could be given to whether the additional due diligence benefits under these provisions could be made available to all registered offerings, not just those made pursuant to the Form C-1. However, such benefits likely should be conditioned on adoption of the mandatory enhancements described in Section 4 above, and extension of liability as described above. Consequently, it is likely that these additional benefits would be applicable only to the company registration system.

6. Delegation to Disclosure Committee. The Committee considered, in the course of its deliberations on the company registration model, a separate proposal to expand the role of the outside directors in ensuring the integrity of corporate disclosures. Although not an integral or necessary part of the company registration model developed by the Committee, the Committee determined to recommend that the Commission endorse a new procedure that would allow (but not require) outside directors to use the issuer's audit committee or a separate committee of one or more outside directors (a "Disclosure Committee") to conduct investigation of the issuer's disclosures. The Committee believes that this proposal has merit whether or not company registration is pursued by the Commission.

The Disclosure Committee can perform the investigative function on behalf of all outside directors, so long as:

- (i) the delegating directors reasonably believe that the member(s) of the Disclosure Committee are sufficiently knowledgeable and capable of exercising the due diligence obligations on behalf of the outside directors (if necessary, with the assistance of then-professional advisers) and with adequate resources, i.e., the delegation must be reasonable;

(ii) the delegating directors maintain appropriate oversight of the Disclosure Committee (including by requiring the Disclosure Committee to report to the Board on the procedures followed to ensure the integrity of the disclosure) and reasonably believe that the Disclosure Committee's procedures are adequate and are being performed; and

(iii) the delegating directors reasonably believe that the disclosure is not materially false or misleading.

7. Summary of Benefits of the Proposed Company Registration System

(a) Benefits to Issuers and Affiliates

- Speed of access to market: market considerations, rather than regulatory concerns, will govern timing -- elimination of mandatory waiting period and Commission Staff review that now add cost and uncertainty.
- Greater flexibility to go to market more often in lesser amounts, in light of lower transaction costs and less delay and uncertainty -- adoption of "just in time capital" techniques.
- Elimination of the potential negative price impact known as "market overhang," that may still result from registering equity securities on a universal shelf for many issuers.
- Greater flexibility in determining nature of marketing efforts -- timing and content of prospectus driven by informational needs of investors, not the need to prepare and deliver after-the-fact compliance documents determined by regulation.
- Elimination of a separate registration requirement for acquisitions.
- Payment of filing fees at time of sale, rather than in advance (as in the case of shelf offerings).
- Reduction or elimination of concerns regarding gun-jumping, integration, general solicitation, restricted securities, and other constructs developed over the years to maintain the separation of the public and private markets.
- Elimination of discount attaching to sale of restricted securities in private markets.
- Lower risk premiums paid on cost of capital as a result of enhanced disclosure practices.

(b) Benefits to Investors

- Disclosure enhancements will result in better due diligence practices and raise level and reliability of corporate reporting, benefiting purchasers in both primary offerings and in the secondary market.
- Greater flexibility in negotiating transactions due to elimination of regulatory constraints (eliminates timing constraints, fungibility constraints, resale restrictions, etc.).
- Protection afforded by registration provisions, including statutory remedies, potentially extended to broader class of transactions that otherwise would be conducted outside those protections, such as private placements or flowback of securities from overseas offerings.
- Full liquidity for what otherwise would be privately placed securities.
- In contrast to the prospectus supplement procedure currently used in shelf offerings, transactional information and material development disclosures would be covered by Section 11 liability and provided to the trading markets in a more timely fashion.
- Lower costs of capital raising incurred by issuers will inure to the benefit of the issuer's shareholders through greater productivity and profits.
- Improved prospectus disclosure that permits issuers to prepare offering documents containing clear and concise information tailored to the needs of investors and the nature of the transaction.

(c) Benefits to Underwriters Officers, and Directors

- Elimination of registration requirements and resale restrictions with respect to most directors and officers that are imposed as a result of their status as "affiliates."
- Better opportunity to perform adequate due diligence due to Form 8-K filing requirements.
- Significantly better guidance as to what constitutes a reasonable investigation in the context of integrated disclosure and streamlined offering processes.