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March 24, 1997

Mr. Jonathan G. Katz, Secretary
United States Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: Plain English Disclosure (Release Nos. 33-7380; 34-38164; IC-22464; File No. S7-3 97)

Dear Mr. Katz:

PSA The Bond Market Trade Association ("PSA") is pleased to submit hereby its written comments in response to the above-captioned Release. These comments express principally the views of various PSA member firms involved in the activities of our Corporate Bond Division.¹ Most of these firms have had the pleasure of meeting on several occasions during the course of the past nine months with representatives of the Securities and Exchange Commission (the "Commission") who explained in detail the reasoning and rationale underlying the Commission's "plain English" initiative, including the salient questions set forth in the Release.

PSA would like to take this opportunity to express its appreciation to those SEC staff members who participated in the above-mentioned meetings. Based in part on the input provided at these meetings, PSA fully supports the *goals* of the plain English initiative. We believe full and adequate disclosure of the material elements of securities offerings is the cornerstone of the Federal securities laws, and plain English standards in conjunction with such disclosure will generally enhance efficiencies in the marketplace and promote meaningful investor protection goals.

In light of the above, PSA believes it is critical to emphasize the need for *education* with respect to the implementation of plain English. In this regard, we feel the following recommendations are noteworthy:

- Additional workshops (perhaps similar to the session sponsored by PSA on November 19, 1996) designed for underwriters would be beneficial regarding plain English proposals applicable to the front and back cover pages of the prospectus, any summary of the offering and related risk factors. If appropriate, these workshops or other educational sessions might also constitute the basis for SEC interpretive releases.
- Such workshops should convey assurances that the degree of competence and understanding demonstrated to date by senior SEC staff members regarding the challenges associated with plain English will consistently be achieved at all SEC staff levels, particularly in connection with the review process.

- Regarding any future rulemaking in the area of plain English, we strongly suggest an advance approach similar to that which was undertaken in the preceding nine months: that is, initial informal meetings involving senior SEC staff members and industry practitioners in order to delineate major concerns and a workable course of action. As previously mentioned, PSA members are concerned about the possible risk of liability stemming from allegedly misrepresenting the terms of an offering in the context of plain English. And as more fully discussed below, to the extent that cross-references can be used in front and back cover pages, the summary and the risk factor sections of the prospectus, any such risks may tend to be mitigated. However, pending further in-depth analysis and discussion of the nuances relating to plain English, it would be impractical for PSA and its membership to support extending plain English requirements beyond these three areas at the present time.

Most importantly, in suggesting these educational steps, PSA would like to underscore its interest in being part of the success of the plain English initiative. Advancements in information technology in the securities industry have reached the point where it is essential for electronically transmitted communications to contain clear and concise terminology. Plain English is clearly in step with the effective utilization of technology by broker-dealers and other bond market participants. Consistent with this constructive sentiment, PSA's specific comments regarding the Release are as follows:

A. Concerns About Increased Liability

In the Release, the Commission requests feedback about the liability concerns raised to date by commenters.

The concern expressed by PSA members, reflecting concerns held by the dealer community but also applicable to issuers, is that when complex provisions with many details are restated in different words, it is nearly inevitable that a different meaning will be expressed. We are not aware of any case law or empirical data to support this view. We do not believe that this proves that liability concerns are imagined. Furthermore, where there is an emphasis on reducing the amount of detail and focusing on only the most important points, more minor details - which are nonetheless part of the picture - are likely to be eliminated.

Complex prospectus disclosure frequently arises in the context of descriptions of provisions in indentures and other documents affecting securities, such as leases, mortgages, insurance policies and corporate charter documents. These underlying documents tend to be carefully crafted to accomplish several goals, including:

- expressing the outcome of detailed negotiations as to the obligations and rights of the issuer and its securityholders relative to each other;
- describing obligations and rights of the issuer with other parties, including other creditors and other securityholders; and
- describing hedging transactions such as swaps.

These concerns might be limited by the fact that the plain English requirements are proposed to extend only to certain portions of the prospectus. So long as issuers are able to describe the terms of their indentures and other underlying documents in words drawn from those underlying documents, even if not in plain English format, the liability issues will be lessened. As proposed, the new rules will require issuers that include a prospectus summary to select the most important matters and highlight them in the summary. More importantly from a liability standpoint, it will permit the issuer to derive comfort from a cross-reference to the more detailed and complete discussions elsewhere in the prospectus.

B. Concerns About the Staff Review Process

Based on reports of Commission staff and PSA members that have been involved, the plain English pilot project has been very successful. We believe this is largely due to the efforts of senior Commission staff members, who have been extremely effective advocates and leaders. They deserve much credit for bringing the plain English project to where it is today.

However, if plain English does become a requirement for all registration statements, these senior staff members will have little direct involvement with the staff review made of those registration statements. In 1995, the Commission made full disclosure reviews of 1,980 Securities Act registrations.² Clearly this work is, and will continue to be, broadly distributed among SEC staff members. PSA members are concerned about the level of commitment and understanding of plain English principles of the many staff members that will administer the new rules.

Staff examiners will need to be trained adequately. The specific plain English rules establish highly subjective standards: short sentences; descriptive captions; use of glossaries but avoidance of frequent reliance on defined terms; and non-legal, non-technical terminology.³ The problems inherent in these standards can be demonstrated by one of the before-and-after examples in the Plain English Handbook. On pages 32 and 33, under the heading "Use Short Sentences", the "before" sentence is complex and contains 77 words. The second redrafted alternative uses bullet points and is significantly clearer than the original, but contains 89 words. Both versions substantially exceed the 25 to 30 word ideal stated in the Release. Can issuers and underwriters be confident that Commission staff will favor the clearer disclosure even if it "breaks the rule" requiring short sentences? Furthermore, as acknowledged in the Release, "There is no one absolute form of plain language."⁴ Any attempt to mechanistically judge whether the plain English rules have been followed is likely to yield arbitrary and capricious results.

We believe that a strong training program for examiners who review registration statements will do much to alleviate any problems. PSA members offer their services in that process, to help examiners understand the drafters' perspective on the review process.

Reviews for plain English compliance should be part of the normal full review process, not a separate limited review. PSA believes that the plain English review should be part of the ordinary full review process, rather than the subject of limited reviews of a broader universe of filings. PSA members would oppose instituting limited reviews to check for compliance with the plain English principles, in those cases where the subject filing is not selected for a full review. In recent years, limited reviews were conducted as to "event risk" disclosure; PSA members believe that any benefits derived from such limited reviews did not outweigh the significant delays they created in the timing of transactions. Furthermore, a "limited" plain English review would be significantly more involved and time-consuming than were the event risk reviews, requiring a detailed reading and more extensive comments. We would ask that the Commission clarify, at the time that any plain English rules are adopted, its intention as to monitoring filings in the review process for this purpose.

C. Comments on Specific Proposals

In addition to the discussion above about Rules 421 and 461, PSA offers the following comments about the balance of the rule proposals contained in the Release.

1. Changes to Item 501 of Regulation S-K

PSA generally supports the proposals with respect to Item 501 of Regulation S-K ("Front of Registration Statement and Outside Front Cover Page of Prospectus"), which call for changes to the format and content of the prospectus front cover page. We believe that overall the proposed changes will remove from the front cover page material that is not of primary importance to investors (such as details of the underwriting arrangements) and leave more space for the issuer to use for most important disclosure. We also support the Commission's decision to omit specific requirements as to print type or font size on the cover page, leaving such matters to the discretion of the issuer and underwriters. Our concerns about the Item 501 proposals are set forth below.

Retain the cross-reference on the cover page to the risk factors section. We believe that the risk factors section is one of the most important parts of prospectuses that contain them. We therefore believe it is important to point the reader to the location inside the prospectus where this important information can be found. We recommend that the proposed version of Item 501 be changed to continue to require the front page cross-reference to the risk factors disclosure.

Remain flexible as to underwriters' use of their established front cover style manuals. No less than any corporate colors, typeface or other style, PSA members have developed and used prospectus cover page styles which differentiate their "products" from those of their competitors. We strongly urge the Commission to be flexible in permitting PSA members to continue to use these unique styles so long as they also seek to follow the plain English principles. We believe that the rules as proposed permit PSA members sufficient latitude to do so.

2. Changes to Item 502 of Regulation S-K

PSA supports the proposed changes to Item 502 of Regulation S-K ("Inside Front and Outside Back Cover Pages of Prospectus"). We believe that these proposals will remove much of the boilerplate material from these areas of the prospectus and overall improve readability.

In response to the specific question in the Release, PSA members do not believe that the back cover legend describing the dealer's prospectus delivery obligations is necessary for purposes of reminding the dealer of these obligations. Their own internal compliance procedures are adequate to provide for deliveries where required.

3. Changes to Item 503 of Regulation S-K

PSA supports the proposed changes to Item 503 of Regulation S-K ("Prospectus Summary, Risk Factors and Ratio of Earnings to Fixed Charges"), subject to the overall liability and other concerns discussed above about the plain English process in general.

In response to specific questions raised by the Commission in the Release, we would make the following comments:

- *Neither the summary nor the risk factors sections should be limited in length, either by setting a page limit or a content-based limit.* These portions of the prospectus are among the most important parts of the document. The drafters of the document must be given the discretion, subject to overall requirements to be clear and concise, to make these sections as long or short as necessary to convey the relevant information. In a transaction with many significant risk factors, if faced with a restriction on the number of risk factors that may be included, a drafter will come up with ways to combine related points so as to comply with the formulaic requirement. This may not enhance the reader's understanding, as related but separate matters may be combined under one heading. Similarly, a page limit could have the effect of inappropriately cutting off relevant summary or risk factor disclosure, or inducing the drafter to crowd the page with smaller type or narrower margins, since those matters are less.
- *The contents of the summary section should be determined by the drafters.* The rules should not mandate that certain disclosure appear, or not appear, in the summary. Regulators should not substitute their judgment for that of the drafters, who must make a transaction-specific determination of what disclosure is relevant and appropriate under the particular circumstances.
- *A prospectus summary should not be required in all prospectuses.* The prospectuses used in many shelf takedowns are only two or three pages long. To burden these very short, straightforward prospectuses with a prospectus summary requirement is unnecessary. Once again, PSA believes that these drafting decisions should be left to the drafters, who can react to all the relevant facts and circumstances.

- *The ordering of risk factors should not be mandated.* All risk factors are matters of great import which all investors should read carefully and understand. PSA strongly opposes any implication that the risk factors toward the end of the section should receive less of the reader's attention than those appearing ahead of them. The issuer and underwriter and their counsel choose those matters which are covered in the risk factors section because they believe those matters to have the potential to materially adversely impact the investor. As a result of that potential, all such matters should receive the same serious attention of the reader.

4. Transitional Provision

PSA supports the proposed timetable for transition to the new rules, if adopted.

5. Commission's Cost-Benefit Analysis

On the benefit side of the analysis, we would point out that while the proposals may offer significant benefits to individual investors, the benefits to the sophisticated institutional investors that dominate the corporate debt markets are less clear.⁵

PSA believes that the Commission's analysis of the likely cost of the proposed rules overlooks the two factors described below.

Increase in length of most prospectuses. PSA believes that there is likely to be an increase in length of prospectuses which follow the plain English principles. We believe that such documents will be longer for two reasons:

- the rules encourage increased amounts of "white space"; even if no changes are made to the words printed in a document, increasing the amount of white space will increase the length of the prospectus; and
- we believe that the plain English version of most disclosure will be longer than the current version: if no longer permitted to use such shorthand methods as defined terms, concepts will be repeated over and over; if no longer permitted to use a highly technical term, even after explaining once what it means, the longer explanation will be repeated over and over rather than the term itself.

Transitional cost of converting to plain English disclosure. Most prospectus disclosure is borrowed from existing sources: either previous filings by the same issuer or previous similar transactions by other issuers. Until the point in the future when there are many available precedents that follow plain English principles, registrants will face a significant cost, in terms of management time and attention as well as outside legal and other advisors, in complying with these requirements. We estimate that this could increase by up to 50% an issuer's legal and other costs in preparing a new registration statement.

In conclusion, PSA would like to reiterate its commitment to working with the Commission on a cooperative basis to achieve plain English goals. Even though this matter is the subject of formal rulemaking, we would anticipate continuing our liaison with the SEC staff regarding dissemination of information concerning pertinent developments relating to the plain English initiative. In this regard, we would welcome the opportunity to highlight such developments in our newsletters and at conferences which frequently involve participation by issuer and buy-side representatives. Once again, PSA supports the thrust and goals of plain English; it is our belief that education is a key factor regarding its implementation; and we offer the resources of our Association to assist with this overall effort.

Questions or any suggestions concerning the items mentioned in this comment letter may be directed to the undersigned or Joseph W. Sack, PSA Senior Vice President, or Sarah M. Starkweather, PSA Vice President and Associate General Counsel, at (tel.) 212-440-9400.

On behalf of PSA, thank you for your interest in our views and for your ongoing cooperation on this matter.

Very truly yours,

Paul Saltzman
Senior Vice President
and General Counsel

cc:Members of PSA's Corporate Bond Division
The Honorable Arthur Levitt, Chairman, *Securities and Exchange Commission*
The Honorable Steven M.H. Wallman, Commissioner
The Honorable Norman S. Johnson, Commissioner
The Honorable Isaac Hunt, Jr., Commissioner
Brian J. Lane, Director, Division of Corporation Finance
Nancy M. Smith, Director, Office of Investor Education and Assistance
Ann D. Wallace, Senior Counsel to the Director, Division of Corporation Finance

¹ PSA represents approximately 220 securities firms and banks which underwrite, trade and sell debt securities, both domestically and internationally. PSA's member firms, many of which are active in the Corporate Bond Division, participate in approximately ninety-five percent of the initial distribution and secondary market trading of corporate debt securities, including investment grade and non-investment grade corporate debt securities as well as mortgage and other asset-backed securities. More information about PSA is available on PSA's Internet home page at <http://www.psa.com>.

² See 1995 Annual report of the Commission, appearing on the Commission's website.

3 Proposed Rule 421(b)(1) - (4).

4 Release at page 3155, quoting from Robert D. Eagleson, What Lawyers Need to Know About Plain Language, Michigan B.J. 44 (1994).

5 As of year-end 1996, PSA estimates that only about 10% of corporate bonds were held by individual investors.