



Securities Industry Association

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February 13, 1997

Jonathan G. Katz, Secretary
 Securities and Exchange Commission
 450 Fifth Street, NW
 Washington, DC 20549

Re: Offshore Press Conferences, Meetings with Company Representatives Conducted Offshore and Press Related Materials Released Offshore Securities Act Release 7356, Securities Exchange Act Release 37803, (File No. S7-06-96)

Dear Mr. Katz:

The Capital Markets Committee (the "Committee") of the Securities Industry Association ("SIA")¹ is pleased to respond to the request of the Securities and Exchange Commission (the "SEC") for comments on the above-captioned release (the "Release"). The Release proposes two measures, each designed to facilitate U.S. press access to offshore press activities. For the reasons set forth below, we support the proposals. We suggest, however, that the measures be broadened in several important ways.

A. Overview

The Release proposes one safe harbor under the Securities Act of 1933 (the "Securities Act Safe Harbor") and one under the Securities Exchange Act of 1934 (the "Exchange Act Safe Harbor"). Under the Securities Act Safe Harbor, an issuer, selling security holder, or their representatives, would not be deemed to have: (i) made an "offer" for purposes of Section 5; (ii) engaged in "general solicitation" or "general advertising" within the meaning of Regulation D; or (iii) engaged in "directed selling efforts" within the meaning of Regulation S; by allowing journalists access to offshore press conferences, meetings with issuer or selling security holder representatives conducted offshore, or press related materials released offshore, where or in which a present or proposed offering of securities is discussed. The Securities Act Safe Harbor as proposed would require four conditions to be met: (a) the press activity must be conducted offshore; (b) at least part of the offering must be conducted outside the United States; (c) access must be provided to foreign press rather than only U.S. press; and (d) any written materials to which journalists are provided access that relate to certain offerings likely to have significant U.S. investor interest must contain a cautionary legend and not attach any form of purchase order or coupon that could be returned to express interest in the offering.

The Exchange Act Safe Harbor would make clear that a bidder for securities of a foreign private

issuer, as well as the foreign target company, or their representatives, and any other person who has a filing obligation under the Williams Act, would not be deemed to have triggered the filing and procedural requirements of the Williams Act by virtue of providing U.S. or foreign journalists access to offshore press conferences, offshore meetings with their representatives, and press related materials released offshore, at or in which a present or proposed tender offer of securities is discussed. The Exchange Act Safe Harbor as proposed would be subject to satisfaction of three conditions: (i) access must be provided to both U.S. and foreign journalists; (ii) written materials must include a legend where there is likely to be significant interest in the tender offer by U.S. investors; and (iii) no means to tender securities or coupons that could be returned to indicate interest in the tender offer can be provided as part of, or attached to, any press related materials.

SIA supports both proposed safe harbors. As the SEC noted, access to offshore press activities for journalists writing for publications with a significant U.S. circulation have been unduly restrictive because of uncertainty as to whether such access would result in a violation of U.S. securities laws. We believe that attempts to restrict the flow of legitimate market-related information are neither in the best interests of investors nor necessary for their protection. Eliminating restrictions on *bona fide* press activities and permitting dissemination of appropriate information to the marketplace are welcomed first steps.

We believe, however, that the safe harbors as proposed are too narrow in scope. The situations they attempt to correct are consequences of the current offer-based regulatory scheme. The SEC is considering broader policy questions and regulatory reform to the capital-raising process and we applaud these efforts. We refer to our November 13, 1996 letter on the SEC's concept release regarding capital formation for a more complete discussion of our views on related topics, such as the concept of "conditioning the market." Because we previously expressed our views on those matters, we limit this letter to the question of press activities.

B. Securities Act Safe Harbor Needs to be Broader

The proposed Securities Act Safe Harbor Rule should be broadened in several important ways. It should be extended to apply to: (i) all foreign and domestic issuers and selling shareholders; (ii) underwriters and public relations firms working on behalf of such issuers and selling shareholders; and (iii) offerings made exclusively in the United States as well as offerings made both in the United States and offshore.

The SEC, noting the rapid advances in global electronic communications technology, stated in the Release that corporate transactions involving securities are increasingly newsworthy events, regardless of where in the world these transactions take place. This observation holds true whether the issuer is domestic or foreign and whether the transaction is offered in domestic or foreign markets.

The Securities Act Safe Harbor should not be limited to press activity conducted by issuers but, rather, should extend to activities by selling shareholders, underwriters and public relations firms. Many offerings include shares offered by selling shareholders. Additionally, with multi-tranche transactions, especially privatizations, issuers and selling shareholders often hire public relations firms to assist in the selling effort. The issuer and these other distribution participants do not control the press or determine the newsworthiness of financial information.

To the extent that the press deems an offering newsworthy, information regarding the offering is bound to be published. The accuracy and completeness of this information will be enhanced with freer access to the offerors, underwriters and public relations firms that are most familiar with the offering. The antifraud provisions of the federal securities laws, which would continue to apply under the safe harbor, should provide sufficient investor protection.

We believe that the Securities Act Safe Harbor should apply to offerings wherever they are made, including offerings exclusively in the United States. For a foreign issuer (or a U.S. issuer with significant offshore operations), a public offering is an important corporate event that could warrant a press conference. If an offering is deemed newsworthy by the press, it should not matter if the offering occurs onshore or offshore. An offshore offering requirement easily could be circumvented merely by adding a Canadian or Regulation S tranche to a U.S. offering. Moreover, at an initial stage of a planned or pending offering, it may not be known whether the offering will have both foreign and U.S. interest.

We believe that a test based on "intent" would be difficult to apply and would discourage appropriate press activity. A subjective standard would place artificial restrictions on the content of the information, including legitimate information, that may be discussed during the press-related activities or the information that may then be disseminated by U.S. journalists to investors in the United States. U.S. journalists and U.S. investors would be placed at a competitive disadvantage if they received different information than foreign investors. The SEC may find it difficult to enforce geographical limitations and, in many cases, individuals may receive the information due to the speed of advanced communication technology and blurred geographic boundaries. For the foregoing reasons, we recommend a purely objective test without limits on content or dissemination of information.

C. Exchange Act Safe Harbor Also Needs to be Broader

We believe that the Exchange Act Safe Harbor as proposed is too narrow for the same reasons that we see the proposed Securities Act Safe Harbor as being overly restrictive. We recommend that the SEC eliminate the limitation requiring press activities to occur offshore. The Exchange Act Safe Harbor should be expanded to include: (i) tender offers for foreign issuers made exclusively in the United States as well as those made offshore; and (ii) tender offers for securities of all foreign issuers, not strictly issuers that qualify for "foreign private issuer" status.

The geographic focus of both the press contact and the tender offer location requirements should be eliminated from the Exchange Act Safe Harbor. A requirement that all written materials be filed with the SEC either would deter bidders from extending the offer to U.S. security holders or would cause U.S. journalists to be excluded from offshore press activities. U.S. and non-U.S. journalists should be given equal access to offshore press conferences without triggering the filing and procedural requirements of Rule 14d-9.

U.S. news organizations have an increasingly global reach. Even where U.S. journalists are excluded from offshore press activities, in most cases they receive the information secondhand from foreign affiliates or other international news or wire services. It is not unusual for the excluded U.S. journalists to report the announcement of a tender offer immediately after, if not simultaneously with, the foreign journalists who were given access. By permitting U.S. journalists access to such press activities, whether they occur offshore or in the United States,

press reports will be more accurate, and U.S. press will be on more equal footing with foreign press. This timely reporting of market sensitive events in the United States will help reduce any competitive disadvantage U.S. security holders may experience resulting from differences in the substance and timing of such information.

D. Conclusion

We support the SEC's efforts to facilitate U.S. press access to offshore press activities. For the reasons set forth above, however, we recommend that the proposed safe harbors be broadened.

SIA is pleased to have this opportunity to express our views on the important issuers raised in the Release. If you would like to discuss these views in more detail or if we can be of any of any further assistance, please feel free to call the undersigned at 212-761-6686.

Sincerely,

Ralph Pellecchio
Chairman
Capital Markets Committee

Footnotes

1 The Securities Industry Association is the trade association representing more than 750 securities firms headquartered throughout North America. Its members include securities organizations of all types--investment banks, brokers, dealers, specialists, and mutual fund companies. SIA members are active in all markets, and in all phases of corporate and public finance. Collectively, they provide investors with a full spectrum of investment services and account for approximately 90% of the securities industry's revenue in the United States.