



## Securities Industry Association

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August 25, 2000

Mr. Jonathan G. Katz  
U.S. Securities & Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Re: Use of Electronic Media; File No. S7-11-00

Dear Mr. Katz:

The Securities Industry Association (“SIA”)<sup>1</sup> appreciates the opportunity to express its views on the above-referenced interpretive Release (“Release”) and request for comment regarding the use of electronic media by corporate issuers and intermediaries.

### **I. INTRODUCTION**

We commend the SEC for addressing such critical concepts as electronic delivery and issuer web site content in a timely manner. Keeping pace of the latest technological advances in the financial field and fitting them into a regulatory construct is a daunting responsibility. The Release reflects the diligent effort of the staff to gather information on emerging trends and practices from a wide variety of sources. We are especially

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<sup>1</sup> The Securities Industry Association brings together the shared interests of more than 740 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The U.S. securities industry manages the accounts of more than 50-million investors directly and tens of millions of investors indirectly through corporate, thrift, and pension plans. The industry generates more than \$300 billion of revenues yearly in the U.S. economy and employs more than 700,000 individuals. (More information about the SIA is available on its home page: <http://www.sia.com>.)

grateful to the staff for the many opportunities accorded the members of SIA to provide information, demonstrate new technologies, and otherwise convey our opinions.

The Release also provides helpful insight into the SEC's analysis of the application of antifraud provisions to website content. With the advent of the website as a means of information delivery, the public image of the corporation has been radically transformed. Formerly impenetrable information and communication barriers have fallen as companies use the Internet to share more information about themselves and interact with customers, investors and the general public. Companies need to know how they can use this important new communications medium properly, and the Release includes some helpful answers.

Also, in the section on Technology Concepts, the Release correctly identifies many of the current issues faced by practitioners in this industry. The dialogue generated by the questions posed should prove quite interesting and will hopefully provide the SEC with some guidance on what steps to take next.

Unfortunately, despite the positive aspects of the Release mentioned above, the Commission has not met the challenge of the bold advances in technology and communication with a bold response. The Commission has yet to challenge the assumptions underlying the existing regulatory model and respond with creative new approaches that respond to how business is transacted today. Arguably, the restrictions on written communications found in Section 5 of the Act have always been overbroad. However, until relatively recently, the fastest and most efficient way of communicating information has been by telephone. Such communications were permitted by Section 5.

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In recent years, the development of fast, cost-effective and broadly accessible means of effective communication (i.e., email, telex, fax and the internet) has meant that the most commercially efficient means of communication is now electronic rather than telephonic. However, unlike the telephone, electronic means of communication are deemed to be written for purposes of Section 5 of the Securities Act. The rapid pace at which transactions occur in today's marketplace requires extensive communications. For example, with increased communications, we are able to reduce capital risk by clarifying the status of buyers and sellers earlier in the transaction, and reduce systemic risk by arranging for terms of settlement in closer proximity to the transaction time. These developments require the SEC to revisit the scope of Section 5 and Rule 134.

The principles of investor protection are bedrock and should not be transient. The means of assuring those principles, however, need to be constantly challenged in light of the SEC's concomitant responsibility to promote efficiency and competition. The SIA comment letter seeks to challenge preexisting views on two areas that are featured prominently in the Release - electronic delivery of documents and conducting an offering through the internet - and to begin a dialogue about developing a more flexible regulatory regime.

The first part of the letter focuses on electronic delivery and urges the Commission adopt a new standard that makes investor access to documents sufficient to meet the delivery requirement under appropriate circumstances. It is time to reexamine the comforting notion that customers are any more inclined to read and benefit from information that is sent via US mail than by material that they themselves choose to retrieve via alternative sources, such as the internet.

Second, we provide a response to the Commission's questions on the logistics of electronic only offerings.

The third part of the letter focuses on procedures for conducting online offerings and communications in general. SIA urges the Commission to go beyond case-by-case consideration of individual online offering models and develop flexible rules that accommodate the whole range of distribution channels. In addition, we urge the Commission to rethink its whole approach to communications and to take significant steps to adapt existing SEC rules to insure that they are no longer an unnecessary impediment to commercially efficient transactions, while maintaining the important investor protections provided by the Securities Act. Our letter recommends that the SEC take specific action in two areas: (1) the scope of permitted communications during the public offering process, and (2) the mechanics of the "order-taking" process.

## **II. ELECTRONIC DELIVERY**

### **A. ACCESS EQUALS DELIVERY**

Generally, SIA believes that for a growing number of customers "access equals delivery." As described in the Release, access equals delivery means that the mere posting of a document to which a customer has a legal right under the federal securities laws is sufficient to constitute delivery to that customer.

It is our view that issuers and broker-dealers may offer a choice and range of electronic services to investors and customers. The customer should be able to choose the types and level of service it wishes, so long as the documents which must be available to the customer are made available in the manner agreed by the customer. Thus, a

broker-dealer could offer a traditional paper based service and a customer could choose that. Similarly, a broker-dealer could offer a pull model of electronic document availability, in which the customer accesses information from a website, and a customer could choose that. Still other broker-dealers could offer a push model, one in which notices of availability of particular documents are sent to the customer, and the customer could choose that. In each instance, the customer is choosing a service level, and a price that is commensurate with the level of service selected. Each of the methods is compliant with the law, in our view, because the customer has specified how it wishes to receive information.

At least two classes of customers, institutional investors and individual online investors expect to access information electronically, rather than have it delivered to them. Large numbers of institutional investors employ people whose job it is to seek out and obtain information about actual or potential investments those investors have made or may make. There is also a large and growing class of individual online investors whose preferred and primary means of interaction with their broker-dealer is electronic. Both classes of customers desire and expect to receive trade details and other information through electronic means rather than through paper mail. These customers also expect to receive an electronic advice of an executed trade by accessing their accounts online.

We believe that if such customers so choose, issuers and broker-dealers should be able to save the costs of printing documents or initiating contact with them when one of the documents to which they are legally entitled becomes available. That choice would be manifested in accordance with the guidance provided in the Release with respect to obtaining consent to electronic delivery. Accordingly, an institutional investor may agree

prospectively to obtain proxy statements or prospectuses at a location specified by the issuer. Such an investor may also agree to go to a broker-dealer's designated online location and obtain trade confirmations that can be directly downloaded into its own books and records. This can result in cost savings to customers, issuers and broker-dealers, as it will save the costs of paper delivery, while permitting the institutional investor to more easily and readily obtain information or enter it into its computerized record keeping system.

In the future, we expect a growing portion of the investing public to have and prefer electronic access to securities information and securities accounts (see chart below). Marketing surveys conducted by our firms indicate many customers already feel overwhelmed by the volume of email they receive and would actually prefer to access or "pull" information on their own terms. As this segment of the investing public grows, the "access equals delivery" standard will ultimately become universally acceptable. We believe the Commission should revisit the access equals delivery question on a periodic basis as investor electronic access grows and investor behavior shifts toward pulling information rather than having it delivered.

We note that the Release reiterates the concept that an issuer may choose to make an offering exclusively via electronic means. Consistent with this policy, we believe that a broker-dealer should also have the right to choose how it interacts with its customers. Accordingly, a broker-dealer should be permitted to conduct business with all or a segment of its customers exclusively through electronic means. This principle should apply to all broker-dealers, not just e-brokers. The SEC should clarify that traditional

brokers may require customer consent to electronic delivery as a precondition to the use of electronic platforms or services provided by such broker.

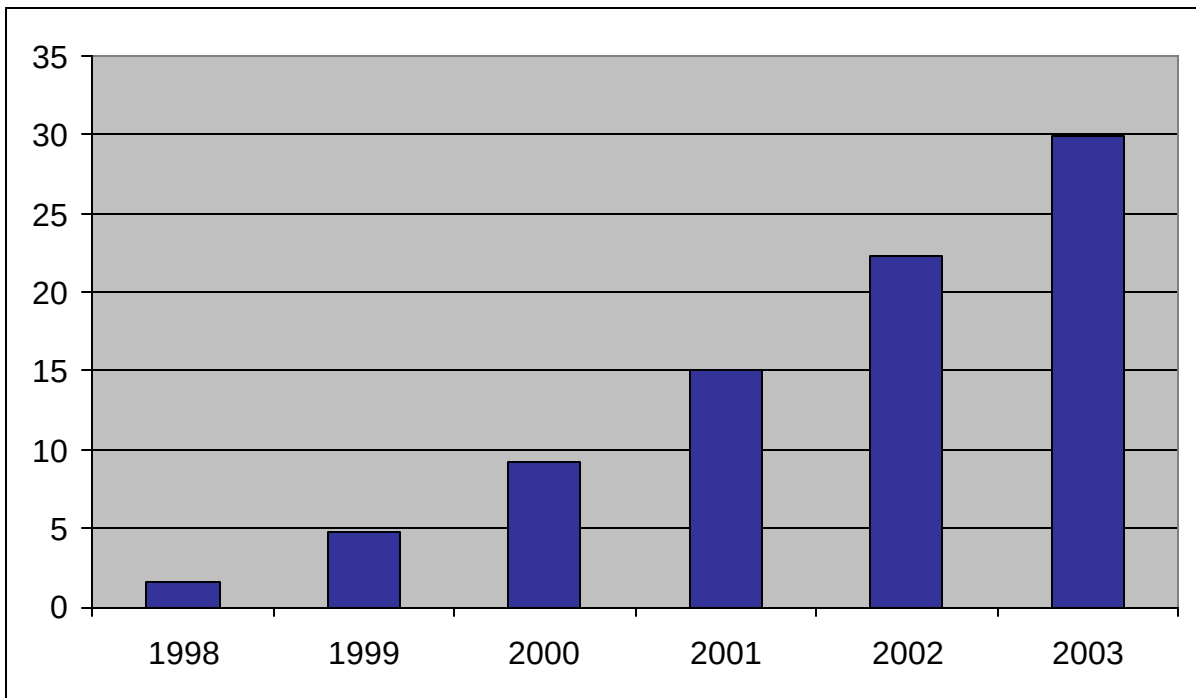
SIA believes that at this stage of the development of electronic media of communication, it should remain an investor's choice based upon his or her computer and other electronic equipment, technical savvy and personal behavior patterns.

You have specifically asked about the time it takes for delivery of documents. We believe that at current access speeds, there is no real impediment. However, we believe that this is one reason that the choice should remain with the customer about how and through whom it chooses to invest. We also believe that when one compares the time it takes to obtain a prospectus or proxy statement over current dial up internet connections to the two to four days that it takes for receipt after a paper prospectus or proxy statement is mailed, the "disadvantages" of electronic delivery are more imagined than real. For example, electronic delivery of the mutual fund prospectus allows the investor to have this additional information available for consideration at the same time. Also, electronic delivery of confirmations for secondary trades enables customers to review the trade information on trade date so that any discrepancies involving commissions, number of shares purchased or price can be resolved immediately rather than two days later.

We note that even today's internet technology allows for instant access to and retrieval of documents. With the emergence of DSL, cable and satellite technologies, the speed of delivery to users will only get faster. Moreover, as the SEC is probably aware from its own experience as the operator of a website, technological barriers to readability

of documents have all but vanished as more choices for document viewing and downloading have become available.

| <i>Internet Households</i> |                                  |
|----------------------------|----------------------------------|
| <i>Year</i>                | <i>U.S Households (Millions)</i> |
| 1998                       | 1.64                             |
| 1999                       | 4.79                             |
| 2000                       | 9.27                             |
| 2001                       | 15.1                             |
| 2002                       | 22.3                             |
| 2003                       | 29.9                             |



#### B. BURDEN SHIFT

You have asked for comment on the “burden shift” from issuers to investors associated with electronic delivery and the impact on burden shift to the Commission’s

mission of investor protection. We do not believe that any burden has been shifted or will be shifted by the use of electronic means of delivery. Whether information is pulled in by an investor or pushed out to an investor, the existing means of electronic delivery make it easier than ever for the investing public to obtain information. Further, we anticipate that more issuers and intermediaries that are providers of information may develop additional alternative means of providing electronic notice. For example, proxy solicitation firms may develop web sites that have tables of issuers and disclosure document availability with links to the disclosure location.<sup>2</sup> Similarly, sites such as Freeedgar ([www.freeedgar.com](http://www.freeedgar.com)) may develop the same types of information. Broker-dealers may include within their web sites, as a service to customers, links to those sites or develop their own to assist customers in accessing documents. A broker-dealer may seek to obtain electronic consent to delivery of such documents from its customers<sup>3</sup> so as to speed delivery and lower costs. We do not see the means of delivery or access as a significant factor affecting the Commission's mission, so long as the information is actually available and subject to the standards of the securities laws.

#### C. ENTITLED DOCUMENTS/DISCRETIONARY DOCUMENTS

Finally, we note that you have maintained the distinction between documents to which a person is entitled under the federal securities laws and those that are discretionary with the sender of a document. The entitled documents are, as set forth in

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<sup>2</sup> We note that in accordance with previous guidance from the Commission, issuers and proxy solicitation firms ask investors if they wish to receive documents electronically and provide notice of availability via email.

<sup>3</sup> This would permit electronic access not only for non-objecting beneficial owners, but to objecting beneficial owners as well.

this Release and in the 1995 and 1996 Releases, confirmations of transactions, prospectuses (preliminary and final) and proxy statements. Discretionary documents include advices of trades, research reports, account statements<sup>4</sup>, notices sent in accordance with Rules 134 or 135 in connection with public offerings, among others. SIA agrees with the Commission that this distinction should remain in place.

#### D. ELECTRONIC SIGNATURE LEGISLATION

Congress' enactment of the Electronic Signatures in Global and National Commerce Act ("ESIGN") results in a number of uncertainties for firms trying to comply with the SEC's guidance and requirements on the one hand, and ESIGN's requirements on the other. In many cases the two sets of requirements are compatible; in other cases it is unclear. While the bulk of this letter argues for significant changes in the SEC's interpretations with respect to electronic delivery, it is SIA's view that ESIGN did not preempt the SEC's role as the regulator charged with interpreting the application of the 1933 and 1934 Acts to the delivery of documents to investors. SIA believes that the SEC should publicly confirm that it concurs with this position as soon as possible. If the SEC does not agree with this interpretation of ESIGN, it should promptly utilize the interpretive rulemaking and exemptive authority provided in the legislation<sup>5</sup> to clarify that existing rules, regulations and interpretations will remain in effect. Set forth below are some of the differences between the SEC's current rules and ESIGN:

First, the 1995 and 1996 Releases summarize the attributes of informed consent while Section 101(c)(1) of ESIGN imposes its own different consent requirements.

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<sup>4</sup> We note that account statements are generally subject to the rules of self-regulatory organizations, the exception being the requirement under Rule 15c3-2 to a statement of free credit balances that is usually contained in account statements.

Second, the Release clarifies that investors may consent to electronic delivery telephonically. Section 101(c) of ESIGN provides several means by which customers can consent electronically, but does not specifically mention telephone consent. The Commission should make clear that telephonic consent meets that requirement.

Finally, one attribute of the Commission's guidance on electronic delivery from 1995 to the present has been its general approach of leaving details such as the format of the consent and the format of the electronic disclosure itself to the industry and the market. Section 101(c)(1)(C)(ii) requires that a "consumer consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access the information in the electronic form that will be used to provide the information that is the subject of the consent." By contrast, the Release affirms that PDF is an acceptable form of delivery if firms or issuers inform investors of the requirements necessary to download PDF when obtaining consent to electronic delivery.

### **III. ELECTRONIC ONLY OFFERINGS OF SECURITIES**

The Commission has asked a number of questions about electronic only offerings of securities. Properly understood, the delivery of the preliminary and final prospectuses are conditions to offer and sale, not a matter of right. Thus, if an issuer chooses to conduct an electronic only offering, the consequence of a potential investor withdrawing consent to electronic delivery of documents (assuming that the withdrawal occurs prior to purchase) is that the customer cannot purchase/be sold the security in question, not that

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<sup>5</sup> Section 104(d) of the Act

the customer must be sent a prospectus in paper format. It is important to remember that a customer does not have the right to purchase a security until a lawful contract is made.

You also ask how issuers and intermediaries would comply with their delivery obligations other than by providing paper delivery in the event of technical difficulties. The answer depends upon the nature of the technical difficulty and the document to be delivered.<sup>6</sup> Realistically, these concerns are mitigated by the operation of backup electronic sites and the structure of the Internet. We note that no member of our committee is aware of a web site having been unavailable for these purposes for any material period of time. As is the custom today with existing operational issues, firms should be able to choose how they want to address the unlikely event of an outage that interrupts the offering process, whether by paperback-up or some alternative method.

#### **IV. ONLINE PUBLIC OFFERINGS & COMMUNICATIONS**

The internet is playing an ever increasingly important role in the offering of securities. It is likely that in the near future a significant portion of all of the securities distributed in registered public offerings in the United States will be available online. While the offer and sale of securities online to retail investors has received the most attention, and is subject of the SEC's only No Action letter (the *Wit Capital* letter) with respect to non-auction, online offerings, the number and dollar amount of online offerings made to institutional investors is growing very rapidly and will no doubt surpass the volume of online sales to retail investors. As with other areas of sales on the internet, the

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<sup>6</sup> If the technical difficulty is with the customers computer or his or her internet service provider, there can be no fault with the issuer or the intermediary, just as problems experienced by the postal service are not imputed to broker-dealers today.

business-to-consumer (“B to C”) sector has developed first, but the business- to-business (“B to B”) sector has the potential to be orders of magnitude larger than the initial (“B to C”) sector. We point this out for two reasons.

First, to illustrate the need to develop flexible rules that accommodate the whole range of distribution channels -- from offers and sales to retail investors that may be new participants in the public offering process, to offers and sales to the largest and most financially sophisticated institutional investors that have been long-term participants in the new issue markets. The relevant rules must provide maximum flexibility. They must accommodate, on a rational and fair basis, offers and sales to institutions and offers and sales to individuals, as well as offers and sales made both online and off-line through traditional distribution channels. The legal issues are not new, but the existing rules need to be adapted to apply to new channels for distributing securities.

Second, to urge the Commission staff to move beyond the initial stage of focusing on online offerings as interesting and relatively unique new offering methodologies to now come to grips with the need to take significant steps to adapt existing SEC rules to insure that they are no longer an unnecessary impediment to commercially efficient transactions, while maintaining the important investor protections provided by the Securities Act. The existing rules can be substantially amended in order to promote these important changes in our capital markets without diminishing investor protections. Failure to make changes of the type that we describe below are already costing issuers, underwriters and investors significant sums of money and consuming valuable time and resources. If left unaddressed, these costs will begin to erode the competitive advantages that our capital markets currently enjoy vis-à-vis offshore markets.

We believe that the Commission should amend its existing rules and staff positions in at least two important areas: (1) the scope of permitted communications during the public offering process, and (2) the mechanics of the “order-taking” process.

A. COMMUNICATIONS DURING THE PUBLIC OFFERING PROCESS

The Securities Act places very significant restrictions on the use of written communications by distribution participants in connection with the public offering of securities in the United States. The existence of these restrictions is a central and absolutely vital component of the disclosure and liability structure that underlies the Securities Act. We do not advocate changes in the Securities Act rules nor staff interpretive positions that would alter or undermine the existing statutory framework.

However, the existing rules and interpretations pre-date the internet, facsimile transmissions and, perhaps most importantly, email. The 21<sup>st</sup> century has brought us a world in which we communicate without global boundaries at the speed of light. Transactions that used to take months are done in days. Primary and secondary offerings already settle in just three trade days and T+1 trade settlement for secondary transactions will be a reality in the near future. The Commission has not kept up with these changes in communications. This has resulted in significant and in some cases absurd distortions in the public offering process. For example, both the Commission and the industry have known for years that confirmations are sent through the DTC settlement system in advance of the final prospectus. The existing DTC settlement process (which has significantly reduced the risk of failures and delayed settlements) would not work without such confirmations, yet the Commission has not modified its rules to cope with this reality.

The time has come (it actually is long overdue), to make some pragmatic changes in the rules to permit public offering participants to communicate with each other in a commercially efficient manner. We have been making the suggestions set forth below for a number of years. The SEC has not been able to take the steps necessary to deal with these problems. In fact, recently the Commission staff has begun taking positions with respect to written communication in connection with offerings that actually are more restrictive than the interpretations that it has taken for the past 20 or more years.

The Commission previously proposed a solution to the problem of communications in connection with an offering in the “free writing” provisions of the Aircraft Carrier proposal. Without revisiting those proposals in detail, the proposals involved obligations to file all written material with the SEC and would have created Section 11 liability for the content of such materials or Section 12(a)(1) liability for the failure to file all such materials (not to mention serious concerns about the extent of the liability of distribution participants for materials prepared by other distribution participants). Those proposals actually would have created restrictions on commercially efficient communication that would be more severe and cumbersome than the existing system and would have resulted in far less meaningful disclosure to investors than is available under the present rules. We desperately need to “debottleneck” the process of communicating during registered offerings to the greatest extent possible without losing important investor protections. The Aircraft Carrier proposals were not the way to solve the problem.

We do not advocate, as others have done, the removal of all of the existing restrictions on communications before, during and after the public offering process.

Instead we are proposing a series of changes that would maintain the existing statutory framework and would greatly enhance the efficiency of the offering process (thereby reducing costs and systemic risks), without reducing investor protections. What is required is not a rule permitting free-writing, but rather a rule that permits commercially efficient communications in connection with the offering process. Our proposals would not result in the prospectus becoming an irrelevant legal liability document, nor would they permit salespersons to send their clients potentially misleading or fraudulent written communications about the issuer, its financial condition or its prospects. We believe our proposed framework would greatly expand the ability of distribution participants to, among other things, communicate in writing limited information about the securities, the timing of the offering, changes in the terms of the offering, account opening and “order-taking” mechanics, marketing events, allocations and the pricing terms, as well as basic information about the issuer.

In order to do this, we propose that Rule 134 should be significantly revised. While, it was intended to be a safe harbor, the Commission staff has increasingly come to view it as a statement of the exclusive manner in which written communications made after the registration statement has been filed, other than the registration statement and the prospectus, can comply with Section 5 of the Act. The *Wit Capital* No-Action letter gave market participants the initial hope that the Commission had recognized the need to develop a very different interpretation of the scope of Rule 134 and, in general, the definition of an offer or sale under Section 2(a)(3) of the Securities Act. *Wit Capital* was a revelation to distribution participants. It appeared to reflect the adoption of several enormously important concepts with regard to the interpretation of Rule 134 and Sections

2(a)(3) and 5. *Wit Capital* appeared to stand for the proposition that written communications that were narrowly constrained in terms of the scope of the statements made about the company and that were not “salesy” or did not “hype” the offering (even if the content of such communications were outside the very narrow list of items permitted in Rule 134), would be permitted if they were part of a process for facilitating the offering. In other words, an offer and sale as used in Section 2(a)(3) would be more narrowly read to refer to communications that were designed to “sell” the security. In this context, the focus appeared to be on what laymen and Madison Avenue think of as sales efforts – written communications intended to convince you to buy something, with the emphasis on statements made to cause you to make the purchase. We hoped that the Commission was distinguishing such statements from written communications focused on letting the potential buyer know that the offering was being made or which actually facilitated their access to basic factual information about the issuer or the offering, as well as the prospectus. *Wit Capital* even seemed to recognize that making it easier for an investor to make an informed investment decision and execute that decision is consistent with the mandate of the Commission, provided that investor protection was not diminished.

However, the Commission seems to have lost momentum after issuing the *Wit Capital* letter. The Commission staff has, in certain respects, actually narrowed the interpretation of *Wit Capital*. Despite early promises, the much awaited Release did not really address the online offering area. In addition, the Commission staff has begun taking certain very restrictive positions with respect to written communications.

Rule 134 is too restrictive. Furthermore, the Commission staff has recently begun to interpret it in a manner that is even more restrictive than the way in which even the most conservative securities law practitioners have interpreted the Rule. The underlying principle of the Rule ought to be to provide a safe harbor, once a registration statement has been filed, for the commercially efficient written communication of information about an offering. This should be done in a manner that is not intended to convince a potential buyer to purchase the security and which should include or provide a hyperlink to the prospectus or indicate where a prospectus otherwise can be obtained by phone, fax or mail. There should be no question of the legality, once a registration statement has been filed, of an email to a client inviting an investor to a road show, a cover letter (in writing or by email) including a prospectus, an email informing an investor (online or off-line) of a potential offering, or a letter including basic information about the mechanics of a directed share offering. Once the registration statement is effective, it should also be clear that an email to an investor or a DTC confirm, whether or not accompanied or preceded by a final prospectus, is not a violation of Section 5. Therefore, we would suggest the following specific changes:

***Availability of a Prospectus.*** Intense debate and enormous confusion surround the issue of whether a Section 10 or a Section 10(a) prospectus must be available to an investor in order for an issuer or underwriter to communicate in a manner subject to the safeharbor provided by Rule 134. The question seems to turn on whether a preliminary prospectus filed with the SEC that omits certain required information (generally pricing-related information such as the estimated price range or the number of shares being offered) is a Section 10 prospectus of the type required to be available prior to sending a

communication that falls within the Rule 134 safe harbor. The SEC staff has taken the position that a Section 10(a) prospectus (including all required information other than that permitted to be omitted pursuant to Rule 430A) is required in order to come within the safe harbor. The staff has extended this analysis to situations in which there is an effective shelf registration statement.

We believe that written communications pursuant to Rule 134 should be permitted whether or not the prospectus meets the requirements of Section 10(a). Once a registration statement has been filed, a Section 10 prospectus can be mailed to investors pursuant to Section 5(b)(1). A Section 10(a) prospectus is required in order to deliver a security pursuant to Section 5(b)(2). Indications of interest and conditional offers to buy can be solicited pursuant to Section 5(c) once a registration statement has been filed, which need not include a Section 10(a) prospectus. Limiting the scope of Rule 134 to situations in which a Section 10(a) prospectus is available makes no sense in light of Section 5(c) and would seem unlikely to survive judicial scrutiny as a matter of basic statutory interpretation. The drafters of the Securities Act carefully delineated situations where a Section 10 versus a Section 10(a) prospectus is required. Rule 134 simply refers to Section 10. We believe that the Rule should be interpreted as written.

Another, less preferable, way of eliminating the negative impact of this interpretation of Rule 134 by the Commission staff would be (i) in non-shelf offerings to permit the use of a Section 10 prospectus as long as the underwriters made available a Section 10(a) prospectus at least 48 hours before accepting either conditional offers to buy or indications of interest, and (ii) in shelf offerings to drop the Section 10(a) prospectus requirement. This would facilitate communications announcing an offering at

the time of filing, while meeting the policy objective of insuring that either a preliminary prospectus or a base prospectus is available before investors are asked to make an investment decision.

Yet another solution for certain types of offerings would be to provide the same accommodation to U.S. companies that is currently provided to foreign companies. Permitting U.S. issuers to have their registration statements reviewed on a confidential basis by the Commission staff prior to filing would reduce the number of situations in which issuers or underwriters would find it advantageous to utilize a Section 10 prospectus that is not a Section 10(a) prospectus. As the Commission grants this courtesy to all foreign issuers as a matter of course, no changes would appear to be required to be made in the Securities Act or the Rules to provide “most-favored nation” status to U.S. issuers.

Finally, we believe that the Commission staff should either adopt a more flexible interpretation of the existing disclosure rules or amend those rules in order to permit more flexible “price discovery” and various types of auctions of new issues of securities. This would help reduce the number of circumstances in which prospectuses would be deemed to comply with Section 10, but not Section 10(a). Rule 134 would be more widely available, even as it is currently drafted. See the discussion below under “Auction Mechanics”.

***Information About the Issuer.*** Even as customarily interpreted by practitioners, Rule 134 provides insufficient latitude to provide information about the issuer. As currently interpreted by the Commission staff, the Rule is virtually useless because it does not permit even the most basic information to be disclosed. Practitioners always

thought that the brief description in Rule 134(a)(3) could at least be read to pick up the first few sentences describing the issuer from the company description in the prospectus summary, even if words or phrases like the “leading” or the “world’s largest” were included. After all, this language was included in the prospectus and the issuer and underwriters were willing to accept Section 11 liability for such statements and to provide a “link” to the prospectus (either by furnishing a physical copy or a hyperlink to an online prospectus). The Commission staff has recently expressed a “strict constructionist” view of the entire Rule. Issuers have been threatened with potential liability for violating Section 5. “Brief” now seems to mean only two or three sentences, regardless of the nature of the business being described. These Commission staff positions neither promote the efficient operation of the capital markets nor protect investors. In fact, reducing complicated descriptions of businesses to three sentences without any adjectives may disadvantage investors and has the potential to be misleading.

We believe that the objective should be to allow sufficient information about the issuer to permit a potential investor to ascertain whether or not the offering is one in which the investor might be interested in participating. The issuer’s name, country of incorporation, country of headquarters, corporate form, number of years in which it has been operating, market capitalization, as adjusted for the offering, revenues, profits and assets as of the end of the last fiscal year and any interim period subsequent thereto, the exchange(s) on which the issuers securities are listed and the symbol under which they are quoted, the industry sector in which the company operates as well as a brief description of the issuer’s business (not inconsistent with the prospectus and not limited

to any particular number of words or sentences, nor edited for descriptive adjectives) should be permitted.

We are not proposing the creation of a “summary prospectus” nor allowing free-writing about the issuer. Investors, especially institutional investors, are increasingly faced with information overload. There are so many offerings, coming so quickly and with so much information to digest, that investors do not have the time necessary to examine every prospectus in order to determine whether they might be interested in investing. We are not talking about having sufficient information to make an investment decision, but instead about having sufficient information to permit an initial screening of the available offerings. Investors need enough information to decide which offerings are worth the further investment of time and resources required to make an informed investment decision.

Many investors are focused, either by investment guidelines or their own preferences, on investing in certain types of companies. For example, some funds invest in mid-cap companies, others invest in companies located in a certain region or country, while other funds are focused on certain industry sectors. Rule 134 should be at least broad enough in scope to allow sufficient information about the issuer to be provided to permit focused investors to determine whether or not the offering is of the type of company in which they might be interested in investing. The Rule could include an express prohibition against including information not included in or derivable from the prospectus and a prohibition on information of a type that expressly discusses the merits of or reasons for investing in the company. Just the facts and just the information needed

to make an initial general determination of interest and to identify the offering with respect to which the written communication is being made.

***Information About the Securities.*** The Rule should simply permit the inclusion of any information about the securities being offered not inconsistent with the prospectus. The proposed terms of the security, including pricing related terms should be permitted. The total size of the offering, number or amount of securities being offered, any green shoe and current market prices of a security currently being traded are other terms that should be permitted. Information about where the securities are or will be listed, ratings, ticker symbols, CUSIP or other security identification code, and any similar information should also be permitted.

***Information About the Offering.*** The same principle should apply with respect to information about the offering. The names of any underwriters or selling stockholders, the method of underwriting and distribution, anticipated timing of the offering, information about when and how conditional offers or indications can be submitted and will be accepted or the securities will be allocated, any jurisdictional or other selling restrictions, availability of an online roadshow or any other marketing events that are permitted, methods and mechanics of settlement, including payment in kind or foreign currency and other similar information. In addition, information about the price of comparable securities or hypothetical pricing models should also be within the scope of the Rule. Finally, any description of any risks associated with investing in the offering should be allowed. If the information is factual, helpful to an investor, not inconsistent with the prospectus, is not presented in a manner intended to “hype” the offering or otherwise sell the securities, it ought to be permitted.

**Information About Allocations.** While there may be other ways of addressing this issue (such as clarifying the reference to confirmation in Section 2(a)(10) to limit it to a 10b-10 confirmation), Rule 134 should be amended to clarify that a communication after effectiveness and pricing made to an investor or a third-party information service either online or off-line that provides information about an investor's allocation, the terms of the securities and settlement information, should be permitted whether or not accompanied or preceded by a final prospectus and without regard to whether the final prospectus has been filed or distributed. This sort of notification should not violate Section 5(b)(1). We thought that this was one of the things that the *Wit Capital* letter could be read to permit, but the Commission staff has generally refused to expand the application of this aspect of the letter to other comparable situations. There is absolutely no public policy rationale for requiring the delivery of a final prospectus in this situation. All participants to the transaction are significantly disadvantaged by the inability to quickly and clearly communicate terms of the securities that have been sold and the settlement mechanics. This rule is unnecessary. The Commission has proposed eliminating the delivery requirements with respect to final prospectuses. We strongly urge the Commission to take immediate steps to finally address this problem without waiting to publish a comprehensive online offering Release.

**Other Information.** All other information currently permitted by Rule 134 should continue to be within the scope of the Rule. If online, the communication should provide a link to the prospectus or include the prospectus. Otherwise the information currently required by the Rule concerning availability of a prospectus should be included. In addition, the Rule should clarify that other information that does not constitute an

offering of the securities being offered may be included in a Rule 134 communication. Thus, administrative or account opening or other similar types of information may be included with the Rule 134 information without jeopardizing the safe harbor.

**Websites and Cul de Sacs.** The Release provided some helpful guidance with respect to this area; however, Rule 134 should also provide some clear guidelines with respect to the application of Section 5 to hyperlinks and website “navigation” in connection with online offerings. Hyperlinks to online roadshows, the prospectus, and incorporated documents should be explicitly permitted. Other “general” site navigation should also be clearly permitted. For example, if the offering details page includes the general site navigation tools at the top of the page to access “Research,” “Home Page,” “Market Commentary,” “Help,” “Account Information,” “Deal Calendars,” etc., this should not create a Section 5 problem. On the other hand, navigation or hyperlinks that are specific to the particular offering, other than those described above (roadshows, prospectus, etc.), would not be allowed. In addition, a research page could not include research not otherwise permitted under Rules 137, 138 or 139 or any other available exemption, nor could a market commentary page include headlines or information specifically prepared or highlighted in connection with the offering. However, the fact that a third-party information feed which is not (edited) by the underwriter runs an article on the offering (assuming the article is not itself based on a communication by a distribution participant that would otherwise violate Section 5), should not give rise to a Section 12(a)(1) cause of action.

**Shelf Offerings.** The application of the Rule to shelf offerings is also extremely confusing. The Rule never anticipated shelf offerings, nor for that matter, did the

Securities Act. When the shelf rules were first adopted, the Commission may have lacked the necessary authority to make sensible adjustments to the Securities Act and the relevant rules in order to deal with the offerings conducted pursuant to a shelf registration statement. Clearly, the Commission now has the authority to rationalize the Rules for shelf offerings. To begin with, a Section 10(a) prospectus (a preliminary prospectus supplement) should not be required in order to comply with Rule 134 in connection with a shelf offering, nor should it be a prerequisite to providing an online roadshow. We believe that Section 5 should be read to allow “free-writing” in connection with a shelf offering, if that writing is accompanied or preceded by the base prospectus. At a minimum, whether or not Rule 134 is amended in the manner described above for non-shelf offerings, it ought to be amended to permit the information described above in connection with shelf offerings.

#### B. THE ORDER TAKING PROCESS

The other exciting aspect of the *Wit Capital* letter was the fact that it permitted solicitation of conditional offers to buy prior to effectiveness that could, with certain exceptions, be accepted after effectiveness without reconfirmation. This mechanism essentially made online retail offerings possible. This was a very significant step in the right direction by the Commission staff, one that it has not attempted to roll back in the intervening period. However, while the Commission staff has taken a commercially efficient and forward-looking view in permitting this mechanism, it has limited the full and effective application of this mechanism by imposing a variety of “investor protection” steps. Although the Commission’s staff’s intentions are laudable, the imposition of these somewhat arbitrary requirements to all offerings in which conditional

offers to buy are being solicited is both cumbersome and expensive. Most importantly, the very investors intended to be protected by these measures are the loudest critics of their application. We would propose the following changes:

**Reconfirmations.** The Commission staff currently requires potential buyers to reconfirm their conditional offers to buy in the event that: (1) more than seven business days have elapsed between the time the conditional offer was made or last reconfirmed and the date the offering is priced, (2) the offering prices outside of the most recent estimated range in an IPO or at a premium of more than 5% or discount of more than 20% to the last sale price in a follow-on offering, (3) the estimated price range changes, or (4) the preliminary prospectus is required to be recirculated.

As a general matter, we see no need for the Commission to interpose itself in the contractual arrangements between the underwriters and the buyers so long as the three cardinal rules are followed: (1) no sale is made prior to effectiveness, (2) no offer or sales or solicitations of indications of interest or conditional offers to buy are made prior to filing, and (3) no monies are collected in connection with the sale prior to effectiveness. Otherwise, we believe that the underwriters ought to be free, subject to principles of contract law and any other applicable rules or regulations, to structure the order-taking process as they see fit. There is clearly no statutory basis for the time periods or other rules relating to reconfirmations.

At the very minimum, the requirement that conditional offers need to be automatically reconfirmed solely because a period of more than seven business days has elapsed since the conditional offer was made or more recently reconfirmed should be eliminated or at the very least a longer period of time (at least 15 business days) should

apply generally or to conditional offers made by accredited investors. Investors hate this requirement. The typical marketing period for an IPO is approximately 15 business days. If the underwriter's allocation policy is on a first-come first-serve basis, by necessity an investor wishing to maximize his or her likelihood of receiving an allocation must be prepared to go through the reconfirmation process. High net worth investors that may only be able to get 100 or 1000 shares in an offering find the time involved in reconfirming relative to the amount of money involved in terms of their entire portfolios to be completely disproportionate to the economic stake involved.

Similarly, the reconfirmation requirement in situations where the estimated price range changes or the deal prices outside the range should either be eliminated or at least have a 20% change provision like that included in Rule 430A.

***Waiting Period After Effectiveness.*** The requirement that underwriters wait at least one hour after they have sent a notice of the effectiveness of the registration statement to investors that have submitted conditional offers, before accepting any conditional offers, should be eliminated. There is no statutory basis for the rule and it adds delay that benefits neither the underwriters nor the investors. The investors want to be notified of their allocations as soon as possible. The timing of effectiveness, a concept that few grasp despite FAQs and education materials on underwriter websites, bears no necessary relationship to the pricing of the transaction.

***Auction Mechanics.*** The Commission should also take steps to insure that, to the extent that there is demand for such types of offerings, its rules facilitate, rather than impede, the ability of distribution participants and investors to participate in new methods of distributing securities, including auctions. The Commission has recently issued three

No Action letters relating to online transparent “dutch” auction offerings of securities, however, the Commission’s existing interpretations of its rules with respect to IPOs make online auctions and other “price-discovery” mechanisms unnecessarily cumbersome and impractical. We would suggest that where an auction is to be conducted in connection with an IPO, either: (1) no estimated price range be required based on Instruction #2 to paragraph 501(b)(3) of Regulation S-K; (2) a very wide estimated price range be permitted; or (3) if a range is included and the auction process and the consequences thereof (such as on the use of proceeds) are adequately disclosed, that recirculation of the preliminary prospectus not be required regardless of the price actually set in the auction. The bottom line is that the Commission staff needs to adopt a much more flexible approach with respect to interpreting its rules to facilitate new forms of offerings, so long as basic investor protections are not jeopardized.

## **V. Conclusion**

The recommendations included in this comment letter are intended to encourage the SEC’s thinking on the use of electronic media to evolve along with the technology. Today’s communications tools promise to convert customers from mere downstream recipients of information to fully interactive partners in the investment process. For example, in urging recognition of access as equivalent to delivery, SIA is essentially seeking SEC recognition of the fact that communication between customer and broker is now a two way street, with customers able to control what they see and when. Similarly, the recommendation to liberalize the rules governing communications during the offering process will produce a fairer process with far more opportunities for investor input at each critical stage. Finally, the availability of new and more efficient tools for

communicating will ensure that U.S. financial institutions and markets remain the preeminent financial marketplace in the world. We should not allow the fear of new technology or its misuse to foreclose these untold gains in empowerment and productivity that are now possible.

The SIA very much appreciates this opportunity to present its views. Should you have any questions, please feel free to communicate with Scott C. Kursman of the SIA's staff at (212) 618-0508.

Very truly yours,

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Chair, SIA Technology  
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Patricia Maher  
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cc: The Honorable Arthur Levitt, Chairman  
The Honorable Isaac C. Hunt, Jr., Commissioner  
The Honorable Laura S. Unger, Commissioner  
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