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September 12, 2003

To: Task Force on Private Placement
Broker-Dealer Registration

Ladies and Gentlemen:

The SEC has recently commented about the nature of activities which could trigger "broker" registration under Section 15(a) of the Securities and Exchange Act. On March 6, 2003, in adopting amendments to its existing requirements regarding auditor independence, the SEC commented about broker-dealer activities that would not be permitted for a registered independent public accounting firm under its final rule. The SEC makes clear in this release that the independence rule applies to "broker" activities regardless of whether the firm is registered or not under Section 15(a). Specifically, in footnote 82 the SEC says:

Accountants and the companies that retain them should recognize that the key determination required here is a functional one (i.e., Is the accounting firm or its employee acting as a broker-dealer?). The failure to register as a broker-dealer does not necessarily mean that the accounting firm is not a broker-dealer. In relevant part, the statutory definition of "broker" captures persons "engaged in the business of effecting transactions in securities for the account of others." Securities Exchange Act of 1934 §3(a)(4). Unregistered persons who provide services related to mergers and acquisitions or other securities-related transactions should limit their activities so they remain outside of that statutory definition. A person may "effect transactions," among other ways, by assisting an issuer to structure prospective securities transactions, by helping an issuer to identify potential purchasers of securities, or by soliciting securities transactions. A person may be "engaged in the business," among other ways, by receiving transaction-related compensation or by holding itself out as a broker-dealer. Involvement of accounting personnel as unregistered broker-dealers not only can impair auditor independence, but also would violate Section 15(a) of the Exchange Act.

Task Force on Private Placement
Broker-Dealer Registration
September 12, 2003
Page 2

It is also noteworthy that in the passage quoted above the SEC acknowledges that there are some, unspecified, M&A activities that remain outside of the statutory definition of a "broker."

Attached are the relevant excerpts from the SEC's release. The entire SEC Release is available on the SEC's website at: <http://www.sec.gov/rules/final/33-8183.htm>.

Sincerely,

A handwritten signature in cursive script, appearing to read "Hugh".

Hugh H. Makens

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SELECTED SEC COMMENTS FROM SEC RELEASE
*Strengthening the Commission's Requirements
Regarding Auditor Independence*

SECURITIES AND EXCHANGE COMMISSION
17 CFR PARTS 210, 240, 249 and 274
[RELEASE NO. 33-8183; 34-47265; 35-27642; IC-25915; IA-2103, FR-68, File No. S7-49-02]
RIN 3235-AI73

March 26, 2003

See Footnote 82, below, for a discussion of the SEC's views about activities that may require registration as a broker-dealer under Section 15(a) of the Securities Exchange Act.

II. Discussion of Rules

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B. Scope of Services Provided by Auditors

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8. Broker-Dealer, Investment Adviser Or Investment Banking Services

Our previous rules deem an accountant to lack independence when performing brokerage or investment advising services for an audit client.⁸¹ We are adopting rules that add serving as an unregistered broker-dealer⁸² to our rules that prohibit serving as a promoter or underwriter, making investment decisions on behalf of the audit client or otherwise having discretionary authority over an audit client's investments, or executing a transaction to buy or sell an audit client's investment, or having custody of assets of the audit client. The rule is substantially the same as the Commission's previous rule related to the provision of these types of services to audit clients. We are including unregistered broker-dealers within the rules because the nature of the threat to independence is unchanged whether the entity is or is not a registered broker-dealer.

Selling - directly or indirectly - an audit client's securities is incompatible with the accountant's responsibility of assuring the public that the company's financial condition is fairly presented. When an accountant, in any capacity, recommends to anyone (including non-audit clients) that they buy or sell the securities of an audit client or an affiliate of the audit client, the accountant has an interest in whether those recommendations were correct. That interest could affect the audit of the client whose securities, or whose affiliate's securities, were recommended. These concepts are echoed in the "simple principles" included in the legislative history to the Sarbanes-Oxley Act.⁸³ In such a situation, if an accountant uncovers an accounting error in a client's financial statements, and the accountant, in an investment adviser capacity, had recommended that client's securities to investment clients, the accountant performing the audit may be reluctant to recommend changes to the client's financial statements if the changes could negatively affect the value of the securities recommended by the accountant to its investment adviser clients.

Broker-dealers⁸⁴ often give advice and recommendations on investments and investment strategies. The value of that advice is measured principally by the performance of a customer's

securities portfolio. When the customer is an audit client, the accountant has an interest in the value of the audit client's securities portfolio, even as the accountant must determine whether management has properly valued the portfolio as part of an audit. Thus, the accountant would be placed in a position of auditing his or her own work. Furthermore, the accountant is placed in a position of acting as an advocate on behalf of the client.

* * *

Footnote 82:

⁸² Accountants and the companies that retain them should recognize that the key determination required here is a functional one (i.e., Is the accounting firm or its employee acting as a broker-dealer?). The failure to register as a broker-dealer does not necessarily mean that the accounting firm is not a broker-dealer. In relevant part, the statutory definition of "broker" captures persons "engaged in the business of effecting transactions in securities for the account of others." Securities Exchange Act of 1934 §3(a)(4). Unregistered persons who provide services related to mergers and acquisitions or other securities-related transactions should limit their activities so they remain outside of that statutory definition. A person may "effect transactions," among other ways, by assisting an issuer to structure prospective securities transactions, by helping an issuer to identify potential purchasers of securities, or by soliciting securities transactions. A person may be "engaged in the business," among other ways, by receiving transaction-related compensation or by holding itself out as a broker-dealer. Involvement of accounting personnel as unregistered broker-dealers not only can impair auditor independence, but also would violate Section 15(a) of the Exchange Act.