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August 18, 2008

via e-mail to: rule-comments@sec.gov

Ms. Florence E. Harmon, Acting Secretary
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100 F Street, N.E.
Washington, DC 20549-1090

**Re: File S7-12-08
Release Nos. 33-8929, 34-57942, 39-2457, IC-28298
Proposed Interactive Data for Mutual Fund Risk/Return Summary**

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee" or "We") of the Section of Business Law of the American Bar Association ("ABA") in response to the request for comments by the Securities and Exchange Commission (the "SEC" or the "Commission") on the proposal to require mutual funds to provide risk/return summary information in interactive data format using the eXtensible Business Reporting Language (XBRL) (the "Proposal" or the "Risk/Return Summary Proposal").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee.

We support the Commission's goal of providing risk/return summary information in a form that would improve its usefulness to investors. However, we have concerns regarding the liability-related provisions of the proposal and provide them below, together with suggestions for the Commission's consideration.

Please note that the Committee has also submitted a comment letter, dated August 6, 2008 (the "August 6 Letter") in File S7-11-08, regarding the Commission's proposal of rules that would require operating companies (but not mutual funds or other

investment companies) to report certain financial information in XBRL format (the "Financial Statement Proposal").¹ The Financial Statement Proposal includes liability-related provisions that are similar to those in the Risk/Return Summary Proposal. The August 6 Letter addresses those provisions in the context of addressing the Financial Statement Proposal as a whole. With respect to the Risk/Return Summary Proposal that is the subject of this letter, we focus more narrowly on the liability-related provisions of the Proposal, and more specifically on how these provisions may affect mutual funds in the context of their particular disclosure regime.

I. Introduction and Summary

On May 21, 2008 the Commission voted to propose new rules that would require mutual funds to provide the risk/return summary section of their prospectuses in interactive data format using XBRL, both in an exhibit to their registration statements on Form N-1A filed with the Commission and on their Web sites (if they maintain a Web site) (the "Proposed Rules"). The Commission published the release setting forth the Proposal and the Proposed Rules (the "Proposing Release") on June 10, 2008, and requested comment by August 1.²

The purpose of the Proposal is to make risk/return summary information easier for investors to analyze and to assist in automating regulatory filings and business information processing. The Proposal builds on the "Voluntary Filer Program" started in 2005, which has allowed companies, including mutual funds, to submit financial statements on a supplemental basis in XBRL format as exhibits to certain filings required by the Securities Exchange Act of 1934 (the "Exchange Act") and the Investment Company Act of 1940 (the "1940 Act") (the "Financial Statement Voluntary Program").³ Since August 2007, the SEC has permitted mutual funds to voluntarily submit, as an exhibit to a fund's registration statement, information contained in the risk/return summary section of the prospectus in XBRL format (the "Risk/Return Summary Voluntary Program").⁴

The Proposal includes a number of provisions specifically related to a registrant's liability in connection with the proposed XBRL requirements. Among other requests for comment, the Commission asked commenters to address whether the Proposed Rules "strike an appropriate balance to promote the availability of reliable interactive data without imposing undue additional costs and burdens."

Although we concur with the Commission's overall desire that the information provided by mutual funds assist investors and assist in business information processing, we have identified a number of areas where we believe the liability-related provisions of the Proposed Rules would operate in a manner that may be at odds with the Commission's intentions, as expressed in the Proposing Release, or

¹ See Interactive Data to Improve Financial Reporting, SEC Re. No. 33-8924 (May 30, 2008), 73 Fed. Reg. 32794 (June 10, 2008) (hereinafter the "Financial Statement Proposal Release").

² Interactive Data for Mutual Fund Risk/Return Summary, SEC Rel. No. IC-28298 (June 10, 2008), 73 Fed. Reg. 35442 (June 23, 2008).

³ XBRL Voluntary Financial Reporting Program on the EDGAR System, SEC Rel. No. 33-8529 (Feb. 3, 2005), 70 Fed. Reg. 6556 (Feb. 8, 2005).

⁴ Extension of Interactive Data Voluntary Reporting Program on the EDGAR System to Include Mutual Fund Risk/Return Summary Information, SEC Re. No. IC-27884 (July 11, 2007), 72 Fed. Reg. 39290 (July 17, 2007).

otherwise create uncertainty as to the liability implications of the Proposal. In general, we are concerned that certain aspects of the Proposed Rules may impose greater burdens on registrants than the Commission intended, and may in fact diminish, rather than enhance, investor understanding of information available to them.

The main areas we address in this letter are:

1. Private Litigation. Although we believe that the Commission intended to eliminate the threat of private litigation under Sections 11 and 12 of the Securities Act of 1933 (the "Securities Act") for errors in XBRL interactive data files, the language of the Proposed Rules could leave registrants open to private lawsuits as a result of even technical violations.

Suggestion: Define "Interactive Data File" as the code submitted "pursuant to Rule 405" instead of "in accordance with Rule 405."

2. Registrant Liability. We believe that the Commission intended to provide clarity regarding registrants' liability for interactive data submitted to the Commission or posted on their Web sites, in particular to provide that registrants will not be liable for interactive data provided by registrants and subsequently rendered into a human readable format on non-Commission software. However, apart from the narrow category of human readable data defined as "Interactive Data in Viewable Form," in Proposed Rule 11 of Regulation S-T, the Proposed Rules do not address the broad range of human readable interactive data that will be available to investors.

Suggestion: Provide that viewable interactive data other than "Interactive Data in Viewable Form" will not subject the registrant to federal securities law liability.

3. Penalty for Non-Compliance. We believe that the Commission intended Proposed Rule 485(c) under the Securities Act to provide a predictable, reasonable, and easily curable penalty for failure to comply with the proposed XBRL filing requirement, but as proposed this provision could have far reaching and, we believe, unintended liability implications.

Suggestion: Eliminate the loss of use of Rule 485(b) under the Securities Act as a penalty for failure to timely file interactive data. If the Commission determines to retain that penalty, we suggest the following changes to more appropriately limit the circumstances in which this penalty would be triggered: (i) define "Interactive Data File" as proposed above; (ii) amend Proposed Rule 485(c) to say "pursuant to" General Instruction C.3.(g) of Form N-1A instead of "as required by" the Instruction; and (iii) amend the proposed Instruction to refer to an Interactive Data File required to be submitted and posted "pursuant to Rule 405," instead of "in the manner provided by Rule 405."

4. Possible Investor Reliance on Incomplete Information. Although the Commission intends that access to interactive data will provide investors with better, more reliable information that will help them make better investment decisions, the Proposal will enable and encourage both investors and third parties to extract and reformat individual pieces of information and view them out of the context that the Commission has designed precisely for their protection, such as the entire prospectus. Accordingly, because the Proposal will make it easier for investors to extract and consider specific items of information in isolation, some investors may as a practical matter be encouraged to act on incomplete information.

Suggestion: Permit registrants to include a legend cautioning investors, before making an investment decision, to read and consider the full prospectus or other filing from which the information is taken.

II. Discussion

A. Definition of Interactive Data File – Information Presented “in accordance with” Rule 405 – Liability Implications

The Proposal would require registrants to provide information required in the risk/return summary portion of the prospectus in XBRL as an exhibit to their registration statements, and to post the XBRL file on their Web sites, if they have one. These requirements are set forth in proposed new Instruction C.3.(g) to Form N-1A and in Proposed Rule 405 of Regulation S-T. The machine readable code comprising the XBRL file is generally referred to as interactive data, and the file containing the code as an interactive data file.

The primary liability provisions of the Proposal are found in Proposed Rule 406 of Regulation S-T. According to the Proposing Release, interactive data would be treated as follows under Proposed Rule 406(c).

Interactive data would be

- Deemed not filed or part of a registration statement or prospectus for purposes of Section 11 and 12 of the Securities Act;
- Deemed not filed for purposes of Section 18 of the Exchange Act and Section 34(b) of the Investment Company; and
- Not otherwise subject to the liabilities of these sections.⁵

As so described, these provisions would protect registrants from private actions under Sections 11 and 12 of the Securities Act based on the XBRL exhibit by providing that the XBRL file is simply not a prospectus or registration statement for purposes of those provisions. Lawsuits claiming materially misleading information in the prospectus or registration statement could, of course, be brought based on the related official filing, the status of which would not be affected by the XBRL exhibit,⁶ or based on the interactive data file for fraud under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.⁷

However, the actual text of the Proposed Rule that provides these protections – Proposed Rule 406(c) – is narrower than this statement implies. Proposed 406(c) applies only to an “Interactive Data File,” which is a defined term.⁸ Proposed Rule 11 of Regulation S-T defines the term “Interactive Data File” to mean “the machine-readable computer code that presents the information in eXtensible Business

⁵ Financial Statement Proposal Release at 32809.

⁶ Rule 406(a) specifically states that disclosures in the related official filing are subject to the liability provisions of the securities laws, and nothing in Rule 405 or 406 changes the liability otherwise applicable to an electronic filer’s related official filing.

⁷ As explained below, another section of Proposed Rule 406 appears to be intended to state this expressly, but founders on the definitional issue we address in this section.

⁸ In fact, Proposed Rule 406(c) refers to an Interactive Data File “submitted to the Commission,” which, as discussed below, raises an issue as to whether these protections apply to an interactive data file posted on a registrant’s Web site.

Reporting Language in electronic format in accordance with [Rule] 405.” Accordingly, only an interactive data file that presents information in XBRL “in accordance with” Rule 405 qualifies for “non-prospectus/registration statement” status. This could be read to suggest that all other interactive data – specifically interactive data that is not “in accordance with” Rule 405 – is indeed part of the prospectus and registration statement for Section 11 and 12 purposes, is filed for purposes of Section 18 of the Exchange Act and Section 34(b) of the Investment Company Act, and is otherwise subject to liability under these sections. We suggest that the Commission clarify that “in accordance with” Rule 405 does not mean “in compliance with” with Rule 405 by, for example, substituting the phrase “pursuant to Rule 405” and adding a clarifying statement in the adopting release.

We believe that any other reading of “in accordance with” would be inconsistent with the structure of Proposed Rules 405 and 406 of Regulation S-T, and would place an undue burden on registrants.

First, Rule 405 imposes a comprehensive, technical, and exacting set of requirements for “Interactive Data File submissions and posting,” and the Rule itself directly requires compliance with its own terms. Rule 405(a) expressly states that an Interactive Data File, as defined in Proposed Rule 11 of Regulation S-T, must comply with the content, format, submission and Web site posting requirements set forth in Rule 405.⁹ Accordingly, there is no need, and in fact it would be both repetitive and circular, to impose the specific requirements of Rule 405 through a defined term that already requires compliance with Rule 405. In other words, if “in accordance with” Rule 405 were read to mean “in compliance with” Rule 405, Rule 405 would impose requirements on a document that was already, by definition, in compliance with the Rule. This cannot be the Commission’s intent.

Tying the XBRL file’s status as not part of the prospectus or registration statement under Sections 11 and 12 of the Securities Act to compliance with Rule 405 is also inconsistent with Rule 406. As explained above, Rule 406(c)(3)(A) provides that the Interactive Data File is not deemed filed or part of a registration statement or prospectus for purposes of Sections 11 and 12 and otherwise is not subject to liability under these sections. Proposed Rule 406(c)(3)(C) provides that “other than as stated in subparagraph (c)(3)(A),” an Interactive Data File is subject to liability for the substantive content of the financial and other disclosures, “as distinct from its compliance with Rule 405, under the securities laws in the same way and to the same extent as the Related Official Filing.” Again, if the Interactive Data file refers only to a file that is in compliance with Rule 405, this provision has little meaning, and the reference to liability relating to compliance with Rule 405 even less.¹⁰

⁹ As mentioned above, the requirements are both comprehensive and exacting. For example, Rule 405(b)(2) states that the Interactive Data File must consist only of a complete set of the risk/return summary information required to be presented as set forth in Items 2 and 3 of Form N-1A, “no more and no less,” and Rule 405(c)(1) requires that each data element (which includes all text, line items and numbers) in the Interactive Data File reflect the same information in the corresponding part of the related official filing, and that no data element in the related official filing may be changed, deleted or summarized.

¹⁰ See also the Commission’s narrative explanation of this provision in the Proposing Release that interactive date would be:

subject to other liability under [the securities laws] for the substantive content of the risk/return summary disclosures (as distinct from compliance with Proposed Rule 405) in the same way and to the same extent as the corresponding information in the related traditional format official filing. The content of the risk/return summary disclosures refers, for example, to the investment objectives and strategies, costs,

Most importantly, however, Rule 406 is intended to provide protection from liability for interactive data by treating it as not filed and not part of the prospectus for Section 11 and 12 purposes (“non-prospectus/registration statement status”). This status prevents purchasers from bringing a Section 11 or 12 lawsuit on the basis of the interactive data file (they can still sue under the full panoply of securities laws remedies based on the official filing itself, of course, and on the interactive data file for fraud). Any interpretation of the Proposed Rules that conditions the non-prospectus/registration statement status of the interactive data file on compliance with the technical requirements of Rule 405 would significantly change the balance of burdens and benefits of requiring registrants to submit interactive data.

We note that the “deemed compliance” provision of Rule 406 does not resolve this issue. That provision, Rule 406(c)(1), states that an Interactive Data File submitted to the Commission is “deemed” to comply with Rule 405 if

- (A) The electronic filer makes a good faith and reasonable attempt to comply with Rule 405; and
- (B) As soon as reasonably practicable after the electronic filer becomes aware that the Interactive Data File does not comply with Rule 405, the electronic filer amends the Interactive Data File to comply with Rule 405.

This provision may be very helpful for ensuring that inadvertent and promptly cured errors do not expose filers to SEC enforcement actions. But it does not solve the concern that the non-prospectus/registration statement status of the XBRL file should not hinge on Rule 405 compliance, whether deemed or actual. The “deemed compliance” standard is inherently subjective and factual, circumstances that are not compatible with early resolution of a private claim under Section 11 or 12, where resolution of a motion to dismiss precludes consideration of such circumstances outside of the pleadings. Thus, to take advantage of the “deemed compliance” provision in a Section 11 or 12 action, a registrant/defendant that had submitted an XBRL file that, for one reason or another, inadvertently did not comply with Rule 405, may well be unsuccessful on a motion to dismiss and be forced to go through the expense and distraction of discovery and fact finding to establish that it had made a good faith and reasonable effort to comply with Rule 405 and, in turn, the non-prospectus/registration statement status of the XBRL file, and dismiss the case under Rule 406(c). If that is the case, clearly the value of the Rule 406(c) protection for interactive data files would be severely diminished.¹¹

In summary, we recommend amending the proposed definition of Interactive Data File to include all interactive data files filed or posted “pursuant to” Rule 405, instead of “in accordance with” Rule 405, in order to achieve what we understand to be the Commission’s intentions, to strike the right balance between burdens and benefits, and to avoid the unintended consequences described above.

risks, and past performance. The Proposed Rule 405 requirements generally refer to the process of tagging and formatting the content of the risk/return summary for the interactive data file.

Proposing Release at 35452.

¹¹ Moreover, while liability under Section 11 or 12 would have a materiality threshold, compliance with Proposed Rule 405 does not, and, in fact, the words “no more and no less” and other aspects of the Rule appear to require stringent compliance.

B. Consideration of the Full Range of Liability Scenarios for XBRL-Related Errors

In connection with the requirement to file and post risk/return summary information in XBRL, inadvertent errors could occur in a number of scenarios, leading to inaccurate information being provided to investors or others and, in turn, potential liability under the securities laws. The Proposal addresses a few of these scenarios, but not all, leaving a lack of clarity as to responsibility for and consequences of many significant error scenarios. Because uncertainty about liability may stifle innovation and the development of XBRL applications, we urge the Commission to provide the clarity we request below.

The scenarios the Proposal addresses are as follows:

1. An Interactive Data File (machine readable code presenting information in XBRL “in accordance with” Proposed Rule 405) submitted to the Commission.

As explained above, the Proposed Rules provide that the Interactive Data File is:

- (a) not filed or part of the registration statement;
- (b) not subject to Section 11, 12, and other filing provisions;
- (c) filed for purposes of Rule 103; and
- (d) subject to the other provisions of the securities laws (*e.g.*, the anti-fraud provisions – Section 10(b) and Rule 10b-5 under the Exchange Act; Section 17(a) of the Securities Act – the same as the related official filing.

2. Interactive Data in Viewable Form. This is subject to liability under the securities laws in the same way and to the same extent as the related official filing.

Interactive Data in Viewable Form is proposed to be defined in Rule 11 of Regulation S-T as risk/return summary data that

- (a) are displayed when the Interactive Data File is rendered through software the Commission provides; and
- (b) are displayed through such conversion identically in all material respects to the corresponding risk/return summary information in the Related Official Filing.

Accordingly, Interactive Data in Viewable Form refers only to information that is both (i) rendered through Commission software and (ii) identical to the Related Official Filing.

The following scenarios are not expressly addressed in the Proposal. However, we believe the Commission’s intent is implied and should be expressly stated.

1. Interactive data rendered by Commission software in a manner not identical to Related Official Filing

A registrant should have no liability if an error arises as a result of the Commission’s interactive data rendering software. The final rules or the adopting release should expressly state that interactive data

rendered by Commission software in a manner not identical to the Related Official Filing, as defined in the Proposal, does not subject the registrant to liability.

2. Interactive data rendered by non-Commission software

Once a registrant has submitted or posted the Interactive Data File, the registrant cannot control what investors or other third parties do with it. And indeed, the Proposing Release encourages the market to develop new technology to extract and reformat the information. It would be unfair for the registrant to be held liable for information in human readable format that emerges from this process beyond its control. We believe that the Proposal recognizes this by providing that only the narrow category of information defined as "Interactive Data in Viewable Form" is subject to liability under the securities laws. However, to eliminate uncertainty, we suggest that the final rules or the adopting release state this expressly, and make clear that no liability arises to a registrant as a result of the use or manipulation of data by investors or third parties.

3. Interactive data provided on the registrant's Web site

Proposed Instruction to Form N-1A and Proposed Rule 405 both require that an electronic filer post its risk/return summary information in an Interactive Data File on its Web site, if the filer maintains a Web site. Neither the Proposal nor the Proposing Release clearly addresses the liability issues raised by this required posting.

As a preliminary matter, we ask the Commission to reconsider the proposed requirement for Web site posting of the interactive data file. We believe that this element of the Proposal would exacerbate the investor confusion concerns raised by the Proposal, because it will further encourage investors to view interactive data in isolation, and not in conjunction with the prospectus as a whole. Accordingly, we do not support the proposal to require Web site posting.

If the Commission determines to require Web site posting, we request the Commission to clarify that the protections provided by Rule 406(c) for the Interactive Data File "submitted to the Commission" extend also to the interactive data file posted on the Web site, if it is the same file. In addition, assuming the Web site posting is covered by Rule 406(c), we have the same issues relating to the definition of Interactive Data File discussed above. If these issues are not appropriately clarified, we would be concerned that the interactive data file on the registrant's Web site could be considered a prospectus that is neither a statutory prospectus nor an omitting or summary prospectus authorized by Commission rules, and thus could give rise to liability under Section 12(a)(1) for use in violation of Section 5. Additionally, to the extent there are material errors in the interactive data file, they could subject the registrant to liability under Section 12(a)(2).

4. Interactive data that does not qualify as an "Interactive Data File"

Please refer to the discussion in Section II.A. above. We suggest that this can be solved by the proposed change in the definition of Interactive Data File.

C. Consequences of Automatic Suspension of Ability to use Rule 485(b)

Proposed Rule 485(c) under the Securities Act provides that a registrant's ability to file a post-effective amendment under Rule 485(b) is automatically suspended if a registrant fails to submit and post on its Web site any Interactive Data File exhibit "as required" by General Instruction C.3.(g) of Form N-

1A.¹² This Instruction states that an Interactive Data File, as defined by Rule 11 of Regulation S-T, is required to be submitted to the Commission and posted on the Fund's Web site, if any, "in the manner provided by" Rule 405 of Regulation S-T. The suspension becomes effective at such time as the registrant fails to submit or post an Interactive Data File as required by the Form N-1A Instruction, and applies to any post-effective amendment that is filed after the suspension becomes effective, but not to any post-effective amendment that was filed before the suspension became effective. The suspension terminates as soon as a registrant has submitted and posted to its Web site the Interactive Data File as required by the Form N-1A Instruction.

Rule 485(b) under the Securities Act permits a registrant to obtain automatic effectiveness of its registration statement either immediately or on a stated date within 30 days of filing. This is a critical provision for mutual funds, which offer their securities on a continuous basis and therefore must maintain current prospectuses and registration statements in accordance with the requirements of Section 5 of the Securities Act. Absent the automatic effectiveness provision of Rule 485(b), registrants must either file their registration statements at least 60 days in advance, which is not always practical, or rely on the SEC staff to declare their registration statements effective on an accelerated basis, in order to maintain the continuous offering.

Proposed Rule 485(c) raises a similar issue to that discussed above with respect to Proposed Rule 406. The suspension is automatically triggered by failure to submit and post an Interactive Data File as required by the Proposed Form N-1A Instruction. This requirement potentially imposes Rule 405 compliance as a prerequisite to avoiding the suspension in two different ways. First, the definition of Interactive Data File refers to information "in accordance with" Rule 405, as discussed above. Second, the Proposed Form N-1A Instruction expressly requires submission and posting of the Interactive Data File "in the manner provided by" Rule 405. If Rule 405 compliance (or deemed compliance) is required in order to avoid the automatic suspension, there could be far reaching prospective and retroactive effects. It is not beyond the realm of possibility that an XBRL exhibit may inadvertently deviate from Rule 405 in a manner that goes undetected, and thus uncorrected, for some period of time during which another post-effective amendment is filed. If that were sufficient to trigger the automatic suspension provision, there could be subsequent registration statements that were thought to have become effective, questions raised about whether all securities sold since that time have been properly registered, and so on.

We believe that the potential liabilities and uncertainties to which registrants would be exposed under Proposed Rule 485(c) are disproportionate to the violation, and that the Commission should fashion more appropriate remedies for failure to provide interactive data. First, the failure to timely file the Interactive Data File does not deprive the investing public of the underlying information; such information will always be available in the underlying filing. Second, as noted above, open end mutual funds are required continuously to maintain a current prospectus so that they can continuously offer shares to the public. Sudden loss of the ability to update a prospectus with material information as permitted under Rule 485(b) could interrupt the offering of fund shares and result in substantial injury to the fund and its shareholders. Thorny legal and operational issues could arise with respect to payroll deduction plans, automatic investment plans and other matters that would need to be suspended until the prospectus could be updated. In addition, as noted above, the fund potentially could be exposed to Section 12 liability for sales made pursuant to post-effective amendments filed under Rule 485(b) before the Rule 405 compliance issue was discovered.

¹² The term registrant here seems overly broad as it could affect series of an investment company that were fully in compliance with the Proposed Rules.

If, however, the Commission determines to adopt Proposed Rule 485(c), we believe it is important not only to clarify the definition of Interactive Data File as suggested above, but also to clarify that the Rule N-1A requirement to file "in the manner" provided by Rule 405 refers only to the process of filing, and not to general compliance with the requirements of Rule 405.

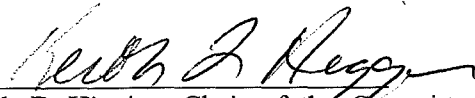
D. Cautioning Investors About Relying on the Risk/Return Summary in the XBRL Files in Whole or in Part Without Consideration of Other Prospectus Disclosures

The purpose of the Proposal is to encourage investors to use the XBRL files to extract information in which they are interested in order to make their investment decisions. However, the Proposal does not address issues raised by enabling investors to view the risk/return summary, or parts thereof, in isolation from the full prospectus. Moreover, it appears that Rule 405 may prohibit registrants from including a cautionary legend to address those issues.

The Proposal should make clear that registrants may include a cautionary statement together with any interactive data, advising investors using the interactive data that, before making an investment decision, they should consider the information in the context of other prospectus disclosures. Moreover, we recommend that registrants should generally be permitted to include in their interactive files whatever additional cautionary legends they believe are appropriate for the protection of investors who may use that information or derivatives of it.

The Committee appreciates the opportunity to comment on the Proposing Release and respectfully requests that the Commission consider the recommendations and comments set forth above. Members of the Committee are available to discuss them should the Commission or the staff so desire.

Respectfully submitted,



Keith F. Higgins, Chair of the Committee on
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