November 28, 2006

The Honorable Karon O. Bowdre
United States District Court of the
  Northern District of Alabama
Hugo L. Black United States Courthouse
1729 Fifth Ave. North, Room 519
Birmingham, AL 35203

RE: In re HealthSouth Securities Litigation, No. CV-03-BE-1500-S (N.D. Ala.)

Dear Judge Bowdre:

You have asked the Securities and Exchange Commission to address an issue relating to Preliminary Note 3 to Rule 144A under the Securities Act of 1933. That Note provides that the safe harbor from registration created by the Rule for sales to Qualified Institutional Buyers (QIBs) is not available if a transaction or series of transactions, although in technical compliance with the Rule, is part of a "plan or scheme to evade" the Act's registration requirements. The Court's question is:

> Accepting the facts alleged by plaintiffs, whether any provision of the Securities Act, including Note 3, invalidates the Exxon Capital Exchange Structure utilized in the bond offerings at issue in this case so as to divest the investment banks of an exemption from the registration process.

In summary, the Commission responds as follows:

(a) Note 3 does not invalidate the Rule 144A/Exxon Capital exchange structure utilized in the bond offerings at issue. Plaintiffs' allegations concerning defendants' motivations for relying on Rule 144A do not implicate Note 3 because the availability of the safe harbor under Rule 144A does not turn on the security offeror's motive. Instead, the safe harbor is unavailable under Note 3 if an offeror's technical compliance with Rule 144A is an attempt to evade registration of an offering to the public, for which registration is otherwise required. For example, the safe harbor would not be available if defendants had sold the bonds to QIBs for the purpose of having the QIBs make an unregistered distribution of the securities to public investors. By contrast, the safe harbor provided under Rule 144A is available where, as plaintiffs allege in this case, the transaction substantively and procedurally complied with the Rule.

(b) Assuming that, contrary to our view, the Court were to conclude that the safe harbor would be lost under the circumstances alleged, that would not mean, as plaintiffs argue, that the offerors of the securities in the unregistered Rule 144A offerings were therefore liable under Sections 11 and 12(a)(2) for misrepresentations in the registration statement and prospectus used in the subsequent registered exchange offer for substantially identical securities.

This is not to say that plaintiffs are necessarily without a remedy under the securities laws. The banks would be liable if they committed fraud in violation of Rule 10b-5, and plaintiffs have pleaded a claim under that provision against them. While there are differences in procedure and proof in asserting claims under Rule 10b-5 as opposed to under Sections 11 and 12(a)(2), such differences should not be a basis for distorting the meaning and purpose of Note 3.

The balance of this letter explains the bases for our answers to the Court's question. [1] We first provide, as background, a description of relevant features of Rule 144A and Note 3, and of the Exxon Capital no-action position, before analyzing the application of the Note to the alleged facts in this case.

BACKGROUND

A. The Rule 144A Safe Harbor from Registration

Rule 144A creates a safe harbor from the registration and prospectus delivery requirements of Section 5 of the Securities Act for the resale of securities that meet the Rule's conditions. In a typical Rule 144A transaction, investment banks (referred to as initial purchasers) buy securities from an issuer in an exempt transaction, and then resell the securities in an unregistered transaction that relies on the Rule 144A safe harbor.

The safe harbor is available only on the condition that the securities are offered and sold exclusively to QIBs, which are, generally speaking, institutional investors that own and invest on a discretionary basis at least $100 million in securities. See Rule 144A(a) (definition of QIB), (d)(1) (conditions to be met to qualify for the exemption). The Rule is based on the Commission's determination that QIBs do not need the investor protections arising from the registration and prospectus delivery requirements of the Securities Act. See, e.g., SEC Rel. No. 33-6806, 1988 SEC LEXIS 2104, *51 (October 25, 1988) ("The key to the analysis of proposed Rule 144A is that certain institutions can fend for themselves and that, therefore, offers and sales to such institutions do not involve a public offering.").

The Rule provides that sales by any person (other than an issuer) that meet the Rule's

[1] Plaintiffs also allege that the banks and their counsel participated throughout the registered exchange offers, including the preparation of the registration statements and prospectuses used to conduct the exchanges, and that as a result the banks should be considered "underwriters," potentially liable under Section 11, and "sellers," potentially liable under Section 12(a)(2), regardless of whether they prevail on their argument that Note 3 invalidates the Exxon Capital exchange structure. The Court did not ask the Commission's views on this theory, and in our view the factual allegations are too conclusory to permit the Commission to provide meaningful guidance. We therefore do not address this claim.

conditions qualify for certain statutory exemptions under Section 4 of the Act.[2] Specifically, Section 4(1) exempts all transactions "by any person other than an issuer, underwriter, or dealer," and Section 4(3) exempts all "transactions by a dealer," subject to specified exceptions.[3] The Rule states that (1) any person other than the issuer or a dealer "who offers or sells securities in compliance with" the conditions of the Rule "shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter of such securities within the meaning of sections 2(a)(11) and 4(1)" of the Act; and (2) a dealer who offers or sells securities in compliance with the requirements of the rule is deemed "not to be participating in a distribution" within the meaning of Section 4(3)(C), and not to be an "underwriter" within the meaning of Section 2(a)(11), and the securities "shall be deemed not to have been offered to the public within the meaning of section 4(3)(A) of the Act."

[2] As a short-hand reference, the Commission, the parties, and the courts sometimes refer to the Rule as creating an exemption, or to transactions as being exempt under the Rule. Strictly speaking, the exemptions are created by the Act, not by the Rule. The Rule provides that transactions meeting its requirements qualify for certain statutory exemptions.

[3] Section 2(a)(11) defines "underwriter" to mean

> any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking * * *. As used in this [definition] the term "issuer" shall include, in addition to an issuer [as defined in Section 2(a)(4)] any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

"Dealer" means "any person who engages * * * in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person." Section 2(a)(12). Among dealer transactions that are not exempt are any transaction taking place within the first 40 days after the security is first "offered to the public" by the issuer or by or through an underwriter (Section 4(3)(A)), and any transaction as to securities constituting the whole or part of an unsold allotment to or subscription by a dealer "as a participant in the distribution of such securities by the issuer or by or through an underwriter" (Section 4(3)(C)).

B. The Note 3 Qualification to the Safe Harbor

Like a number of other Commission rules, Rule 144A contains an anti-abuse provision. Note 3 states:

> In view of the objective of this section and the policies underlying the Act, this section is not available with respect to any transaction or series of transactions that, although in technical compliance with this section, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

C. The Exxon Capital No-action Position

In the Exxon Capital no-action letter, an issuer requested the Commission staff's position on the following set of facts: The issuer proposed to sell securities by means of a private placement. The issuer wished to proceed with the private placement as soon as practical "[i]n view of current market conditions and other factors." Furthermore, the issuer had been advised that it could achieve a lower cost of capital by broadening the market for the securities if the securities could be remarketed to the public subsequent to the private placement. Therefore, the proposed private placement would be followed as soon as practical by a registered exchange offer in which the privately placed securities could be exchanged with the issuer for substantially identical securities. The memorandum for the private placement would disclose the material elements of the contemplated exchange offer, though there would be no assurance that the exchange offer would take place.

The issuer sought confirmation from the staff that subsequent sales of the registered securities by exchange offerees would be viewed no differently from resales by non-affiliated purchasers after completion of any registered primary offering of securities, and, therefore, that resales of the securities by the exchange offerees could be effected without any further registration under the Securities Act or the delivery of a prospectus. The staff replied that, based on the facts presented, and under the assumption that the exchange offerees were not affiliates of the issuer, it was of the view that the exchange offerees could resell the registered securities

> without compliance with the registration and prospectus delivery provisions of the Securities Act provided that such securities are acquired in the ordinary course of their business and such purchasers have no arrangement with any person to participate in the distribution of such securities.

In the intervening years, private placements followed by a registered exchange offer for substantially identical securities have become a common means of raising capital in those sectors of the securities markets where transactions are mostly among institutional investors, including, as in the case now under consideration, in the market for high yield bonds. One variation on the original Exxon Capital fact pattern that has developed is that, rather than merely describing a possible registered exchange offer, the purchasers are given a contractual right to have the issuer conduct such an offer. The sales contracts in this case provided such a right.

ANALYSIS

The Commission does not write on a blank slate in this area. It earlier filed a letter amicus curiae in response to the district court's request in In re Safety-Kleen Bondholders Litigation, No. 3:00-1145-17 (D.S.C.). In that letter, the Commission urged rejection of arguments that would have imposed liability under Sections 11 and 12(a)(2) on the initial purchasers in a Rule 144A/Exxon Capital transaction. The court in Safety-Kleen agreed with the Commission's position.

Plaintiffs in this case attempt to distinguish Safety-Kleen, based principally on their allegations that not only did the banks intend there to be a subsequent registered exchange offering and act with knowledge that misstatements would be made in that offering, as was alleged in Safety-Kleen, but that the banks elected to structure the offer of the securities as a Rule 144A/Exxon Capital transaction for the specific purposes of avoiding Commission scrutiny, detection of the fraud, and liability under Sections 11 and 12(a)(2) for themselves. The key question for the Commission in responding to the Court's request is, therefore, whether this purported distinction is a valid basis on which to find liability here when liability was denied in Safety-Kleen.

In the discussion that follows, we explain why we believe that plaintiffs' proposed distinction of this case from Safety-Kleen is not a persuasive basis for finding liability, and why Note 3 does not deprive the banks of the ability to rely on Rule 144A for their sales to the QIBs. [4] We also discuss why, even if plaintiffs' proposed distinction were valid, that still would not make the banks liable for any misstatements or omissions in the registration statement or prospectus for the subsequent registered exchange offer.

A. Overview – Plaintiffs' Note 3 theories are unprecedented and unsupported under the securities laws.

Though this case arises in the context of a Rule 144A/Exxon Capital transaction, plaintiffs' argument that an otherwise valid exemption should be denied whenever the offeror has committed fraud, or has chosen to make a private offering because it desired to avoid Section 11 or 12(a)(2) liability, or because of some other motive unrelated to the actual nature of the transaction, could be asserted in a wide range of circumstances. Yet plaintiffs have not identified any instance involving Rule 144A *or any other provision of the federal securities laws* in which a transaction that complied in substance with the requirements for an exemption was nonetheless

[4] We note that the Supreme Court has held that a regulatory agency's interpretation in an amicus brief of its own regulations is controlling unless plainly erroneous or inconsistent with the regulation. See Auer v. Robbins, 519 U.S. 452, 461 (1997).

denied that exemption solely on the ground that the motives of the participants rendered the transaction part of a "scheme to evade" registration. Nor have they identified any instance in which the result of denying an exemption was to make the offerors for the non-exempt transaction liable for misstatements in the registration statement or prospectus used in a subsequent registered transaction. We believe that these unprecedented interpretations are unwarranted under the language and structure of the governing provisions.

B. This case raises two issues not addressed in the Commission's Safety-Kleen letter, in which the Commission urged that the mere fact that a Rule 144A offering was to be followed by a registered exchange offer did not mean that the Rule 144A transaction should be treated as a public offering, or that the investment banks that made the Rule 144A offering were liable for misstatements in the exchange offer registration statement, even if the banks knew of the misstatements.

Plaintiffs in Safety-Kleen alleged that the issuer had engaged in accounting fraud and that the initial purchasers knew or should have known of the fraud, yet included misstatements in the offering memorandum they used in a Rule 144A sale. Plaintiffs further alleged that the initial purchasers knew that the registration statement and prospectus that would be prepared by the issuer for the exchange offer would be based on the offering memorandum, and that these documents would therefore repeat the misrepresentations in that document. Based on these allegations, plaintiffs claimed that the initial purchasers should be liable under Section 11 as underwriters of the exchange offer, and under Section 12(a)(2) for misstatements in the offering memorandum. They also claimed as additional grounds for holding the initial purchasers liable for the registered exchange offer that the Rule 144A sale and the exchange offer should be "integrated," i.e., treated as a single transaction.

The Commission began its Safety-Kleen letter by making the point that simply because a Rule 144A sale is made with the expectation that it will be followed by a registered exchange offer provides no basis for holding the initial purchasers liable under Section 11 or 12(a)(2) for misstatements made in the Rule 144A sales. Section 11 creates a private right of action only for persons acquiring a security subject to a registration statement, and there is no registration statement in a Rule 144A offering. Section 12(a)(2) creates liability only for sales made by means of a "prospectus" (or related oral statement), which the Supreme Court defined in Gustafson v. Alloyd, Co., 513 U.S. 561, 569 (1995), to mean a document "related to public offerings by an issuer or its controlling shareholders" (emphasis added), and, as we have seen, Rule 144A offerings are identified by the Commission as transactions not involving a public offering. For these reasons, the Commission concluded that the Supreme Court would hold that a Rule 144A offering memorandum is not a prospectus.

Plaintiffs in Safety-Kleen, like plaintiffs in this case, urged that the Rule 144A sale and the registered exchange offer should be "integrated," by which they meant that the two-step transaction should be considered one offer and sale of registered securities, so that the initial purchasers would be deemed to be the underwriters of the registered exchange offer and therefore liable under Section 11 for misstatements in the registration statement. The Commission explained that "integration" has a specific meaning in the securities laws, and that it was part of the "analytical framework for determining whether multiple securities transactions should be considered part of the same offering" for registration purposes. SEC Rel. 33-7943, 2001 SEC LEXIS 166 at *9 (Jan. 26, 2001). This doctrine

> prevents an issuer from improperly avoiding registration by artificially dividing a single offering so that Securities Act exemptions appear to apply to the individual parts where none would be available for the whole. Improper reliance on an exemption can harm investors by depriving them of the benefits of full and fair disclosure or of the civil remedies that flow from registration for material misstatements and omissions of fact. [Id. at *10.]

The well-established result of finding that offerings should be integrated, the Commission explained, is "the loss of an exemption [from registration] for one or more of the offerings unless an exemption is available for the integrated offering." Id. at *10 n.18. The Safety-Kleen plaintiffs explicitly disclaimed any assertion that the Rule 144A offering should have been registered, however, so the Commission concluded that "the concept of integration for Section 5 purposes is not relevant to this case."

Putting aside the doctrine of Section 5 integration, the Commission also stated that it did "not perceive any basis under the allegations of the complaint on which the Rule 144A offering may be validly exempted from registration for Section 5 purposes, and yet somehow be deemed to be registered or part of a registered transaction for purposes of Section 11." Thus, "[a]bsent allegations of greater participation in the registered exchange offer than are contained in plaintiffs' complaint," the Commission did not believe "that the initial purchasers should be considered 'underwriters'" of the exchange offer "under Section 2(a)(11) and subject to liability under Section 11." See also In re Livent, 2001 U.S. Dist. LEXIS 8933 (S.D.N.Y. June 29, 2001) (reaching similar conclusion).

Finally, the Commission did not find that the allegations in the complaint "establish that the Rule 144A offering should be considered 'part of a plan or scheme to evade the registration provisions of the Act'" under Note 3. The mere fact that the exempt sale was followed by a registered exchange offer pursuant to a pattern common in the industry did not make the initial sale an attempt to evade registration.

The current case presents two issues that were not raised in Safety-Kleen: (A) Assuming that a transaction substantively meets the conditions of Rule 144A in that it is not a disguised means of making an unregistered public offering, is reliance on the Rule nonetheless a scheme to evade registration, so that the transaction should have been registered, where the initial purchasers not only knew that material misrepresentations were to be made in the offer and sale, but also specifically chose to rely on the Rule in order to avoid either Commission scrutiny, detection of the fraud, or liability under Sections 11 and 12(a)(2); and (B) If the exemption is lost, should the two transactions then be "integrated," so that the initial purchasers are liable for misstatements in the registration statement and prospectus for the registered exchange offer?

C. Plaintiffs' averments that the investment banks chose the Section 144A/Exxon Capital structure with knowledge of fraud in the sale of HealthSouth bonds, and for the purposes of avoiding Commission scrutiny, detection of the fraud, and Section 11 and 12(a)(2) liability, do not allege a "scheme to evade" registration within the meaning of Note 3.

Note 3 defeats reliance on Rule 144A when the substance of a transaction is contrary to the Rule even though the transaction is structured so as to comply with the Rule's technical requirements, such as when the transaction is a sham designed to create the illusion that it should be exempt. The adopting release for Rule 144A gives one example of where this principle would apply, and cases brought under Regulation S, which has an anti-abuse provision like Note 3, provide additional guidance by analogy.

The adopting release example concerns the Rule's restriction on the fungibility of the offered securities with securities that are already trading: the Rule provides that in order to qualify for the safe harbor, the securities offered or sold may not have been listed on a national exchange or quoted on an automated quotation system when they were issued. Rule 144A(d)(3)(i). As an illustration of Note 3's application, the adopting release explained that "where an issuer resorted to use of convertible securities or warrants for the purpose of evading the restriction on fungibility, the Rule would not be available." Adopting Release, No. 33-6862, 1990 SEC LEXIS 739, at * 16 (Apr. 23, 1990).

Regulation S under the Securities Act creates a safe harbor from registration for offers and sales of securities outside the United States. Preliminary Note 2 to Regulation S is identical to Note 3 to Rule 144A. The Commission and the courts have consistently held that Regulation S is not available when securities that are purportedly sold overseas are actually placed offshore temporarily as part of a sham transaction to evade the Securities Act's registration requirements. See, e.g., Geiger v. SEC, 363 F.3d 481, 488 (D.C. Cir. 2004) (upholding Commission ruling that Regulation S "does not apply to transactions that, though in technical compliance, are designed to evade the registration requirement"); In re Robert Weeks, SEC Rel. No. 33-8313, 2003 SEC Lexis 2572, *42-*44 (Oct. 23, 2003) ("schemes involving parking securities with offshore affiliates of the issuer do not qualify for the Regulation S safe harbor since they are nothing more than sham offshore transactions structured to evade the Securities Act registration requirements"); SEC v. Ari Parnes, Adar Equities, LLC, 2001 U.S. Dist. Lexis 21722 (S.D.N.Y. Dec. 21, 2001) (upholding sufficiency of complaint alleging scheme designed to evade registration requirements by nominally placing securities offshore with entities cooperating with defendants).

These examples demonstrate that the Note applies when the actual substance of the transaction is such that the exemption should not be available, regardless of technical compliance. Regulation S relies on the fact that securities are offered and sold overseas as a basis for not requiring registration, and the Regulation S safe harbor is defeated when the securities are not actually placed overseas, but are merely parked there in a sham transaction. Similarly, Rule 144A depends upon the fact that when the requirements of the rule are complied with, the securities will be offered and sold only to entities that do not need the protections that the registration and prospectus delivery requirements provide to public investors. Therefore, Note 3 is implicated when a transaction is designed to place securities in the hands of the public, even though it gives the appearance of being a sale to sophisticated investors, not involving a public offering. For example, the safe harbor would not be available if the initial purchasers resold to QIBs for the purpose of having the QIBs make an unregistered distribution of the securities to public investors.

Plaintiffs do not dispute that the transactions at issue here substantively qualified for the exemption. There is no allegation, for example, that the QIBs were intended to be mere conduits for unregistered sales to the public. Nevertheless, plaintiffs urge that the exemption should be lost because the banks knew of the misstatements that were to be made to investors, and they relied on Rule 144A, not for legitimate business reasons, but to avoid Commission scrutiny and detection of the fraud, and to shield themselves from liability under Sections 11 and 12(a)(2).

We note in response that there is nothing inherently nefarious about seeking to avoid Commission review or the possibility of Section 11 or 12(a)(2) liability. An issuer or an investment bank is free to choose whether to make a private or public offering based on the actual nature of the transaction. As mentioned above, there is no precedent for making the exemption question turn solely on offeror motives that are independent of the substance of the transaction. That is not what the Commission has understood the Note to mean, and we believe it would be disruptive of the markets to adopt that position, particularly where the contours of liability under plaintiffs' proposed theory are undefined by current law or by any clearly stated limiting principles.

Not only would the banks not reasonably have anticipated being held liable under plaintiffs' theories; we also have not seen evidence that those theories have been relied upon by the purchasers of the securities. Though we have received several letters from institutional investors urging that Securities Act liability should be available when the initial purchasers knowingly orchestrate a fraudulent scheme, or stating that they rely on the private remedies under the Securities Act in both public and private offerings, or urging that Rule 144A/Exxon Capital transactions are in truth public offerings, none of these institutions claimed that it has ever actually relied on the viability of theories like those advanced by plaintiffs here in deciding whether to invest.

The basis for the Rule 144A exemption is that the purchasers are sophisticated entities with substantial resources who should be able to ascertain what their rights are under various forms of securities offerings. Furthermore, the Securities Act provides investors, and sophisticated investors in particular, with the ultimate choice here. If they want to be assured of being able to invoke remedies available under Sections 11 and 12(a)(2), they should invest only in registered offerings.

D. Even if plaintiffs adequately alleged a "scheme to evade" registration, that would not justify holding the banks liable for misstatements in the registration statement and prospectus for the registered exchange offer.

A finding that the transactions did not meet the requirements of Rule 144A is only the first step in plaintiffs' theory of defendants' liability for misrepresentations in the second step of the transaction. They must also find a way to tie the banks to the registered exchange offer, even though the banks were not identified as underwriters in the registration statement and they did not make any sales by means of the exchange offer prospectus. One of the ways plaintiffs seek to do this is by what they call "integrating" the Rule 144A sales with the exchange offer. By "integration," they mean that the Rule 144A sale and the registered exchange offer would be treated as one transaction, and the banks therefore held liable under Sections 11 and Section 12(a)(2).

As noted in the Safety-Kleen letter, integration is understood in the securities laws to mean the doctrine under which transactions that are claimed to be two or more separate transactions are deemed to be the same transaction for purposes of determining whether a registration exemption is available. [5] For example, an issuer might make an offering that is purportedly exempt under the intrastate offering exemption (Section 3(a) (11)) and what purports to be a separate offering that is registered. If it is determined that the supposedly independent transactions should be integrated, that would mean that the intrastate offering should have been registered, and that the offer and sale of those securities would be a violation of Section 5, remediable in a private action under Section 12(a)(1).

Plaintiffs propose to apply "integration" in an entirely novel manner which stands the concept on its head – rather than being a *means* of testing *whether* a transaction qualifies for an exemption, plaintiffs would make integration a *consequence* of the finding that a transaction was *not* exempt. They would then hold the offeror in the unregistered transaction not only liable for selling unregistered securities, but also liable for misrepresentations in the registration statement and prospectus used in the registered transaction with which the unregistered transaction is integrated, even though the offeror was not otherwise an underwriter of the registered transaction, and did not use the prospectus to sell securities.

[5] The Commission has looked to five factors in determining whether transactions should be integrated, and plaintiffs rely on these same factors to support integration here: (1) are the offerings part of a single plan of financing, (2) do the offerings involve issuance of the same class of securities, (3) are the offerings made at or about the same time, (4) are the same types of consideration involved, and (5) are the offerings made for the same general purpose.

We do not see any basis for holding that the banks are liable for misrepresentations in the registration statement and prospectus for the registered exchange offer solely because they did not have a valid exemption for the unregistered sale. Certainly the integration factors were not developed for the purpose of determining whether a party to one transaction should be held liable for misrepresentations made in a second transaction, and they are ill-suited for that purpose. For instance, the keystone to plaintiffs' argument is that the banks were involved in a fraudulent scheme, yet involvement in fraud is not one of the factors they rely on as a basis for "integration." Every court that has been presented with a similar "integration" theory has rejected it. See, e.g., American High-Income Trust v. AlliedSignal, 329 F. Supp.2d 534, 541-44 (S.D.N.Y. 2004); In re Safety-Kleen Corp. Bondholders Litig., 2002 U.S. Dist. LEXIS 26735, at *2-4 (D.S.C. Mar. 27, 2002).

It seems to us that use of the term "integration" here merely seeks to put a recognized technical label on the conclusions plaintiffs ask the Court to reach, namely that a two-step Rule 144A/Exxon Capital transaction is in truth a single registered offering, that the banks are functionally indistinguishable from underwriters of that offering, and that the exchange offer with the issuer is a formality that should not cut off the banks' underwriter liability. This position is the one that the Commission and the district court rejected in Safety-Kleen. The Commission, and securities market participants, recognize the two steps to be separate transactions. Indeed, the QIBs who bought from the banks in this case presumably relied on that understanding lest they face the possibility that they would themselves be deemed underwriters of the single, "integrated" transaction, with attendant liability. For the reasons discussed above, that settled understanding should not be overturned based on allegations that the banks had motives for making an unregistered offering that are divorced from the actual nature of the transaction.

CONCLUSION

For the foregoing reasons, the Commission urges the Court to hold that (1) the Rule 144A safe harbor should not be denied on the Note 3 grounds raised by plaintiffs, and (2) even if the safe harbor were not available, that would not mean that the banks should be held liable for misrepresentations in the registration statement and prospectus used in the subsequent registered exchange offer.

Respectfully submitted,

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cc: Robin H. Jones, Esq.
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