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March 25, 2011

VIA E-MAIL: rule-comments@sec.gov

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **Release No. 33-9186; 34-63874, Security Ratings**
File Number: S7-18-08

Dear Ms. Murphy:

Thank you for the opportunity to comment on the above-referenced release.

We understand that Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Section 939A") directs the Securities and Exchange Commission (the "Commission") to remove references to or reliance on credit ratings in its rules and forms and to substitute in such regulations such standard of credit-worthiness as each respective agency shall determine as appropriate. We are concerned that the Commission's proposal to replace the investment grade eligibility criteria in Form S-3 and Form F-3 with a "well-known seasoned issuer" or "WKSI" based debt issuance standard will cause certain issuers to lose the ability to use these forms and effectively require them to pursue private offerings instead of registered offerings. In order to avoid this unnecessary consequence, we recommend the Commission reconsider its proposed amendments to Form S-3 and Form F-3 as follows:

1. Issuers with effective shelf registration statements should be grandfathered under existing rules for a three-year period and able to utilize the current transaction eligibility criteria to issue debt securities during this time.
2. The proposed \$1 billion threshold contained in the new transaction eligibility criteria should be lowered significantly.
3. Unregistered debt offerings and exchange offers should count toward the proposed debt issuance threshold.

4. The Commission should add supplemental transaction eligibility criteria to Form S-3 and F-3 based on an issuer's credit-worthiness.

We also believe the inclusion of Nationally Recognized Statistical Rating Organization ("NRSRO") ratings in the list of information permitted to be disclosed under the safe harbor in Rule 134(a)(17) of the Securities Exchange Act of 1933, as amended (the "Securities Act") serves a function—the disclosure of information to investors—that differs from the ratings references or requirements that Congress sought to eliminate in Section 939A. Accordingly, we do not believe that the SEC is required by Section 939A to amend Rule 134 to exclude credit ratings from the list of items that may be disclosed to investors under the Rule 134(a)(17) safe harbor.

We discuss each of these points in more detail below.

The Commission should ensure that issuers currently eligible to register debt securities on Form S-3 and Form F-3 do not lose this eligibility.

The proposed rules would revise the instructions in Form S-3 and Form F-3 to replace the current investment-grade transaction eligibility criterion with the requirement that an issuer have issued (as of a date 60 days prior to the filing of the registration statement) for cash, more than \$1 billion in nonconvertible securities, other than common equity, through registered primary offerings over the prior three years. This is modeled on the standard used to determine whether a company that does not meet the public equity float requirement qualifies as a WKSJ based on its debt issuances and represents what the Commission "preliminarily believe[s] is the most workable alternative for determining whether an issuer is widely followed in the marketplace." (Proposing release at page 12).

The Commission indicates in the proposing release that it wants to "preserv[e] the use of Form S-3 (and similar forms) for issuers . . . [that are] widely followed in the market" and acknowledges that "[t]he legislative history does not indicate that Congress intended to change the types of issuers and offerings that could rely on the Commission's forms." (Proposing release at pages 5 and 13). Yet the Commission estimates that at least 45 issuers that offered debt securities on Form S-3 or Form F-3 during the period from January 1, 2006 to August 15, 2008 (the "review period") based on the existing investment-grade transaction eligibility test would not be eligible to do so under the new transaction eligibility test. (Proposing release at pages 16–17). This number does not capture those companies that would have been eligible but chose not to offer debt securities during the review period or those that had a free-float capitalization or a parent guarantor with a free-float capitalization during the review period in excess of \$75 million (the alternate Form S-3 transaction eligibility threshold). We suspect that if a similar analysis were to be conducted using a review period of the most recent three years (the period used in the proposed transaction eligibility criterion), the number of companies that could lose their Form S-3 or Form F-3 transaction eligibility would be substantially higher because (1) the debt capital markets were essentially closed for the last few months of 2008 and severely limited for much of 2009, which significantly reduced the number of registered debt offerings during the past three years that could be counted toward the \$1 billion threshold contained in the proposed rules and (2) many companies experienced a drop in market capitalization during this period making them more likely to rely on transaction eligibility criteria rather than the public equity float requirement.

Debt issuers that are no longer eligible to use primary shelf registration statements will have less of an incentive to conduct registered offerings, which is inconsistent with the Commission's stated "policy preference for registered offerings." (See *Securities Offering Reform*, Release No. 33-8591, 170 Fed. Reg. 44722, 44728, 44777 (Aug. 3, 2005), which made the shelf registration process easier for issuers in order to encourage them to access the public as opposed to private markets). In our experience, many issuers, if not most, choose to issue registered debt when they are eligible to use a shelf registration statement and therefore opt to pursue a registered offering as opposed to a Rule 144A offering. These issuers would be much more likely to pursue a Rule 144A offering instead of a registered offering if they are not eligible to use a shelf registration statement, particularly in light of the amendments that have shortened the Rule 144 holding period applicable to unregistered securities.

In addition, registered debt issuers could be significantly disadvantaged by this loss of shelf eligibility. As the Commission succinctly points out in *Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3*, Release No. 33-8878, 72 Fed. Reg. 73534, 73535 (Dec. 27, 2007) (which extended limited shelf registration to smaller issuers), shelf registration

provides considerable flexibility in accessing the public securities markets from time to time in response to changes in the markets and other factors. The shelf eligibility resulting from Form S-3 eligibility and the ability to forward incorporate information on Form S-3, therefore, allow companies to avoid additional delays and interruptions in the offering process and can reduce or even eliminate the costs associated with preparing and filing post-effective amendments to the registration statement. By having more control over the timing of offerings these companies can take advantage of desirable market conditions, thus allowing them to raise capital on more favorable terms (such as pricing) or obtain lower interest rates on debt.

We see no justification for depriving issuers currently eligible to use Form S-3 and Form F-3 of the ability to continue to use these forms, and forcing such issuers to pursue unregistered offerings. We therefore urge the Commission to make the following modifications to the proposed transaction eligibility criteria.

1. Issuers with effective shelf registration statements should be grandfathered under existing rules for a three-year period and able to utilize the current transaction eligibility criteria to issue debt securities during this time.

The Commission should adopt a three-year transition period during which currently effective Form S-3 and Form F-3 registration statements are grandfathered under the new rules. During this three-year period, issuers that had effective shelf registration statements on the effective date of the new rules would be able to register debt securities on Form S-3 or Form F-3 based on (1) the transaction eligibility criteria in existence immediately prior to the adoption of the new rules or (2) the new transaction eligibility criteria.

At a minimum, an issuer with an effective Form S-3 or Form F-3 registration statement should be entitled to utilize the transaction criteria in existence on the effective date of its existing shelf registration statement until the expiration of this registration statement, even if it files a Form 10-K or Form 20-F during that period that serves as a post-effective amendment to update its existing shelf registration statement in accordance with Section 10(a)(3) of the Securities Act. This grandfathering would prevent issuers that have already invested the time and expense to put up a shelf registration statement and developed financing plans based on their current shelf eligibility from losing this eligibility due to a midstream change in the rules. It would also give the Commission time to consider alternative transaction eligibility criteria that would enable these issuers to retain their Form S-3 or Form F-3 eligibility.

2. The proposed \$1 billion threshold contained in the new transaction eligibility criteria should be lowered significantly.

The debt WKSJ threshold is simply too high a standard to impose upon all debt issuers for purposes of Form S-3 and Form F-3 eligibility. WKSJ status confers significantly more benefits upon an issuer, including the ability to use automatic shelf registration. The use of Form S-3 or F-3 generally has never been subject to the same threshold criterion as WKSJ status. This is evident by the difference in market capitalization requirements applicable to ordinary versus automatic shelf registration. In order to qualify to use Form S-3 or Form F-3 for equity issuances, an issuer must have market capitalization of \$75 million, whereas in order to qualify as a WKSJ and use an automatic shelf registration statement, an issuer must have market capitalization of \$700 million—nearly *ten times* the market capitalization required in order to use Form S-3 or Form F-3. The elimination of this distinction for purposes of debt shelf registration is completely disproportional to the comparable requirements

for equity issuances and unmerited in light of the difference in risk profile between equity and debt issuances.

As explained above, setting such a high bar for debt issuers' use of Form S-3 or F-3 will only discourage issuers that are no longer eligible to use primary shelf registration statements from pursuing registered debt offerings. We therefore urge the Commission to substantially lower the proposed \$1 billion threshold for debt issuances over the most recent three years to a more attainable threshold, for example, \$500 million.

3. Unregistered debt offerings and exchange offers should count toward the proposed debt issuance threshold.

The Commission should also eliminate the requirement that only primary offerings for cash count toward the issuance threshold. The proposing release states that the attainment of this threshold suggests that there is a "wide following in the marketplace" for these issuers and that "[t]hese issuers generally have their Exchange Act filings broadly followed and scrutinized by investors and the markets." (Proposing release at page 14). While we agree with that premise, we do not understand the benefits of excluding Rule 144A offerings and registered exchange offers from consideration in meeting this issuance threshold.

The rationale offered in the proposing release for excluding Rule 144A offerings and registered exchange offers is that such offerings are not "carried out under the Securities Act's disclosure or liability standards" and that purchasers may not be able to avail themselves of the same remedies as purchasers in a registered offering for cash. (Proposing release at page 15). With respect to the disclosure standards, we note that while the specific requirements of Regulation S-K may be inapplicable in a Rule 144A offering, as a practical matter, the disclosure in Rule 144A offerings is typically substantially comparable to that which would be required in a registered offering for cash. As for liabilities and remedies, we agree that there are differences between registered and unregistered offerings, but we fail to see how that distinction is relevant in determining whether an issuer is widely followed or whether its disclosure is scrutinized. Investors increasingly view the Rule 144A and public markets as interchangeable, as evidenced by the near elimination of any pricing differential between the two markets. Investors follow issuers and scrutinize their filings under the Securities Exchange Act of 1934, as amended ("Exchange Act"), without regard to whether the notes they hold were or were not registered under the Securities Act.

4. The Commission should add supplemental transaction eligibility criterion to Form S-3 and F-3 based on an issuer's credit-worthiness.

Congress provided in Section 939A that the Commission should "substitute" references to and reliance on credit ratings with "such standard of credit-worthiness as each respective agency shall determine as appropriate for such regulations." Yet, the Commission has proposed to replace the current investment grade transaction eligibility criterion with a criterion based on a threshold level of debt issuances because this suggests that the issuer has a "wide following in the marketplace" and its "Exchange Act filings [are] broadly followed and scrutinized by investors and the markets." (Proposing release at page 14). While a wide following is a worthwhile basis for short-form registration, it is by no means synonymous with credit-worthiness.

We therefore believe that the Commission should adopt the proposed debt issuance standard, modified as discussed above, as well as supplemental transaction eligibility criteria related to a debt issuer's credit-worthiness. An approach might be to have a number of alternative measures, such as an appropriately narrow yield spread between the issuer's outstanding debt securities and a comparable treasury issue, or an appropriate interest coverage ratio or debt to capital ratio.

Rule 134 should not be amended to disallow the disclosure of credit ratings since issuers' disclosure of ratings in this context serves a purpose different from that of the references to credit ratings which Congress sought to eliminate in Section 939A.

The Commission has also proposed revising the safe harbor in Rule 134(a)(17) so that security ratings issued by NRSROs are no longer among the items permitted to be disclosed in certain communications not deemed to be a prospectus or free writing prospectus. In our view, the disclosure of ratings in Rule 134 communications serves a policy purpose—the disclosure of information to investors—different from the ratings references targeted by Section 939A and therefore does not fall under Congress's directive in Section 939A. We therefore urge the Commission to continue to allow issuers to disclose NRSRO ratings in Rule 134 communications. In fact, we believe the Commission should expand Rule 134(a)(17) to permit disclosure of ratings by any credit rating agency, not just NRSROs.

The legislative history for Section 939A and its precursors indicates that Congress ordered the removal of references to credit ratings from the Commission's rules and forms to prevent the appearance of a regulatory "seal of approval" on ratings (See Statement of Rep. Spencer Bachus, "For too long, the government has adopted policies that bestowed a 'Good Housekeeping' seal of approval on the rating agencies and their products.") in Introduction of the Consumer Protection and Regulatory Enhancement Act, CONG. REC. E1966, 111th CONG. (2009-2010)). The Commission voices similar concerns in the proposing release but also "recognize[s] that credit ratings play a significant role in the investment decision of many investors". (Proposing release at page 5).

Unlike the use of ratings in Form S-3 or Form F-3, which establish a threshold and bestow a benefit based on the credit-worthiness of an issuer implied by its investment grade rating, Rule 134 merely allows an issuer to disclose a security's rating along with other information about the offering without running afoul of Section 5 of the Securities Act. The Commission is not endorsing or putting a "seal of approval" on this ratings information any more than it is endorsing the underwriters, offering timetable, CUSIP, ticker, listing information or other items permitted to be disclosed under the Rule 134 safe harbor. On the contrary, allowing this disclosure is consistent with the Commission's investor protection mission that "all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it." (See the Commission's website at <http://www.sec.gov/about/whatwedo.shtml>). If the Commission eliminates credit ratings from the list of items subject to the Rule 134 safe harbor, it is likely that companies will no longer disclose security ratings in their Rule 134 press releases, which will deprive investors of this information. We therefore urge the Commission not to remove credit ratings from the list of items permitted to be disclosed to investors under Rule 134.

* * *

We would be pleased to discuss our comments or any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to Richard J. Sandler, Richard D. Truesdell, Jr., Joseph A. Hall, Michael Kaplan or Janice Brunner at 212-450-4000.

Very truly yours,

DAVIS POLK & WARDWELL LLP