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March 28, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549–1090

Re: Proposed Rules Regarding Security Ratings
(Release Nos. 33–9186; 34–63874; File No. S7–18–08)

Dear Ms. Murphy:

We submit this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments on its proposed rules regarding the removal of references to credit ratings in rules and forms promulgated under the Securities Act of 1933, as amended (the "Securities Act") and the Securities Exchange Act of 1934, as amended (the "Exchange Act").[1] We appreciate the opportunity to comment on the matters discussed in the Release.

We commend the Commission for its efforts to implement the legislative mandate of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act")[2] and thereby reduce reliance on credit ratings for regulatory purposes. We also support the Commission's attempt to preserve the use of Forms S–3 and F-3 and similar forms, and the availability of shelf registration, for issuers that are widely followed in the market. Our

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[1] Release Nos. 33–9186; 34–63874 (Feb. 9, 2011) (the "Release").

[2] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

comments are limited to (1) the proposed debt issuance threshold and whether the same threshold should apply to foreign private issuers and (2) the proposed removal of references to credit ratings from the safe harbor provision of Rule 134 under the Securities Act.

I. Form S–3 and Form F–3 Eligibility Requirements

1. Replacement of Investment Grade Rating Criterion With Minimum Registered Debt Issuance Threshold

In the Release, the Commission proposes to replace the transaction eligibility criterion for registering primary offerings of non-convertible securities on Forms S–3 and F–3 – currently, these securities must be rated investment grade by at least one nationally recognized statistical rating organization ("NRSRO") – with a new requirement that the registrant have issued in the last three years at least $1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash registered under the Securities Act.

While we agree that a debt issuance threshold is a suitable replacement for the rating criterion, we believe the threshold for Form S–3/F–3 eligibility should be lower than the one used in the definition of well-known seasoned issuer ("WKSI") in Rule 405 under the Securities Act.

According to the Release, the Commission believes "a wide following in the marketplace makes Form S–3 and Form F–3 appropriate for . . . issuers because information about them is generally readily available."[3] In contrast, the Commission introduced WKSI status in 2005 "for issuers that have a reporting history under the Exchange Act and are presumptively the most widely followed."[4] There was a clear decision at that time to set the bar for qualification for WKSI status at a higher level than the level for eligibility for Forms S–3 and F–3. This distinction is reflected in the current tiered approach, in which WKSI status permits an issuer that is already eligible to use Form S–3/F–3 to go a step beyond and take advantage of the automatic shelf registration process and liberalization of the communication rules. We do not believe it is necessary or desirable, or in the interests of investors or markets, to proceed now to eliminate this distinction.

We note that the public equity float of $700 million required for WKSI status is substantially higher than the $75 million public equity float required for Form S–3/F–3 eligibility, and while it may be difficult to find empirical support for any particular amount, we believe a debt issuance threshold in the range of $250 million would be more consistent with the difference between WKSI status and Form S–3/F–3 eligibility.

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[3] Emphasis added.

[4] SEC Release Nos. 33–8591; 34–52056; IC–26993 (July 19, 2005) (emphasis added).

In the Release, the Commission also solicits comment as to whether the measurement time period for the debt issuance threshold should be longer or shorter than three years. We believe the Commission should adopt a measurement time period of five years. A shorter period could result in issuers with a medium-term maturity profile (e.g., five years) being ineligible to use Form S-3/F-3 for the refinancing at maturity.[5]

Finally, although we think a reduced debt issuance threshold in combination with a longer measurement time period would generally provide a reasonable substitute for ratings-based eligibility, we are concerned that the recent financial crisis, and the resulting decline in public debt issuance volume, may make even a five-year measurement period insufficient and result in a number of issuers with currently effective shelf registration statements unable to use them for future debt issuances after their eligibility is next retested. These issuers have relied in good faith on the rules currently in effect when establishing their financing plans and filing related shelf registration statements. We therefore believe the Commission should grandfather the eligibility to use currently effective shelf registration statements on Form S–3/F–3 for their maximum three-year duration so long as transactions comply with the investment grade rating criterion as currently in effect.

2. Different Standard for Eligibility of Foreign Private Issuers

In the Release, the Commission further solicits comment as to whether the proposed debt issuance threshold raises any issues that are unique to foreign private issuers, especially those that may undertake U.S. registered public offerings as only a portion of their overall plan of financing, and whether it would be appropriate to address these problems by providing a longer time period for measurement or by including unregistered, public offerings of securities for cash outside the United States.

We believe the proposed amendments would inadvertently remove Form F–3 eligibility for a number of issuers that have been active and widely followed in the capital markets and are currently eligible to register non-convertible securities on Form F–3. Specifically, certain foreign private issuers that currently report under the Exchange Act and have done so for more than one year (and are thus currently eligible for Form F–3 and shelf registration) do not have public equity securities. These issuers therefore do not qualify under the public equity float test of Form F–3. Moreover, when the securities of these issuers are not guaranteed by a parent company, they would not be able to rely on General Instruction I.A.5.(iii) of Form F–3, which allows a registrant-subsidiary to rely on the Form F–3 eligibility of the parent company so long as the parent company provides a full and unconditional guarantee. Examples of these issuers include (1) operating companies that have become wholly-owned

[5] Alternatively, the Commission could establish a test based on the outstanding amount of an issuer's qualifying debt securities. For example, an issuer could be eligible for Form S–3/F–3 if it had at least $1 billion in outstanding debt securities that would otherwise qualify for the debt issuance threshold (i.e., U.S. registered debt securities or, for foreign private issuers, debt securities issued pursuant to Regulation S).

subsidiaries through acquisition and continue to operate autonomously from parent affiliates, (2) operating companies that are wholly-owned by a holding company, where the group has traditionally financed debt offerings solely through the operating company, (3) issuers owned by private equity investors or other small groups of shareholders and (4) finance subsidiaries that benefit from keepwell arrangements or other support mechanisms that do not allow them to qualify on the basis of guarantees from their parent companies.

Many of these companies have active debt issuance programs in the European or other foreign markets, but for various reasons, in particular recent widespread market volatility and attractiveness of foreign markets, they have registered no or only a modest amount of debt securities for sale in the U.S. market in the past three years. These issuers, which are widely followed by investors and continue to report under the Exchange Act in order to maintain the U.S. public debt markets as one of their sources of available funding, would be unable to qualify under the proposed debt issuance threshold insofar as it refers only to non-convertible securities offerings registered for sale to the public in the United States. Similarly, issuers that would currently be eligible under the Commission's proposed threshold might lose their eligibility if they were to fund their operations in non-U.S. markets over a period of several years, which they might do if pricing conditions so warranted. These issuers would be unlikely to return to the U.S. public market if they were to lose their eligibility for shelf registration.

As discussed in the Release, the legislative history of the Dodd-Frank Act does not indicate that Congress intended to change the types of issuers and offerings that could rely on the Commission's forms. However, the proposed amendments would in fact change Form F–3 eligibility for the foreign private issuers described above. As a result of what we believe is this unintended consequence of the proposal, we support the second approach suggested by the Commission for adjusting the qualifications for foreign private issuers. We therefore recommend including, in the debt issuance threshold applicable to foreign private issuers, non-convertible securities that are offered for cash outside the United States without registration under the Securities Act in accordance with Regulation S as well as those registered in the United States. Since the proposed debt issuance threshold serves as a proxy for whether the issuer is sufficiently followed in the marketplace, and since the marketplace is global, it seems inconsistent, at least for foreign private issuers, to limit this standard to registered offerings in the United States in circumstances in which such offerings represent only a portion of the total offerings that are followed in the global marketplace for the issuer's securities.

There is precedent for this kind of distinction between foreign private issuers and domestic issuers in Rules 138, 139 and 168 under the Securities Act. In these rules, the reporting history requirement for foreign private issuers is different than that applicable to domestic issuers and refers to their worldwide public equity float, which in our view recognizes that for foreign private issuers securities markets outside the United States are often at least as important as the U.S. market.

II. Rule 134 – Communications Not Deemed a Prospectus

The Commission proposes in the Release to remove Rule 134(a)(17) under the Securities Act, which permits the disclosure of security ratings issued or expected to be issued by NRSROs in certain communications deemed not to be a prospectus or a free writing prospectus. As discussed in the Release, the Commission believes that providing a safe harbor that explicitly permits the presence of a credit rating assigned by a NRSRO is not consistent with the purposes of Section 939A of the Dodd-Frank Act, and it notes that removing the safe harbor for this type of information would not necessarily result in a communication that includes this information being deemed to be a prospectus or a free writing prospectus.

Section 939A of the Dodd-Frank Act requires the Commission to "review any regulation issued by [it] that requires the use of an assessment of the credit-worthiness of a security or money market instrument; and any references to or requirements in such regulations regarding credit ratings." We do not believe the safe harbor of Rule 134(a)(17) is inconsistent with the purposes of the Dodd-Frank Act, because its reference to a credit rating does not represent a credit rating requirement in any sense. Unlike the Form S–3/F–3 eligibility requirements discussed above, which use a specific rating (i.e., investment grade) to establish credit-worthiness, Rule 134 does not set a minimum level of credit ratings as a predicate for granting more favorable treatment to issuers that have obtained that rating level. Moreover, unlike certain other rules that are subject to Section 939A, Rule 134(a)(17) does not imply official recognition of ratings' relevance by requiring issuers to report or disclose them. Instead, it merely allows the inclusion of a security rating (if there is one, and whatever it may be) among many other particulars of an offering that may be announced free of "gun-jumping" risk by issuers that choose to do so.

While we agree with the Commission that the loss of the safe harbor would not necessarily result in a communication being deemed a prospectus or a free writing prospectus, we note that, absent the safe harbor, the entirety of the information in the respective communication would then lose the safe harbor's protection and need to be evaluated under the necessarily more uncertain facts-and-circumstances criteria. That uncertainty is particularly problematic because the analysis could not focus only on whether including a credit rating makes a communication that is not an offer (without regard to Rule 134) into an offer. Since we do not believe the proposed changes to Rule 134 are required by the letter or the spirit of the Dodd-Frank Act, we recommend not making this change, which would unnecessarily chill the disclosure of information investors have come to expect regarding a new debt offering.

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We thank you for the opportunity to submit this comment letter. We would be happy to discuss with you any of the comments described above or any other matters you feel would be helpful in your review of the proposal. Please do not hesitate to contact Leslie N. Silverman or Raymond B. Check at (212-225-2000), or Andrew A. Bernstein (+33-1-40-74-68-00) or Pierre-Marie Boury (+44-20-7614-2200) with respect to foreign issuers, if you would like to discuss these matters further.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP