

March 29, 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 (File Number S7-18-08)

Dear Ms. Murphy:

We respectfully submit this comment letter in response to Release No. 33-9186, dated February 9, 2010 (the "Proposing Release"), in which the Securities and Exchange Commission (the "Commission") has requested comments on proposed amendments to replace rule and form requirements under the Securities Act of 1933, as amended (the "Securities Act") and the Securities Exchange Act of 1934, as amended (the "Exchange Act"), for securities offerings or issuer disclosure rules that rely on, or make special accommodations for, security ratings with alternative requirements. In the following discussion, we have responded to specific questions set forth in the Proposing Release. The comments set forth in this letter reflect our views and not necessarily those of any of our clients.

- **SEC Request for Comment No. 2: Is the cumulative registered offering amount for the most recent three-year period the appropriate threshold at which to differentiate issuers? If so, is \$1 billion appropriate? If not, should the threshold be higher (e.g., \$1.25 billion) or lower (e.g., \$500 or \$750 million), and, if so, at what level should it be set? Please explain your reasoning for a different threshold. We estimate, based on our staff's review of non-convertible offerings, that a threshold of \$750 million would result in approximately four of the companies excluded under the \$1 billion threshold being eligible to use Form S-3, and that a threshold of \$500 million would result in approximately 11 of the issuers excluded under the \$1 billion threshold being eligible to use Form S-3.**

We believe that the threshold should be lower. In addition we believe that the test should relate to aggregate non-convertible securities “outstanding” rather than “issued during the previous three years.” Further, as discussed below, we believe that under certain circumstances, non-convertible securities issued in unregistered private offerings and registered exchange offers (*i.e.* not for cash) should be included in the eligibility calculation. We note that the proposed revisions to General Instruction I.B.2 of Form S-3 would preclude highly rated issuers of non-convertible securities that access the capital markets only periodically and in aggregate amounts over the relevant time period that would not enable them to meet the \$1 billion threshold from availing themselves of the convenience of Form S-3. For example, we are aware of multiple medium-term note issuance programs that have been established by investment grade issuers on Form S-3 that would not be eligible to use the form under the proposed eligibility requirements due to the fact that those issuers did not historically issue large amounts of debt into the market and the programs are characterized by periodic offerings with small aggregate amounts. We believe that issuers of debt under programs of this sort and highly rated issuers of other non-convertible securities that will no longer qualify to use Form S-3 under General Instruction I.B.2 will face substantially increased expense and transactions costs to the extent that they are required to use Form S-1 due to, among other reasons, their inability to forward incorporate by reference under Form S-1. We believe that the added expense and burden associated with Form S-1 may push such issuers to offer and sell unregistered securities in private placements and/or offshore with an attendant loss of SEC regulatory oversight. In addition, such issuers may determine to no longer maintain these types of public market programs, restricting the choices available to investors.

- **SEC Request for Comment No. 9: Is there a reason that this Form S-3 and Form F-3 eligibility requirement should not mirror the registered offering amount requirement for the debt-only WKSI definition?**

We generally do not believe that the threshold should match the registered offering amount requirement for the debt-only WKSI definition given that non-WKSI issuer registration statements on Form S-3 that rely on General Instruction I.B.2 will continue to be subject to SEC review prior to being declared effective. Further, we have suggested below other potential eligibility criteria that could provide issuers with an alternate bases for utilizing Form S-3 under General Instruction I.B.2.

- **SEC Request for Comment No. 10: Should the measurement time period for a dollar-volume issuance threshold (whether set at \$1 billion, as proposed, or at some other level) be longer or shorter than three years (e.g., four or five years or one or two years)? If so, why? Would it be more appropriate for the threshold to include non-convertible securities, other than common equity, outstanding rather than issued in registered transactions over the prior three years?**

We refer to our response to SEC Request for Comment No. 2 above.

- **SEC Request for Comment No. 11: In determining compliance with the dollar-volume threshold, should issuers be permitted to include only securities issued in registered primary offerings for cash, as proposed? Should issuers be permitted to include registered exchange offers or private offerings?**

We believe that issuers should be permitted to include non-convertible securities issued in unregistered private offerings and exchange offers in calculating the \$1 billion or other eligibility threshold.

Privately placed securities. We believe issuers should be permitted to include in the eligibility calculation non-convertible securities that are offered and sold through initial purchasers or other intermediaries pursuant to the safe harbor provided by (i) Rule 144A beginning on the date that non-affiliates are able to freely sell securities purchased in that offering under Rule 144 and (ii) Regulation S upon the expiration, if applicable, of the “distribution compliance period” and, in each case, (a) as long as the issuer has contractually agreed to exchange those securities for securities registered under the Securities Act and (b) as long as the issuer has filed all periodic and current reports that would be required to be filed by an issuer subject to Section 15(d) of the Exchange Act from the time of the offering intended to be included in the calculation through the requisite determination date for S-3 eligibility. We do not believe that the lack of a financial intermediary with potential liability under Section 11 of the Securities Act should preclude the inclusion of such privately placed securities in the eligibility calculation due to the fact that: (1) it is customary for offering documents in these types of offerings to be prepared in material compliance with the disclosure requirements of the Securities Act (particularly to the extent that a subsequent exchange offer is contemplated), (2) distribution participants, including the financial intermediaries, have potential 10b-5 liability exposure in connection with the placement of such securities and there has been significant convergence between the nature and scope of the diligence processes undertaken in connection with private offerings and public offerings of securities by those participants and (3) to the extent that the issuer has been and continues to be subject to the reporting requirements of the Exchange Act, the sufficiency of the disclosure included in an issuer’s offering document would be subject to comparative scrutiny against publicly filed reports that have been and continue to be subject to SEC review.

Registered exchange offers. For many of the same reasons noted above with respect to privately placed non-convertible securities, we believe that issuers should be permitted to include in the eligibility calculation non-convertible securities that are issued in connection with registered exchange offers as long as the issuer has continued to timely file all periodic and current reports that would be required to be filed by a

company subject to Section 15(d) of the Exchange Act following any automatic termination of such issuer's reporting obligations under Section 15(d).

- **SEC Request for Comment No. 14: Is having a wide following in the market an appropriate basis for determining Form S-3 and Form F-3 eligibility criteria? Are there other criteria on which such eligibility should be based? What characteristics should an issuer eligible to use Form S-3 and Form F-3 have? What standard could we use in Form S-3 and Form F-3 to ensure those characteristics are present? If having a wide following in the market is an appropriate standard, would the alternatives on which we have requested comment (e.g., “grandfathering” certain issuers) result in issuers with a wide following in the market being eligible to use Form S-3 and Form F-3?**

We are not convinced that the \$1 billion threshold is the only or the best means by which to judge whether an issuer is widely followed in the market place. We propose each of the following as an additional/alternate basis upon which S-3 eligibility may be based:

- if the securities to be registered are (i) to be listed on a national securities exchange or (ii) will constitute “covered securities” under Section 18 of the Securities Act.
- the issuer is a wholly-owned subsidiary of a WKSI.
- the issuer is (i) a wholly-owned subsidiary of a company that satisfies the \$75 million unaffiliated float test in General Instruction I.B.1 or the finally determined (\$1 billion or other) eligibility criteria under General Instruction I.B.2 and (ii) with respect to which (a) segment reporting under FASB Accounting Standards Codification 280 would be required in the parent company Exchange Act reports, (b) the parent company has, during the most recent fiscal year, filed with the SEC separate financial statements of the subsidiary pursuant to Rule 3-05(b)(2)(iv) of Regulation S-X or (c) the parent company has, during the most recent fiscal year, filed with the SEC separate financial statements of the subsidiary pursuant to Rule 3-09 under Regulation S-X or otherwise.
- **SEC Request for Comment No. 29: Should we continue to provide a safe harbor for communications that include disclosure of ratings information? Would it be appropriate to allow such communication regarding a security rating assigned by any credit rating agency and not limit the safe harbor to NRSRO ratings? If the credit rating agency is not an NRSRO, is it appropriate to require additional disclosure to that effect? Do issuers include credit ratings in Rule 134 communications?**

We believe that the SEC should continue to provide a safe harbor for communications that include disclosure of ratings information. In connection with the sale of securities, it is common practice for an issuer to make various disclosures regarding the transaction utilizing Rule 134 and, in connection with the sale of debt securities, such communications typically include the ratings assigned. We believe that removal of the safe harbor would increase uncertainty regarding the status of any communication that includes ratings information (thereby increasing transaction costs and potentially decreasing the flow of information to the market generally). In addition, we do not believe that the text of Section 939A of Dodd-Frank requires the removal of the safe harbor. Section 939A(a) requires the SEC to review “any regulation issued by [the SEC] that *requires* (emphasis added) the use of an assessment of the creditworthiness of a security or money market instrument and any references to or requirements in *such* (emphasis added) regulations regarding credit ratings” and section 939A(b) requires the SEC to modify “any such regulations.” Thus, we believe that Section 939A should be read to require the modification of SEC regulations only if such regulations require the use of an assessment of the creditworthiness of a security or money market instrument.

We appreciate the opportunity to comment on the Proposing Release. Please feel free to contact Matthew E. Kaplan at (212) 909-7334 with any questions about this letter.

Very truly yours,

/s/ Debevoise & Plimpton LLP

Debevoise & Plimpton LLP