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File No. S7-19-18
SEC Release No. 33-10526; 34-83701

Ladies and Gentlemen:

We respectfully submit this letter in response to the request for comment by the Securities and Exchange Commission (the "Commission" or the "SEC") on its proposed amendments in Release No. 33-10526; 34-83701; File No. S7-19-18 (the "Release") to the financial disclosure requirements applicable to guarantors and issuers of guaranteed securities, as well as to affiliates whose securities are pledged as collateral for registered securities. We thank the Commission for its efforts to revise these rules and the opportunity to provide our comments.

We broadly support the Commission's disclosure simplification efforts by replacing outdated rules with new rules that are designed to ensure that investors receive information that is potentially material to an investment decision but can be complied with by issuers in a timelier and more cost-efficient manner, thereby facilitating registered public offerings and the corresponding Securities Act of 1933 (the "Securities Act") protections for investors. With respect to the Release, we agree with the basic principle that investors primarily focus on the parent company's consolidated financial statements in the context of investments in guaranteed and collateralized securities issued by operating companies.[1] In our experience the principal rationale for including guarantees and collateral in debt issuances often is to ensure that the debt securities have a *pari passu* claim to that of other creditors (credit facility lenders for example). In this context the goal is to avoid structural subordination or collateral subordination. Accordingly, in the Rule 144A / Regulation S unregistered debt offering context, rather

[1] We refer to "operating companies" to distinguish from issuers of asset-backed securities (as defined in Item 1101(c)(1) of Regulation AB).

than the detailed information required by Rule 3-10, the parent's consolidated financial disclosure typically is supplemented with (i) the amount of structurally senior debt, (ii) a measure of earnings (EBITDA or operating earnings) attributable to nonguarantor subsidiaries for the most recently completed fiscal periods and any subsequent interim period and (iii) the total assets and liabilities of nonguarantor subsidiaries as of the end of the most recently completed fiscal period. This data typically is neither audited nor subject to interim period review procedures by the parent's auditors.

Because proposed Rule 13-01 would more closely resemble disclosure practice in the Rule 144A / Regulation S market, we believe that it could potentially incentivize issuers of guaranteed securities to undertake registered offerings. Subject to our specific comments below, we believe that both issuers and investors would benefit from the adoption of proposed Rule 13-01. In contrast, as further described below, we see little benefit to these stakeholders by replacing Rule 3-16 with proposed Rule 13-02. We would support the elimination of Rule 3-16 and believe that other disclosure requirements and incentives are sufficient to cause issuers to disclose relevant material information in offerings of debt secured by capital stock of affiliates. Below we comment on specific aspects of the proposed amendments to the Rules and, where relevant, share our recommendations.

A. Rule 3-10 Amendments.

The following comments concern the proposed amendments to current Rule 3-10:

1. Consolidated Subsidiary Disclosure.

We support the Commission's proposal to eliminate the requirement that a subsidiary be 100% owned by the parent in order to qualify for the omission of its separate financial statements, and to replace it with the requirement that the subsidiary be consolidated in the financial statements of the parent. We believe the current construction of Rule 3-10 is overly constrictive in its requirement for 100% ownership, as for the purposes of evaluating default risk there is no practical difference between a company being fully or majority owned by the parent. In either case the parent has control of the subsidiary, and, even if the subsidiary is less than wholly owned, the minority equity interests are subordinated to the debt obligations of the subsidiary. Providing separate financial information for subsidiaries with less than 100% parent ownership is a significant cost that we believe provides little additional value to investors.

2. Full and Unconditional.

We support the proposal that only the parent company's obligation needs to be "full and unconditional" to rely on the Alternative Disclosures. We believe that

disclosure of the limitations on the scope of the guarantee is more important to investors than providing separate financial statements of the issuer of a limited guarantee. Local law requirements in many foreign jurisdictions preclude the issuance of a guarantee that satisfies the SEC definition of "full and unconditional". For example, Section 8-10 of the Norwegian Private Limited Companies Act of 1997 No. 44 / Norwegian Public Limited Companies Act of 1997 No. 45 (Aksjeloven and Allmennaksjeloven), restricts a Norwegian private or public limited liability company from providing guarantees in connection with the acquisition of its shares or the shares in the parent company and, as a consequence of these restrictions, the value of the guarantees provided by Norwegian guarantors may be reduced to zero in such circumstances. Historically due to potentially adverse tax consequences it was rare for foreign subsidiaries to guarantee debt of domestic registrants. However, assuming the pending changes to relevant tax regulations are adopted, guarantees by foreign entities may become more common, thereby increasing the utility of eliminating the full and unconditional requirement for obligors other than the parent.

3. Disclosure Reporting Period.

We support the Commission's proposal to limit the periods for which financial information is required as part of the Alternative Disclosures to the most recently completed fiscal year and year-to-date interim period. As described above, in the Release itself and in prior commentary by practitioners, these are the periods for which disclosure typically is provided in Rule 144A / Regulation S debt offerings.

4. Requirement to Disclose Other Material Information.

We appreciate that in adopting rules, the SEC often wishes to convey that its line-item disclosure rules are subject to the overarching securities law liability requirement that a registration statement not omit to state a material fact necessary to make the statements therein not misleading.[2] In light of that overarching liability regime, we believe that it is potentially confusing and unnecessary to include clause (a)(5) of proposed Rule 13-01. Read literally, this catch-all obligation would override all other relevant disclosure obligations. We respectfully request that the SEC not include this provision in proposed Rule 13-01.

5. Location and Timing of Alternative Disclosure.

We support the Commission's proposal to permit companies to provide the Alternative Disclosures either inside or outside of the consolidated financial statements in registration statements covering the offer and sale of registered debt securities as well as related periodic reports. Under the current construction of Rule 3-10,

[2] *See* Securities Act Section 11(a), 15 U.S.C. § 77k(a); Section 12(a)(2), 15 U.S.C. § 77l(a)(2).

the Alternative Disclosures must be included in the notes to the parent company's consolidated financial statements, and accordingly must be audited (on an annual basis) and reviewed (on an interim basis). Given the cost and delay associated with preparing these additional financial disclosures (together with the requirement to provide three years of such data), we believe that this requirement in particular has driven would-be registered debt issuers to the Rule 144A / Regulation S debt market. Eliminating the need to have the Alternative Disclosures audited as part of an offering would substantially reduce time to market for issuers—a valuable consideration when market conditions fluctuate quickly.

Similarly, we see no benefit to requiring that the Alternative Disclosures be included in the parent registrant's financial statements beginning with the annual report for the year in which the relevant offering occurred. Even if outside the financial statements, the Alternative Disclosures nevertheless would be subject to parent's internal control over financial reporting as well as disclosure controls and procedures. In addition, it seems somewhat incongruous for a heightened compliance obligation to apply only after an offering has occurred. We respectfully propose that the Commission revise the proposed rule to permit registrants the flexibility to include such disclosures outside the financial statements in both prospectuses and periodic reports.

We also encourage the SEC to expressly provide that the Alternative Disclosures need not be included in a registration statement at the time of effectiveness so long as they are provided prior to an offering of the securities in respect of which the Alternative Disclosures are required. Perhaps the most efficient way to implement this would be to amend Rule 430B(a) to cover any information required by proposed Rule 13-01. Such a rule would provide substantial relief to those issuers who wish to include a variety of potential debt offering structures (including multiple registrants) in a registration statement at the time of filing while ensuring that the required disclosures be made at the time of any actual offering.

6. Financial Disclosure for Recently Acquired Subsidiary Issuers and Guarantors.

We support the Commission in its proposal to eliminate the requirements contained in current Rule 3-10(g) to provide separate pre-acquisition financial statements for recently acquired subsidiary issuers or guarantors. We believe this requirement to be overbroad. The Commission proposes to address this by including a provision in proposed Rule 13-01 that would require disclosure of recently-acquired subsidiaries to the extent material to an investment decision. Although the SEC's proposal would ameliorate the current disclosure rules applicable to recently acquired subsidiaries, we would encourage the SEC not to perpetuate separate disclosure rules in this context for recently acquired subsidiaries. As the Commission notes in the Release, Rule 3-05 itself requires such pre-acquisition financial statements for *significant* acquired subsidiaries and it is widely acknowledged that -- in its current form -- Rule 3-05 often requires disclosure of immaterial acquisitions. We applaud the SEC's current efforts to reassess

Rule 3-05 and the SEC Staff's willingness to consider Rule 3-13 waivers in this context. We believe that it would be preferable and support the overall goals of disclosure simplification to rely on Rule 3-05 (including as it may be revised) for the applicable financial disclosure rules associated with recently acquired entities.

7. Ongoing Reporting Obligations for Non-Reporting Subsidiaries.

We support the Commission's proposal to eliminate the obligation for a parent company to continue to provide the Alternative Disclosures in its periodic reports for subsidiary issuers and guarantors in situations where the relevant subsidiary's own filing obligations have been suspended by operation of Section 15(d)(1) of the Securities Exchange Act of 1934 (the "Exchange Act") or through compliance with Exchange Act Rule 12h-3. The current requirement is highly anomalous and frequently results in an expensive ongoing disclosure cost with no discernible benefit to investors following business combination transactions. Moreover, it has become commonplace for issuers to tailor *contractual* reporting obligations to meet the perceived needs of investors and the proposed change will in no way limit this type of "private ordering."

8. Clarification of Form Eligibility for Certain Convertible and Exchangeable Debt Instruments.

Though not addressed in the Release, we would encourage the SEC to clarify form eligibility for (i) parent company debt securities convertible into parent company common stock that are guaranteed by subsidiaries and (ii) debt securities of subsidiaries that are fully and unconditionally guaranteed by the parent and exchangeable for parent company common stock. When these instructions were previously revised, the wording caused some confusion in this regard. Initially, the SEC Staff clarified its interpretation of the relevant form instructions telephonically to certain lawyers active in the equity-linked securities offering market. The SEC Staff subsequently clarified this position in the CD&I set forth below. As the relevant form instructions will need to be revised in connection with adoption of proposed Rule 13-01, we would encourage the SEC to eliminate the current lack of precision therein as it relates to convertible and exchangeable securities.

Question 118.07

Question: May a majority-owned subsidiary of a well-known seasoned issuer parent use the parent's automatic shelf registration statement to register the subsidiary's guarantee of the parent's registered debt securities that are convertible into equity securities of the parent and not any other securities of the subsidiary, provided that the parent is eligible to register any of its securities on an automatic shelf registration statement?

> Answer: Yes. General Instruction I.D of Form S-3 and General Instruction I.C of Form F-3 refer to guarantees of non-convertible securities, other than common stock, of the parent. However, each security would be analyzed separately and the form may be used to register the subsidiary's guarantee of the parent's registered debt securities that are convertible into equity securities of the parent and not any other securities of the subsidiary when the parent is primarily eligible as a well-known seasoned issuer to register any of its securities on the automatic shelf registration statement (and is not limited to registering only debt securities). [Feb. 27, 2009]

B. Rule 3-16 Amendments.

With support for the SEC's effort to streamline Rule 3-16, we respectfully submit that the existing rule should be eliminated and not replaced. In essence, proposed Rule 13-02 would create a legal presumption that financial information regarding an affiliate whose securities secure a debt obligation is material but then permit a registrant to omit that information if it determines that it is immaterial and discloses the basis for the determination. We believe that establishing such a presumption could have unintended consequences and limit the willingness of issuers to rely on the Rule. Moreover, it is generally not the case that SEC disclosure rules require a registrant to set forth the analysis underlying a decision not to disclose something based on lack of materiality. In the absence of a specific rule, issuers will need to make their own determinations about the appropriate level of financial and nonfinancial disclosure about affiliate equity securities pledged as collateral. We believe that if a registrant wishes to receive "credit" from investors for the incremental value attributable to the collateral, it will provide the disclosure that it believes is sufficient to communicate this to investors. Any such disclosure will be subject to general securities law liability provisions if that disclosure is misleading.

In our experience, separate financial information regarding affiliates whose securities serve as collateral is not provided in Rule 144A / Regulation S debt offerings. In addition, we believe that even if proposed Rule 13-02 is adopted and the associated disclosure obligations are streamlined, the market may continue to accept "cutback provisions" that limit the collateral provided solely to avoid separate reporting requirements associated with the collateral. These provisions can result in uncertainty as to the scope of the collateral securing an obligation and create gaps between the collateral provided to one group of creditors, such as bank loan lenders, and secured noteholders. As a result, we do not see a likelihood that proposed Rule 13-02 would result in additional disclosure being provided in the context of registered offerings to which the Rule would apply.

If the SEC determines to replace Rule 3-16 with proposed Rule 13-02, we would submit the following comments:

1. Presentation of Financial Disclosure.

As stated above, we agree with the general principle that the parent company's consolidated financial statements typically are the primary focus of investors in evaluating creditworthiness. Accordingly, we support the proposal to replace the requirement for separate financial statements for each affiliate who pledges securities as collateral with summarized financial information on a combined basis for all affiliates that are consolidated in the parent's financial statements.

2. Requirement to Disclose Other Material Information.

Consistent with our comments on proposed Rule 13-01(a)(5), we request that the SEC remove the catch-all provision in proposed Rule 13-02(a)(5). We believe this provision is confusing and may unintentionally be read to supersede generally applicable securities law liability provisions.

3. Substantial Portion (20%) Collateral Threshold.

We support the Commission's proposed revision of Rule 3-16 to remove the current substantial portion test in favor of a materiality test. The current rule often results in needless costs for registrants and immaterial disclosure for investors, such as in situations where large registrants issue small amounts of securities. The market has evaluated the cost and benefit of separate disclosure in this context and responded with collateral "cutback provisions" that effectively eliminate the applicability of Rule 3-16. However, this approach potentially creates additional risk for investors as it "solves" the burdensome disclosure requirement by reducing the collateral package pledged for the benefit of investors in registered debt offerings. In light of the prevalence of "cutback provisions," if proposed Rule 13-02 is adopted, we would ask the Commission to consider whether the repeal of Rule 3-16 should apply to currently outstanding securities or only future offerings. A repeal that applies to currently outstanding securities may result in unintended substantive credit consequences depending upon the precise drafting of the relevant "cutback provision", especially if the provision only operates to exclude collateral if its inclusion would require disclosure of separate financial statements in SEC filings.

4. Requirement to Disclose Finding of Immateriality.

As set forth above, we believe the requirement in proposed Rule 13-02 to disclose the basis for finding financial information of an affiliate who collateralizes parent company securities to be immaterial incongruous with the broader SEC disclosure regime. We would therefore propose to remove this requirement from proposed Rule 13-02, if adopted.

5. Location of Disclosure.

Consistent with our comments on the proposed revisions to Rule 3-10 allowing registrants flexibility in where they may locate their Alternative Disclosures in offering documents, we request that the Commission similarly permit such flexibility with respect to any disclosure required by proposed Rule 13-02 in a registrant's periodic reports.

* * *

We thank the Commission for the opportunity to provide our feedback on the above matters. To discuss further, you may direct questions or comments to Steven L. Burns, William V. Fogg, Andrew J. Pitts, Craig F. Arcella or Christopher M. Tierney at (212) 474-1000.

Respectfully submitted,

/s/ Cravath, Swaine & Moore LLP

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