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November 29, 2010

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

Re: Comments on Proposed Rules Regarding Short-Term Borrowings Disclosure (File No. S7-22-10)

Dear Ms. Murphy:

We are responding to the request of the Securities and Exchange Commission (the "Commission" or "SEC") for comments regarding proposed amendments to Item 303 of Regulation S-K and other conforming changes to the Commission's rules and regulations (collectively, the "Proposed Rules") to require that registrants disclose additional information about their short-term borrowings.[1] We appreciate the opportunity to comment.

The Proposed Rules reflect the Commission's continued focus on the transparency and accessibility of financial statement information for investors. We believe providing meaningful quantitative and qualitative information that will enable current and potential investors and other users of a registrant's financial statements to better assess its liquidity and overall financial condition is an important priority and laudable goal. However, this goal must be balanced against the significant additional burdens that the proposed changes to existing disclosure requirements will impose on registrants. We therefore believe any final changes to the existing

[1] Release Nos. 33-9143; 34-62932 (the "Proposing Release").

disclosure regime must improve in a clear and material way the total mix of information available to the investing public.

Given the degree of international participation in the U.S. capital markets and the increased regulatory scrutiny of financial institutions around the world in the wake of the recent crisis, a large percentage of registrants that would be subject to the Proposed Rules are already required to comply with multiple sets of regulatory requirements (*e.g.*, bank regulatory rules, whether U.S., foreign national, or multi-national; local securities commission and stock exchange disclosure requirements and multi-national requirements, such as EU directives; and, for registrants that do not use U.S. GAAP as their primary accounting principles, the requirements of IFRS or local GAAP).

Under these circumstances, any rules that would impose additional disclosure obligations on registrants should be designed and implemented to elicit useful information for investors without imposing an unnecessary burden on registrants. We believe the Commission should carefully consider the burden of any new rules that would require major systems-related investments by a significant number of registrants, particularly foreign private issuers and entities that would meet the proposed definition of "financial company" but do not currently report in accordance with *Industry Guide 3*, *Statistical Disclosure by Bank Holding Companies* ("Guide 3"). Many such registrants do not currently have financial reporting systems that allow them to capture information regarding their short-term liquidity as frequently or with as much specificity as is prescribed by the Proposed Rules, or at all. Insofar as registrants are burdened by the new disclosure requirements, the ultimate cost will be borne by shareholders, and to the extent that such burdens are disproportionate to the benefits derived by investors, that ultimate cost to shareholders will be correspondingly disproportionate. It is also important for the Commission to take account of the need for systems development and related steps in setting transition periods and compliance dates for any new rules.

Disclosure of Short-Term Borrowings on an Intra-Day Basis Should Not be Required for Any Financial Companies

Particular concerns argue against collecting and providing information on an intra-day basis. Intra-day balances are even more difficult to compile than daily balances, and we believe the calculations reflect an inherent level of arbitrariness. Intra-day balances cannot be collected in any practical manner because financial companies generally calculate their short-term borrowings by netting various outstanding balances. This netting does not occur on a "real-time" basis and therefore intra-day balances do not present meaningful variations in amounts, but rather reflect a certain randomness in the inflows and outflows of cash relating to short-term borrowings, resulting in "real-time" balances that are more distorted than end-of-day balances.

For Certain Financial Companies, the Requirement to Compile Daily Amounts of Short-Term Borrowings Will Represent a Disproportionate Burden

The Proposed Rules would require financial companies to report (a) the average amount outstanding during each reported period, calculated on a *daily* average basis, (b) the amount outstanding at the end of each reported period, and (c) the maximum *daily* amount outstanding during each reported period, for a variety of specified categories. Because U.S. banks are currently required to compile short-term borrowings information on a daily basis in connection with the preparation of reports to U.S. banking regulators, we agree that the Proposed Rules would not impose a significant additional burden on U.S. banks.

However, non-U.S. banks, and other non-bank financial companies (both U.S. and non-U.S), are not currently subject to such requirements and many do not compile this information on a daily basis. For these registrants, the new requirements of the Proposed Rules are significantly more onerous than the ones currently imposed by Guide 3, particularly because many registrants for which the collection of information on a daily basis would require unwarranted or undue burden or expense are either non-U.S. banks that have been granted derogations from the strict application of Guide 3 or non-bank financial companies that do not report in accordance with Guide 3 at all.

While we agree that recent events have demonstrated a need for additional disclosure in this area, we do not believe the disclosure of maximum daily amounts reflects the way in which some financial companies manage their liquidity profile. We urge the Commission to seek to define and characterize those registrants that do not manage their funding and liquidity profiles from a daily or "maximum daily" perspective. For those registrants, we urge the Commission to revise the Proposed Rules to be congruent with the current requirements and actual application of Guide 3. This approach would have the complementary virtue of excluding from the daily calculations approach those financial companies for which it would be most likely to be the greatest burden.

Not all financial companies do or are required to manage liquidity on a daily basis. Many use a longer time horizon, the length of which depends on the risks they seek to manage and the particular circumstances surrounding the transactions in which they are engaged. As a result of this longer-term approach, shifts in their outstanding short-term borrowings during a day or even over the course of many days are not necessarily meaningful or even indicative of an underlying trend. Requiring a financial company to disclose maximum daily amounts could have the unintended consequence of conveying to investors information that is distorted by the short-term focus of the disclosure because the timing of the required information does not match the overall timing of the registrant's borrowing goals. As a result, short-term borrowings information presented with this level of specificity could be misinterpreted by investors in a way that causes them to derive negative (or positive) inferences from short-term borrowing swings that were never intended to reflect anything other than temporary (though inevitable) timing mismatches in certain financial transactions.

If, in fact, any such short-term swings in a registrant's financial condition are indicative of a sustained and significant trend, financial companies are already under a requirement to disclose and discuss such trends as part of existing Management's Discussion & Analysis ("MD&A") disclosures, an obligation that was recently reiterated by the Commission in the Interpretive Release[2] issued contemporaneously with the Proposing Release. We believe enhanced MD&A disclosures about significant trends underlying a registrant's liquidity (including meaningful short-term borrowing swings) are a better method of conveying a financial company's liquidity profile without imposing undue burden on the registrant. Financial companies can tailor this disclosure in a way that conveys the requisite information in context, thereby allowing them to present a more useful description of their liquidity profile without the artificial distortions resulting from arbitrary swings in their short-term borrowings.

If the Commission disagrees with the approach we describe above, we urge the Commission nonetheless to consider the logistical and operational burden the Proposed Rules would impose on certain categories of financial companies and to revise the Proposed Rules in a manner that takes into account these operational and logistical constraints. As noted above, many non-U.S. banks and non-bank financial companies currently do not have financial reporting systems that allow them to track short-term borrowings on a daily basis. This situation reflects the fact that such institutions are not currently subject to similar requirements imposed by any of their multiple regulators. While technological advancements have ameliorated compliance costs in recent years, the systems necessary to comply with the Proposed Rules would be so comprehensive and so different from those that these registrants currently use to manage their data that the development of such systems will require substantial time and expense, and impose other significant burdens.[3] In fact, the Commission is often asked by non-U.S. banks to agree to derogations from the strict requirements of Guide 3 (and has traditionally been flexible in its handling of such requests) because they do not currently compile all borrowing data on a daily basis—rather this information is consolidated on a weekly or even monthly basis. Therefore, if the Commission believes non-U.S. banks and non-bank financial companies (whether U.S. or non-U.S.) should present maximum daily amounts for the specific categories, it will likely be impossible for many of these registrants to implement and perform adequate testing of the required systems in time for their annual report for the fiscal year ended December 31, 2010. As a result, we urge the Commission to revise the Proposed Rules to provide that the new disclosure requirements will not apply to reports relating to fiscal year 2010 periods, but rather that the requirements will only apply to periods beginning on or after January 1, 2011 for the largest U.S. financial institutions that are already subject to Guide 3 and be phased in over a longer period of time for other categories of registrants.

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[2] Nos. 33-9144; 34-62934; FR-83.

[3] We note that any requirement to impose further disaggregation will exacerbate each of the issues described herein. As the level of disaggregation increases, so does the complexity of a registrant's reporting systems and the resulting disclosure. We comment further on the disaggregation elements of the Proposed Rules below.

We also urge the Commission to revise the Proposed Rules to provide transition relief to non-U.S. banks. The Proposed Rules allow financial companies that are not currently subject to Guide 3 to phase in the required disclosures on the theory that such financial companies have not been compiling the necessary historical data that would allow them to present several years of comparative data. For these same reasons, we believe non-U.S. banks, which historically also have not been collecting this data, should benefit from the same transition rules. Because of the extent and complexity of the historical data that is required, without this accommodation, many non-U.S. banks simply cannot recreate this data on a retrospective basis in a timely and accurate manner.

Disclosure of Short-Term Borrowings by Category Should Be Consistent with Current Guide 3 Requirements

Existing Guide 3 Categories, Subject to Necessary Derogations, Should Be Followed by all Financial Companies

We urge the Commission to revise the Proposed Rules to require that disclosure of short-term borrowings by category follow the same categories currently required by Guide 3. This will minimize the burden imposed on registrants by reducing the extent of the systems changes required by the Proposed Rules, while continuing to provide meaningful information to investors.

Therefore, we believe U.S. banks should continue to comply with the categories currently required by Guide 3. Non-U.S. banks should also continue to comply with the categories of Guide 3, subject to the derogations previously accorded to these foreign private issuers. As noted above, these derogations were granted because non-U.S. banks are subject to the regulations of their home country regulators, which have been tailored to the specific circumstances of the companies in those countries. Imposing upon foreign private issuers the obligation to comply with a second set of disclosure requirements, which are less tailored to their particular circumstances, would impose an unnecessary burden on foreign private issuers without providing additional meaningful information to investors. Much like the Proposed Rules allow foreign private issuers that do not prepare financial statements under U.S. GAAP to provide disclosure of categories that correspond to the classification used for such types of short-term borrowings under the accounting principles they use to prepare their primary financial statements, we believe the flexibility to continue to use the current Guide 3 categories, subject to previously granted derogations, should be permitted for non-U.S. banks. To the extent that the categories currently used by non-bank financial companies (whether U.S. or non-U.S.) do not match the current Guide 3 categories, we believe similar derogations should be accorded to these registrants.

No Further Disaggregation Should Be Required

We urge the Commission to eliminate the requirement to further disaggregate the required disclosures "by currency, interest rate or other meaningful category." First, disaggregation by currency is difficult to achieve in the context of complex financial reporting.

For example, banks or other registrants that traditionally issue notes denominated in one currency but linked to the movement in another currency may find it difficult to determine which currency should be considered the reporting currency. Similarly, a swap from one currency into another currency raises the same categorization problem. Furthermore, for registrants that consolidate the results of subsidiaries that have a different reporting currency, any transactions that occur at the subsidiary level in one currency will have been translated into the parent's reporting currency as part of the consolidation process, making it difficult to report transactions at the subsidiary level in a disaggregated manner without significant burden and extensive changes to the registrant's existing reporting systems.

Second, because any additional disaggregation requirement adds an increased level of complexity to a registrant's reporting systems and to the resulting disclosure, we believe any significant trend that would be highlighted by further disaggregation could more meaningfully be disclosed to investors through narrative discussion. Under current MD&A requirements, registrants are already required to disclose and analyze material trends, including pursuant to Item 305 of Regulation S-K. We believe existing disclosure requirements are sufficiently broad to encompass currency, interest rate and other trends that exist within the individual categories of short-term borrowings and that such disclosure is better tailored to each registrant's specific circumstances in order to elicit the most relevant information for investors.

Aggregation Permitted by Guide 3 Should Continue to Apply

We urge the Commission to revise the Proposed Rules to permit aggregation in accordance with a quantitative threshold similar to the one included in Guide 3, which provides that registrants are not required to break out their borrowings into the specified categories where the average outstanding balance in any such category is less than 30% of stockholders' equity. Adoption of such a quantitative threshold would significantly ease the compliance burden on registrants. In addition, while the Proposing Release suggests eliminating the 30% threshold with the goal of producing more comparable and more useful disclosure, we believe, to the contrary, that, in the absence of a quantitative threshold, the disaggregation of short-term borrowings with such a degree of granularity could well produce less useful disclosure because such disaggregation would require a registrant to present the material information alongside *de minimis* (and therefore immaterial) amounts.

The Rules for Determining Whether a Registrant Must Disclose According to the Requirements for Financial Companies Should Be Revised

The Proposed Rules currently allow a registrant that is not a bank, broker-dealer or an entity that is a holding company of one of a specified group of entities to make a subjective assessment of whether it "is engaged *to a significant extent* in the business of lending, deposit-taking, insurance underwriting or providing investment advice..." We believe the inherent ambiguity in this provision of the Proposed Rules should be replaced with a clear quantitative threshold, and that such threshold should be calculated over a period of more than one year. Adoption of this concept would significantly reduce uncertainty, ease compliance burdens and lessen the subjective element inherent in the application of the Proposed Rules.

We urge the Commission to include in the definition of a financial company for purposes of the Proposed Rules any company that derives at least 50% of its revenues from the business of lending, deposit-taking or insurance underwriting for (i) the immediately prior fiscal year <u>and</u> (ii) at least one of the two fiscal years preceding the immediately prior fiscal year.[4] Our proposed addition of a multi-year test recognizes that registrants will need significant time to compile the information necessary to make the additional disclosures called for in the Proposed Rules and that they should not therefore be subject to a regime under which they could "suddenly" find themselves to be financial companies due to short-term dislocations in their operations or anomalies in their results. Because our proposal is less vulnerable to subjective interpretation than one based on each registrant's evaluation of the meaning of "to a significant extent," we believe the resulting disclosure will be less variable from company to company and allow for better comparability across registrants.

In addition, we do not believe a company that is engaged in the provision of investment advice or holds an investment adviser is one that should for that reason be included in the definition of "financial company" since the liquidity profile of a company engaged in the provision of investment advice would not be, absent some additional circumstances, of particular concern to investors.

With respect to the current hybrid approach in the Proposed Rules according to which a registrant may provide separate disclosure for its financial and non-financial businesses, we note that it is not likely to be a practical accommodation because it is ill-suited to the borrowing reality of most registrants. Generally, companies borrow on a company-wide basis rather than entering into borrowing arrangements on a segment-by-segment or even business-by-business basis.

Imposing Requirements for the Disclosure of Leverage Ratios Would Create an Unnecessary Burden for Registrants

While we understand that leverage ratios often serve as an important indication of a registrant's ability to manage its debt obligations and operating costs, as well as its overall solvency, we do not believe requiring registrants to disclose such ratios according to a pre-determined set of rules would be beneficial to the investing public and urge the Commission not to adopt any such requirement. Any registrant that believes a leverage ratio constitutes important disclosure for investors should instead provide such a ratio calculated according to the particular rules applicable in its country of organization or to its industry, along with the necessary accompanying narrative disclosure.

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[4] We note that this multiple year test is similar to the test in Rule 3-01(c) of Regulation S-X, pursuant to which the date of the balance sheets required to be presented in a registrant's filings depends on whether such registrant (i) expects to report income after taxes but before extraordinary items and the impact of an accounting change ("<u>income</u>") for the most recently completed fiscal year for which audited financial statements are not yet available and (ii) has reported income for at least one of the two fiscal years immediately preceding such most recently completed fiscal year.

U.S. and non-U.S. banks generally provide leverage ratios in their periodic filings. These leverage ratios comply with the requirements of the regulators that regulate them and other market practice. These home country requirements are tailored to best reflect the particular circumstances of the companies to which they apply. Requiring a bank, or any other registrant, to provide a leverage ratio that conforms to a uniform set of requirements applicable to all companies across all industries fails to take into account the specific circumstances of each registrant. There is no uniform formula for leverage or its components that would apply across industries due to the varied manner in which different types of companies raise capital, finance operations, and manage cash, as well as widely different rules regarding the treatment of regulatory capital instruments in various jurisdictions and industries. For example, insurance companies are subject to specifically designed leverage and capital rules intended to reflect the particular risk profile of companies in this industry. Rather than achieving consistency of presentation across registrants, requiring a common leverage ratio would result in disclosure of an essentially meaningless measure and possibly divert investors' attention from the much more relevant measures of liquidity applicable to each registrant's special circumstances.

The Timetable for Implementing the Proposed Rules Should Permit Adequate Time for Registrants to Prepare

While recognizing the importance of moving forward on enhanced liquidity disclosure, we believe the Commission should allow sufficient time for registrants to prepare for compliance with any final rules, particularly if the disclosure requirements of the Proposed Rules are retained as proposed. As described above, many registrants do not currently have financial reporting systems in place to allow them to collect the data necessary to support the new disclosures required by the Proposed Rules. Even for companies that are already subject to Guide 3, the Proposed Rules impose additional requirements that would require changes to current reporting systems, particularly for foreign private issuers. Because of the complex nature of the necessary reporting systems and the technical nature of the data required to be compiled, we do not believe many companies will be in a position to present this data in accordance with the required rules in time for their annual report for the fiscal year ended December 31, 2010. As a result, we urge the Commission to revise the Proposed Rules to provide that the new disclosure requirements will not apply to reports relating to fiscal year 2010 periods, but rather that the requirements will only apply to periods beginning on or after January 1, 2011 for the largest U.S. financial institutions that are already subject to Guide 3 and be phased in over a longer period for other categories of registrants.

In addition, as described above, any requirement in the Proposed Rules to present historical comparative data should not be applicable to registrants that have not been subject to such requirements in the past. Therefore non-U.S. banks should benefit from the same transition rules applicable to non-bank financial companies contained in the Proposed Rules.

Interim Period Disclosure for Foreign Private Issuers Should Be Required Only if a Material Change Has Occurred

The Proposed Rules provide that foreign private issuers would be required to include short-term borrowings disclosure for the three most recent full fiscal years and quarterly information for any subsequent interim periods included in their registration statements. The Proposed Rules further state that foreign private issuers are not required to file quarterly reports with the Commission and therefore the Proposed Rules do not apply to Form 6-K reports submitted by foreign private issuers.

The fundamental premise of SEC financial reporting by foreign private issuers is that reports are required to be presented on an annual basis. Foreign private issuers are not currently required to present short-term borrowings information in accordance with Guide 3 in their interim reports filed on Form 6-K and may need to implement significant systems changes in order to provide this data (*e.g.*, implementation of internal controls relating to interim short-term borrowings disclosure and increased external auditor involvement with regard to interim disclosure). As a result, we urge the Commission to revise the Proposed Rules to clarify that a foreign private issuer should not be required to provide interim short-term borrowings disclosure except to the extent necessary to enable a reader to assess material changes in its short-term borrowings since the end of the fiscal year covered by its most recently filed Annual Report on Form 20-F. Because the only information required to be presented would be limited to a narrative discussion of any material changes since the most recently completed fiscal year, we believe this modification of the Proposed Rules would balance the twin objectives of providing investors with useful information for understanding a registrant's liquidity profile while not imposing a burden on foreign private issuers that is disproportionate to the benefit derived by investors.

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We commend the Commission for placing its rule-making efforts focused on improving the quality and transparency of liquidity disclosure at the forefront of its regulatory agenda. We would be pleased to respond to any inquiries you may have regarding this letter or our views on the Proposing Release more generally. Inquiries may be directed to Michael J. Volkovitsch or Jeffrey D. Karpf at (212) 225-2000.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

cc.: Securities and Exchange Commission
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