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December 17, 2010

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Re: File No. S7-22-10
Release Nos. 33-9143; 34-62932
Short-Term Borrowings Disclosure

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee" or "we") of the Section of Business Law (the "Section") of the American Bar Association ("ABA") in response to the request by the Securities and Exchange Commission (the "Commission") for comments on its September 17, 2010 proposing release referenced above (the "Proposing Release").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

OVERVIEW OF COMMENTS

While we recognize the underlying events that led to the Commission's rule proposal and acknowledge that it is important for those companies for which short-term borrowings represent an important source of liquidity to address short-term borrowings in their responses to Item 303 of Regulation S-K, management's discussion and analysis of financial condition and results of operations ("MD&A"), we respectfully submit that the proposed rule will not effectively achieve its important disclosure goal for two reasons. First, by universally mandating line-item disclosure in MD&A, the proposed rule departs, and detracts, from the principles-based disclosure approach that we believe underlies an effective MD&A. Second, the proposed rule imposes a significant new disclosure requirement on thousands of companies to which the underlying concern is inapplicable.

We believe that it is important for the Commission and the Staff of the Division of Corporation Finance (the "Staff") to continue to provide guidance to companies to enable companies to provide the most meaningful principles-based MD&A disclosure. We commend the efforts of the Commission and the Staff have taken to date to improve the disclosure of short-term borrowings and believe these efforts have already been effective in producing improved disclosure regarding this issue. The interpretive release, Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis, Release No. 33-9144 (September 28, 2010), contains very helpful, nuanced examples of potential MD&A disclosure that would be applicable to certain companies. We believe that the Staff has also been successful in raising overall awareness of this topic through public statements, comment letters and other interpretive guidance. These actions already taken by the Commission and Staff have addressed the underlying issue in a manner that bolsters the important, fundamental concept that MD&A is most effective when applied as a flexible, principles-based disclosure requirement.

To the extent the Commission determines to proceed with rule making, we recommend below some specific changes to the proposed disclosure requirement. We also recommend that there be appropriate transition relief to permit companies to develop the new disclosure controls and procedures that would be required with respect to any new line-item disclosure requirements. Finally, we do not believe an across-the-board requirement for companies to disclose leverage ratios would provide investors with meaningful information.

SPECIFIC COMMENTS

A. A Line-Item Requirement Specifically Quantifying Intra-Period Short-Term Borrowings is Not the Best Way to Enhance the Quality of MD&A Disclosure of Short-Term Borrowings

The initial question posed for comment in the Proposing Release is, appropriately, whether information regarding short-term borrowings and intra-period variations in the level of short-term borrowings is useful to investors. Such information is certainly <u>not</u> useful for companies whose liquidity is not dependent on access to such financing. We submit that the vast majority of reporting companies fall into this category. These companies typically rely on other important sources of liquidity, including the ability to generate cash from operations, the ability to access more permanent sources of working capital such as longer term debt or equity and the ability to use cash accumulated from prior financings and operations. We do not believe it would be helpful to investors to require these companies to provide details of whatever short-term borrowing arrangements they maintain (for example, many highly liquid companies may maintain credit facilities for use in one or more geographic areas for discrete situations that could, if needed, be served by other means).

We note that, even for companies whose liquidity is dependent on short-term borrowings, this dependence is usually evident from the financial statements provided in periodic filings. Unless the amount of short-term borrowings is materially reduced from a high point during the period to a low point at the end of each period, the balance sheets for such companies would regularly show meaningful amounts of short-term borrowings and the cash flow statements would illustrate the importance of this source of funds. In fact, we believe that an appreciation for the issuer's reliance on this source of financing as an absolute matter is at least as important to investors as a quantification of the levels of these borrowings at interim points throughout the period, or of average borrowings during a period. In those cases where the period-end borrowing levels are sufficiently different from the amounts of such borrowings used during the period so as to effectively understate the importance of this source of funds, we fully agree that effective disclosure, responsive to the existing requirements of Regulation S-K Item 303, would require discussion of this divergence. However, optimal disclosure of this difference would likely vary from company to company depending on the nature of the company's borrowing activities and other aspects of its liquidity.

More generally, we believe Item 303 of Regulation S-K has achieved its success as a disclosure requirement largely because it is primarily principles-based and therefore provides significant flexibility for a company to address the often changing nature of what constitutes material information regarding the financial aspects of its business. Adopting detailed, specific rules such as those proposed with respect to short-term borrowings would be inconsistent with the principles-based nature of MD&A and may in the long-run result in less meaningful overall MD&A disclosure. Detailed rules specifying lists of required disclosures necessarily focus issuers' attention on addressing the enumerated items of information. This focus on the enumerated items may distract a company's attention from consideration of disclosures regarding more significant macro trends or important items that are outside the express scope of the required disclosure. In effect, the more prescriptive and specific a disclosure requirement becomes, the more likely issuers will be to conclude (incorrectly) that a response to the enumerated items will be sufficient to respond to the requirement. Although requiring specific disclosures in the context of a principles-based rule is not per se objectionable, it may require additional effort by the Commission to emphasize the continuing principles-based nature of a company's overall disclosure obligation. However, requiring disclosures by all companies of specific information that may only be material to a small subset of companies risks undermining, to some extent, the notion that all information in the MD&A is intended to be material to investors.

Although we understand that the impetus for the proposed rule arose as a result of the failure by certain issuers to provide meaningful disclosures regarding their short-term debt practices in MD&A, we do not share the view that each such identified failure should necessarily lead to amendments to the disclosures required to be provided in MD&A. Among other things, the Commission has already made known to companies its views regarding these disclosure issues, which will now form the backdrop of all future disclosures regarding short-term borrowings. Perhaps more importantly, if history serves as any guide, there will be a continuing need, based on the cyclicality of our markets and companies' practices, for the Commission to address MD&A disclosure issues in the future. Were MD&A to evolve from its current principles-based disclosure standards to a concatenation of detailed and specific disclosure requirements reflecting the history of disclosure failures by small groups of companies, the result could undermine the overall goal that MD&A should provide management a generally free hand to provide transparency to investors regarding a company's financial disclosures.[1] We believe the greatest opportunity for the Commission to meaningfully and timely improve MD&A disclosure regarding emerging areas of concern would therefore be for the Commission and the Staff to continue their regular, widely publicized, communications regarding current and emerging issues such as through interpretive guidance, "Dear CFO" letters, comment letter compilations and C&DIs, as well as through the transparency of the comment letter process. To further strengthen the benefits of the Staff's work in this area, we suggest that the Commission add to the Division of Corporation Finance website a link to a page that sets forth various Commission and Staff guidance on a variety of MD&A topics.

In light of the foregoing, we believe that the detailed, across-the-board disclosure proposed in the Proposing Release will not produce, in the overwhelming majority of cases, additional meaningful information for investors. Further, we do not believe that it is possible to adopt a rule requiring the quantification of intra-period short-term borrowings that effectively addresses the issues we discuss above. However, because the Commission has now publicized its concerns regarding disclosures relating to short-term borrowings,[2] companies have now been advised of the need to address these matters to the extent they may be material to investors. This type of guidance, on a continuing basis, will be very effective in permitting companies to craft disclosure suited to their unique circumstances.

The comments that follow below set forth our suggestions for changes to the proposed rule should the Commission determine to proceed with rulemaking.

B. Any New Quantitative Disclosure Requirement Regarding Short-Term Borrowings Should Be Based on Information That Companies Actually Use in Managing Their Business and Should Not Create Substantive Requirements Regarding How, or How Often, a Company Manages Its Short-Term Borrowings

As the Commission has stated on numerous occasions, a principal objective of MD&A is to enable investors to see the company through the eyes of management. Consistent with this objective, any new quantitative disclosure requirement regarding short-term borrowings should be focused on, and limited to, quantitative information upon which a company actually makes

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[1] The Commission has stated (http://www.sec.gov/rules/interp/33-8350.htm): "The purpose of MD&A is not complicated. It is to provide readers information 'necessary to an understanding of [a company's] financial condition, changes in financial condition and results of operations.' The MD&A requirements are intended to satisfy three principal objectives:

-to provide a narrative explanation of a company's financial statements that enables investors to see the company through the eyes of management;
-to enhance the overall financial disclosure and provide the context within which financial information should be analyzed; and
-to provide information about the quality of, and potential variability of, a company's earnings and cash flow, so that investors can ascertain the likelihood that past performance is indicative of future performance."

[2] The disclosures have been made both in the Proposing Release and also by the Commission widely publicizing its 2010 "Dear CFO" letter. http://www.sec.gov/divisions/corpfin/guidance/cforepurchase0310.htm

decisions in the normal course of managing its business. Companies should not be required to implement new systems or processes in order to collect and report data on a basis that is different from the manner in which the company otherwise manages its short-term borrowings. Simply put, the disclosure requirement should reflect, not dictate, actual business practice.

The method and frequency by which a company actually manages its short-term borrowings should be a very good indicator of the materiality of such borrowings are to that company. Accordingly, in order to help investors understand the company's business through the eyes of its management, to the extent additional quantitative disclosure is required, companies should only be required to provide quantitative disclosure based on the information that is actually used for the purpose of managing their short-term borrowings. If a company manages its short-term borrowings on a weekly basis and routinely collects information on the level of weekly borrowings, that frequency should dictate how it should report quantitative information regarding its average and maximum short-term borrowings in MD&A. Similarly, if a company manages its short-term borrowings on a quarterly basis and routinely collects information on the level of short-term borrowings only at quarter-end, the company should be required to report quantitative information in its MD&A only on a quarterly basis. In each case, as part of its qualitative disclosure, the company should explain how and how often it manages short-term borrowings.

In the same vein, to the extent a company manages the short-term borrowings associated with different aspects of its business differently, it should be required to provide disclosure only with respect to its actual business practices. Such disclosure would avoid the burden of collecting information that is not otherwise used in managing the company's business yet still enable investors to understand the use of short-term borrowings through the eyes of management. Such disclosure based on the company's actual business practices will provide investors with valuable information about management's assessment of the risks associated with short-term borrowings and the issuer's control environment.

Tying the disclosure requirement to the data actually used by the issuer would also obviate the need for the Commission to define the term "financial company," thereby eliminating a major element of complexity from the proposed rule.

C. No New Disclosure Should Be Required Where Short-Term Borrowings Are Not Material to a Company

We agree with the Commission's observation in the Proposing Release that potential issues arising from short-term borrowings are not limited to the financial services sector. While recognizing that short-term borrowings may represent a material issue for companies in almost any industry, we believe that, for the vast majority of issuers that would be subject to the proposed new requirement, short-term borrowings are not likely to be material to an understanding of their liquidity. In light of this, and in order to avoid the burden to companies preparing additional disclosure that are not likely to be material to investors, to the extent the Commission determines to implement a line-item requirement with respect to short-term borrowings, we suggest that the final rule state that no disclosure would be required where an issuer's level of short-term borrowings are not material. It would be preferable for there to be a bright-line standard for determining when short-term borrowings are immaterial (or at least a presumption of immateriality, absent other qualitative factors that make the borrowings material notwithstanding their quantitative immateriality). For example, without intending to be exhaustive as to what appropriate bright-line standards might be, we suggest that no disclosure should be required if the maximum level of short-term borrowings for the period in question was less than 50% of the company's cash and cash equivalents or where substantial portions of the maximum amount of short-term borrowing were available under a committed source of financing (such as a revolving credit loan facility).

D. Detailed Quantitative Disclosure about Short-Term Borrowings Should Not Be Required on a Quarterly Basis

As a general principle, the MD&A for interim periods is required to focus on material changes from the MD&A included in the most recent annual report. To the extent discussion of short-term borrowing will be required with respect to interim periods, we believe it should similarly focus on material changes from the most recent annual report. Specifically, we believe any interim reporting requirement should be focused on the matters that affect the qualitative disclosures that are required to be provided annually (e.g., a material change in the business purpose for short-term borrowings; a material change in the type of short-term borrowing arrangements used by the company; a material change that would materially reduce or impair the company's access to short-term borrowings).

E. Companies Should Be Allowed to Aggregate Categories of Short-Term Borrowings in Any Required Quantitative Disclosure

In our view, companies should be allowed to aggregate immaterial categories of short-term borrowings and identify (but not individually quantify) by footnote the types of instruments included in this aggregated category. We note that Guide 3 does not require quantitative information for any category of short-term borrowings for which the average balance outstanding during the period was less than 30% of stockholders' equity at the end of the period. We suggest that individual disclosure should only be required when a category exceeds a similar threshold or, alternatively, 25% of the total short-term borrowings. In addition, companies should be allowed to completely omit reference to categories that are not applicable to that company.

F. The Proposed Standard for Required Disaggregation of Quantitative Information Should Be Modified

Proposed Item 303(a)(6)(i)(D) of Regulation S-K would require disaggregation whenever necessary "to promote understanding or to prevent aggregate amounts from being misleading." The "promote understanding" prong is, in our view, too vague, and it will be difficult for companies to know whether the applicable standard applies to them. The "prevent . . . from being misleading" prong should, in our view, more closely track the standard set forth in

Exchange Act Rule 12b-20.[3] Moreover, rather than requiring disaggregation of data in the table as proposed, we believe the quality of disclosure would be enhanced if the differences between various short-term borrowings were addressed, to the extent material, as part of the company's narrative disclosure.

G. The Definition of Financial Company Should Be Made More Definitive

To the extent the Commission decides to mandate the frequency with which companies must calculate their average and maximum borrowings, we believe the Commission should adopt a bright-line standard for determining which companies are engaged to a "significant extent" in the relevant financial businesses. Section 102(a)(6) of the Dodd-Frank Act contains a quantitative test of 85% of revenues or assets related to financial activities, which we believe provides the kind of clear guidance that would be appropriate in this context.

H. Quantitative Disclosure of Intra-day Borrowings Should Not Be Required

We agree with the Commission's determination not to require quantitative disclosure regarding intra-day borrowings. We believe any such requirement would be difficult for companies to implement. However, we believe it would be appropriate for the Commission to consider including as a part of the qualitative disclosure or the Adopting Release, a statement or instruction reminding companies that discussion of intra-day borrowings should be included to the extent a company monitors intra-day borrowing peaks, such peaks are materially different from reported period-end amounts and such peaks are material to an understanding of the company's liquidity.

I. The Relationship Between the Terms "Short-Term Borrowings" and "Short-Term Obligations" Should be Clarified

In order to more clearly present the relationship of the term "short-term borrowings" as used in proposed Item 303(a)(6)(iii) of Regulation S-K to the term "short-term obligations" as defined in GAAP, Item 303(a)(6)(iii) of Regulation S-K should be revised as follows:

> "(iii) As used in this paragraph (a)(6), the term "short-term borrowings" [~~includes~~] **<u>means</u>** ~~amounts payable for~~ short-term obligations **<u>(as defined in FASB ASC Topic 210-10-20) that constitute indebtedness for borrowed money</u>**. **<u>Information about short-term borrowings shall be presented using the following categories:</u>**"

J. Item 303(c) Should be Extended to the Short-Term Borrowings Disclosure and to Forward-Looking Statements Made in Response to Any Other MD&A Requirement

[3] "In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading."

Because forward-looking information would be specifically required by proposed Item 303(a)(6), we believe the Commission should extend the safe harbor in Item 303(c) to the short-term borrowings disclosure requirement. Proposed Item 303(a)(6)(ii) would expressly require companies to provide a discussion of the future effect of short-term borrowings on the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources. Although we recognize that the proposed short-term borrowings disclosure involves a mix of both historical and forward-looking information, we see no reason why the forward-looking portion of the disclosure should not be accorded Item 303(c) safe harbor protection (we note that the Item specifically excepts historical facts from its coverage).

Moreover, proposed Item 303(a)(6)(ii)(B) would require a specific discussion as to the importance to the registrant of its short-term borrowings in respect of its liquidity, capital resources, market-risk support, credit risk support or other benefits. In order for a company to provide a meaningful response to this Item, it may need to refer to potentially sensitive forward-looking information, reflecting its assessments of the likely future effects and the relative importance of such matters, as contemplated by the rule. In order to encourage a candid and transparent discussion of these important items, we believe it would be important to provide companies the same level of safe harbor protection as is provided pursuant to paragraphs (a)(4) and (a)(5) of Item 303.

Over the past decade, MD&A has generally become more forward-looking by reason of the Commission's guidance and Staff comments. In view of this trend, in addition to our specific comments above, we believe it would be appropriate for the Commission to consider whether the Item 303(c) safe harbor should be generally revised to expressly encompass any forward-looking information included within MD&A. As the Commission is aware, forward-looking information is often critical to effective MD&A disclosure, providing investors with the most complete picture of a company's financial condition and results of operations. The fact that the Item 303(c) safe harbor applies only to forward-looking information provided pursuant to paragraphs (a)(4) and (5) of Item 303, but not to other forward-looking information provided in Item 303, creates unnecessary ambiguity regarding the Commission's view as to the applicability of the statutory safe harbors (in Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934) to forward-looking information not within the Item 303(c) safe harbor provision. We encourage the Commission to consider expanding Item 303(c) to apply by its express terms to any forward-looking information included in the MD&A when the conditions specified in Item 303(c) and in the statutory safe harbors are otherwise met.

K. Disclosure and Discussion of Leverage Ratios Should Not be Required of All Companies

The Commission acknowledges in the Proposing Release that, outside of the banking industry, there are many methodologies used in assessing a company's debt levels and capital adequacy. Rather than imposing uniform disclosure requirement, we believe that the Commission should encourage companies to discuss the measures that are most relevant to a particular company and/or industry, and provide them the flexibility to determine the most appropriate means for communicating information about their capitalization and leverage profile.

We believe that a mandated use of a specific leverage ratio definition applicable across all industries and issuers may be burdensome to companies and cause confusion for investors, particularly if a prescribed methodology for computing the leverage ratio leads to anomalous results in particular circumstances or fails to accurately depict the leverage profile of a particular issuer or a class of issuers. Companies would then need to provide yet further disclosure to effectively qualify any misperceptions that may have been caused by the mandated use of a specific leverage ratio determination.

L. The 8-K Exception for Short-Term Borrowings in the Ordinary Course Should Be Retained.

The current carve-out in the definition of "direct financial obligation" for the purposes Items 2.03 and 2.04 of Form 8-K, which excludes short-term borrowings obligations that arise in the ordinary course of business, should be retained as proposed. A comprehensive discussion of short-term borrowings is best reserved for the MD&A, where all such borrowings can be fully addressed in context. In addition, issuers would be best able to collect the data necessary to provide that comprehensive disclosure at the time they prepare their documents requiring an MD&A. The current reporting regime for direct financial obligations, on the other hand, should continue to be focused on unquestionably and presumptively material items, so that there would be no need for management to ascertain, on a four business day timetable, whether ordinary course short-term borrowing obligations must be reported. This would be especially true in view of the extensive use of short-term borrowings to fund daily operations in the ordinary course of business. Were the carve-out for short-term borrowings arising in the ordinary course of business not to be available, issuers would be burdened by a continuing obligation to obtain and assess this information on a real-time basis, and the process could result in a significant number of additional Form 8-K filings, leading to investor confusion as to which of an issuer's Form 8-K filings truly reflect material developments. In our view, the best place for a comprehensive discussion of short-term borrowings should be in the MD&A, as the Commission has proposed.

M. The Transition Provisions for the Rule Changes Should Fully Accommodate the Needs of Issuers to Develop the Systems Necessary to Formulate the Detailed Disclosure

We believe that the proposed new requirements could potentially require the development of significant new disclosure controls and procedures in order to collect and analyze the required information. This may particularly be the case for companies that are not currently subject to Industry Guide 3, but which fall within the final definition of "financial companies." As such, during the first year that the requirement applies, we believe that it would be appropriate for the transition relief to provide that any company that is unable to report the required level of detail should be permitted to report in the greatest detail that its systems reliably allow without unreasonable effort or expense, together with disclosure of the steps it is taking to put in place systems that will provide the required information by the second year it is subject to the requirement. Further, in view of the effort we believe would be necessary to provide the proposed new disclosures, we believe that the disclosure requirements should first be applicable, subject to transition provisions for the specific information, to reports for the first fiscal year ending on or after six months following the effective date of the new rules.

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The Committee appreciates the opportunity to comment on the Proposing Release and respectfully requests that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the Staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin
Jeffrey W. Rubin
Chair of the Committee on Federal Regulation of Securities

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