Fitch Ratings

One State Street Plaza
New York, NY 10004

T 212 908 0500 / 800 75 FITCH
www.fitchratings.com

December 14, 2009

BY ELECTRONIC MAIL

Ms. Elizabeth M. Murphy
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: *File Nos. S7-24-09 and S7-25-09*
Proposed Rule and Concept Release - Credit Rating Agencies

Dear Ms. Murphy:

Fitch, Inc. ("Fitch") submits this letter in response to the request for comments of the Securities and Exchange Commission ("SEC" or the "Commission") on (i) the Proposed Rule with respect to the disclosure of information regarding credit ratings used by registrants (Release Nos. 33-9070; 34-60797; IC-28942; File No. S7-24-09, the "Proposed Rule") and (ii) the Concept Release on Possible Rescission of Rule 436(g) under the Securities Act of 1933 (Release Nos. 33-9071; 34-60798; IC-28943; File No. S7-25-09, the "Concept Release"). Fitch is a nationally recognized statistical rating organization ("NRSRO").

The SEC's Proposal

The Proposed Rule would require registrants, in certain situations, to disclose specified information about any credit ratings used in connection with a registered offering of their securities. The Concept Release proposes rescinding 436(g). Given the required disclosure of credit ratings in the Proposed Rule, the result would be that, should an NRSRO consent, it would be considered to be an expert for purposes of the relevant registration statement, with the consequent liability under Section 11 of the Securities Act of 1933 (the "Securities Act")[1]. We are surprised by the SEC's proposed approach, as it is directly contrary to one of the conclusions drawn from the recent credit crisis by regulators throughout the globe – that is, that investors placed too much reliance on credit ratings and neglected to perform their own due diligence.

[1] It is not clear what would happen in the event the NRSRO chose not to consent under the Securities Act. Would the registrant still be required to disclose the credit rating(s) and related information, but include a clear statement that the NRSRO had not consented to such disclosure? Alternatively, would the registrant be prohibited from disclosing the credit rating(s) in any manner? We also note proposals by the SEC that consent is not necessary for certain disclosures. We believe that under Section 11, without consent, no Section 11 liability could attach to an NRSRO with respect to such disclosures.

By requiring the disclosure of credit ratings in registration statements, the SEC is officially categorizing credit ratings as material information that investors must consider. The SEC then compounds this heightened importance for credit ratings by labeling all credit rating agencies ("CRAs") as "experts." Given this approach, it would not be surprising to find that investors will simply rely on the "expert" CRAs and cease performing altogether their own review of the creditworthiness of the securities being offered. This is certainly the approach investors often take with respect to the "experts" that Section 11 clearly covers: accountants, engineers, appraisers and "persons whose profession gives authority to a statement made by [them]," such as lawyers.

The SEC recognizes this risk in the Proposed Rule: "We acknowledge the risk that requiring disclosure of credit ratings could emphasize their significance and draw attention away from other, more important information about the registrant and its securities"; and "Requiring ratings disclosure may reinforce the importance of ratings, possibly causing investors to place undue reliance on the rating". The SEC believes this result can be "mitigated" by disclosures on the limitations of credit ratings, as well as improvements in the quality of credit ratings. While Fitch has always been in favor of increased transparency, whether with respect to credit ratings or the securities themselves, and is continually striving to improve the quality of its credit ratings, we do not think that these elements can provide a sufficient counterweight to the prominence being given by the SEC to credit ratings through this proposed approach. The progress that has been made to date to educate investors and encourage them to make their own reviews will be undercut.

Fitch's Alternative Proposal

We believe the SEC should consider taking the opposite approach – prohibit the inclusion of all credit ratings (whether issued by an NRSRO or any other CRA) in registration statements. Such a prohibition would be a clear signal to the market not to place undue reliance on credit ratings. This approach would also be consistent with the SEC's expressed desire to decrease reliance on credit ratings, and consistent with the SEC's removal of references to credit ratings from certain of its rules and forms.

If an investor wanted to know the current credit rating of a security, s/he can access the CRA's own free public website. We think a CRA's website provides the most appropriate context for disclosure of a CRA's credit ratings: the website will contain, for example, the CRA's code of conduct and other regulatory information, ratings definitions, detailed disclaimers about ratings, and the specific information (and limitations with respect to) relied on in connection with any particular rating.

We note that the proposed new paragraph (g) to Item 202 would require an issuer to set forth a significant amount of information about a credit rating in the registration statement. NRSROs already disclose the vast majority of the 14 items listed in proposed Item 202(g) as part of the routine disclosures they make in connection with a credit rating. Items such as the name of the CRA and whether it is an NRSRO; the credit rating; the relative ranking of that credit rating; the date the credit rating was assigned; the ratings definitions; material scope limitations to the credit rating; the rationale for the credit rating, any other published ratings/evaluations

with respect to the credit rating, together with an explanation of such ratings/evaluations and the relative ranking thereof; material differences, if any, between the actual terms of the securities and the terms of the securities as assessed for purposes of the credit rating; and statements to the effect that a credit rating is not a recommendation to buy or sell securities, that it can be revised or withdrawn at any time and that investors should conduct their own evaluations are all items that are currently disclosed by Fitch in connection with its credit ratings. An NRSRO is required to disclose many of these items under the rules of the SEC. Of the remaining four items, two relate to fee disclosure, about which we note that the SEC has recently proposed rules with respect to additional required disclosure by NRSROs concerning fees paid by issuers. The other two items are intended to address ratings shopping – a topic which we address in our comments below.

We believe that the proposal to add new Item 202(g) is unnecessary as NRSROs are already making, or will make in the future, such disclosures. If it chose to, the SEC could extend these required disclosures to all CRAs. It would be more effective, therefore, for the CRAs themselves to provide any necessary disclosures. This would also encourage investors to examine more carefully the context in which credit ratings are issued, including understanding better what risks are and are not intended to be incorporated in a credit rating.

Other Considerations

Competition. One of the stated aims of the Credit Rating Agency Reform Act of 2006 is to increase competition among CRAs. We think that the Commission's Proposed Rule would, in fact, discourage competition. First, if the CRA or any of its affiliates has provided "non-rating services" to a registrant, the SEC proposes to require disclosure of the actual fee paid with respect to the credit rating of the registrant's securities, as well as the aggregated fees paid for the "non-rating services" during a specified period. Fitch believes that disclosing fees paid with respect to individual credit ratings puts smaller CRAs at a competitive disadvantage relative to Moody's and S&P. These two CRAs together control the global market for credit ratings; they could use this data to target competitors. Fitch believes that the policy goal – greater transparency as to the concentration of revenue to a CRA from certain sources – can best be served by requiring CRAs to disclose annually by name the top 50 sources of revenue and what percentage of revenue that top 50 comprises. NRSROs currently make similar disclosure to the SEC with respect to the top 20 entities. An NRSRO can easily publish such information with respect to a larger number.

The second proposal that we believe will harm competition is the requirement to disclose "preliminary" credit ratings, as well as "final" credit ratings not used in connection with the relevant securities offering, ostensibly to stop ratings shopping by the registrant. As mentioned above, Moody's and S&P are the dominant players in this market; registrants often, therefore, feel compelled to use credit ratings from these two CRAs. The requirement to disclose preliminary or final but unused credit ratings will simply solidify the dominant market position as Moody's and S&P, as registrants will be discouraged from soliciting any other credit views. We also note that disclosure of preliminary credit ratings would be confusing for investors (especially given that preliminary credit ratings include those with respect to "a particular structure of a security even if not tied to a specific registrant or group of assets") – new or

changed information can subsequently come to light, and/or a transaction's structure can change substantially; this means that a preliminary credit rating, or even a "final" credit rating, would not be comparable to the credit ratings actually assigned by CRAs. In addition, given the incomplete nature of these types of credit ratings, we do not see how a CRA could have any liability with respect to these credit ratings

Liability Standard. As mentioned above, we believe that attempting to treat NRSROs as so called "experts" under Section 11 will undermine efforts to encourage investors to conduct their own investigations as to whether any particular securities are suitable for investment by them. We also note another perverse result of attempting to treat a NRSRO as an expert for liability purposes as to its credit rating. Officers and directors of the registrant and the underwriters of the securities offering, the parties statutorily responsible for ensuring the adequacy and accuracy of the content of the registration statement under Section 11, are not responsible for conducting a "reasonable investigation" (so-called "due diligence") with respect to "any part of the registration statement purporting to be made on the authority of an expert (other than himself)." As a result, various parties central to a public debt offering (such as the officers and directors of the debtor and the underwriters of the offering) could abrogate their responsibility for the adequacy of essential disclosure about the creditworthiness of the registrant to the NRSRO. This can be particularly acute in structured finance, where these statutorily responsible parties can attempt to shift the burden to NRSROs for their own responsibility to ensure that a registration statement is free from material misstatements and omissions.

Indeed, we believe that what a CRA produces – a forward-looking opinion on the creditworthiness of an entity or its securities – is fundamentally different from the work produced by the Section 11 experts specifically enumerated in the Securities Act (accountants, engineers and appraisers). For example, accountants provide largely historic verifications of financial statements and appraisers provide heavily qualified opinions of the current value of property or assets; credit ratings are a CRA's best-educated view of what will happen in the uncertain future.

Fitch has previously stated that, while it supports the concept of enhanced accountability for what CRAs do, it disagrees with the notion that greater liability is the right way to achieve this goal. We continue to believe that there is a misperception regarding CRAs and liability. CRAs are already liable under current securities law, just as other entities are (e.g., corporate officers, investment bankers, accountants, lawyers, etc.), to the extent that a CRA intentionally or recklessly makes a material misstatement or omission in connection with the purchase or sale of a security.

Increased liability will also create yet another barrier to entry for any CRA that may wish to become an NRSRO. The commentary relating to the Proposed Rule and the Concept Release references the fact that current Rule 436(g) only applies to NRSROs and suggests that this creates a significant disadvantage to other CRAs. The commentary suggests that the elimination of Rule 436(g) will somehow even the playing field. We believe this is not at all likely. Registrants do not refer to the ratings of CRAs that are not NRSROs in registration statements for a variety of reasons. Not least of which reasons is that most investors would not recognize a CRA that is not an NRSRO under their own investment guidelines. We believe that there is no

evidence to suggest that the perceived inequality in the application of Rule 436(g) has adversely affected any non-NRSRO. To the contrary, we cannot imagine why a CRA would seek to build up its recognition and become an NRSRO if doing so would subject it to increased liability when a registrant finally refers to its credit ratings in a registration statement. The proposal seems to defeat the entire purpose of becoming an NRSRO if one of the perceived benefits of recognition (use of the credit ratings by registrants) creates a significant, new liability.

Thank you for giving us the opportunity to provide our comments. We hope you find them useful, and that you will give them due consideration. Please call me at (212) 908-0626 with any questions that you might have on our comments or if you wish to discuss this matter further at your convenience.

Very truly yours,

Charles D. Brown
General Counsel