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December 29, 2009

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: Credit Ratings Disclosure – File No. S7–24–09

Dear Ms. Murphy:

We are pleased to submit this letter in response to Release No. 33-9070 (the "Proposing Release") in which the Securities and Exchange Commission (the "Commission") solicits comments on proposed new rules that would require certain disclosures of information regarding credit ratings used by registrants in connection with registered offerings of securities.

In the Proposing Release, the Commission asks whether its proposed disclosure requirements should distinguish between corporate fixed income securities and structured finance products. For a number of reasons, we believe that the disclosure requirements should not be applied to issuers of corporate fixed income securities.[1] First, the concerns that the Commission is seeking to address through the proposed disclosure requirements, as those concerns are articulated in the Proposing Release, appear to relate primarily to structured finance products. Unlike the case of some structured finance products, the risks covered by credit ratings of corporate fixed income securities are typically limited to credit risk as that term has been understood historically. It is our experience that investors in the corporate fixed income market understand very well the terms of credit ratings and what those ratings do or do not cover. Moreover, investors

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[1] In general, we are not commenting in this letter on the proposed applicability of the disclosure requirements to closed-end funds.

who desire additional information have complete access to ratings-related information on the website of the relevant credit rating agency, where the various ratings and their limitations are explained. With respect to potential conflicts of interest, if rules separately proposed by the Commission are adopted, pertinent information will be disclosed in NRSRO-published reports which each rating release will reference explicitly.[2] In view of the current (and proposed) widespread public availability of this information, we submit that any concern that investors may not be receiving this information in a timely manner is unfounded, and that proposed regulations are not needed to promote this objective.

Second, we are concerned that broad application of the disclosure requirements proposed by the Commission will lead to the use by issuers of standardized, “boiler plate” language, which investors will come to ignore. Much of the information will simply be copied from the relevant portion of the rating agencies’ websites. Distribution participants and their counsel may feel compelled to perform “due diligence” on the description of the ratings. While it may not be possible to predict how that process would evolve over time, it does seem clear to us that the work and associated expense devoted to those efforts would raise the cost of registered offerings without a commensurate gain in investor understanding or investor protection, compared with the present state of affairs.

Third, while sophisticated investors may simply choose to ignore the required disclosures because they already are fully aware of the information, other investors may view the inclusion of a substantial amount of ratings-related disclosures in offering documents as unduly emphasizing the importance of ratings, to the exclusion of other information regarding the quality of the issuer. To the extent that further information regarding a credit rating was thought to be essential to be included in a prospectus, we believe that a simple link to the relevant rating agency’s website should suffice, together with a statement that the reference to the website does not constitute the incorporation by reference in the prospectus of the information contained on the website.

Fourth, as described further below, the amount and scope of the proposed disclosures would present a significant impediment to executing corporate shelf offerings in a timely manner. In particular, for some of our clients the process of determining all fees paid by the issuer and its affiliates to the credit rating agency and its affiliates, for a period running up to the date of the offering, may require substantial time and resources and result in the type of “speed bump” in the offering process that the Commission in recent rule makings has sought to avoid or mitigate.

In sum, imposing these disclosure requirements on issuers of corporate fixed income securities would increase offering costs and risk confusing investors

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2 *See Proposed Rules for Nationally Recognized Statistical Rating Organizations*, Rel. No. 34-61051, 74 Fed. Reg. 63866 (December 4, 2009).

without a corresponding material benefit to investors. If the Commission decides to implement these disclosure requirements, we would suggest that they be limited to issuers of structured finance products only. Additionally, to the extent that information required to be disclosed pursuant to the Proposing Release is publicly available on an NRSRO website, an issuer should be permitted to satisfy the Commission's disclosure requirements by referring to that website without incorporating any of the website information into the issuer's disclosure document.[3]

Should the Commission decide to require credit ratings disclosure from some or all issuers, we respectfully submit the following additional comments on the specific requirements contemplated by Proposing Release.

A. Comments on the Substantive Disclosure Requirements

1. *The disclosure requirements contemplated by the Proposing Release should not apply to offerings by foreign governments on Schedule B.*

We believe that offerings of foreign governments should be exempted entirely from any disclosure requirements adopted by the Commission for two principal reasons. First, the vast majority of such offerings are plain vanilla debt offerings which do not present the concerns of transparency, conflicts of interest or "ratings shopping" that the Commission is seeking to address in the Proposing Release. Second, the Commission historically has treated foreign governments with deference based on considerations of comity. We believe that the same considerations support exclusion of Schedule B offerings from the proposed disclosure requirements.

2. *Certain proposed disclosure requirements would be duplicative in light of existing rules promulgated by the Commission.*

In the Proposing Release, the Commission asks whether the disclosure requirements should include a "catch-all" provision that would require any other information necessary to understand a credit rating. We believe that such a provision would be unnecessary in light of Securities Act Rule 408, which requires issuers to include any additional material information necessary to make required disclosures not misleading in light of the circumstances under which they are made.

Additionally, the Proposing Release notes that if a disclosed rating is changed prior to effectiveness, the issuer would be required to update the accompanying disclosure in the final prospectus or, in connection with a delayed shelf offering, in the prospectus supplement. Where this change is material in the context of the offering of

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3 Alternatively, an issuer's exclusion of required disclosure information from its registration statement or prospectus should be deemed immaterial to the extent that such information is publicly available on an NRSRO website.

the securities, we believe that the Commission's existing rules (*see, e.g.,* Securities Act Rule 159) adequately and appropriately address the obligation to update.

3. *The disclosure requirements relating to "preliminary ratings," as drafted, appear to be overly inclusive.*

While we appreciate the efforts of the Commission to address "ratings shopping," we believe that the proposed definition of a preliminary rating is overly inclusive to the point that disclosure would present a number of compliance issues. The Commission has indicated that it intends a broad reading of the term "preliminary credit rating," which would include "any oral or other indications of a potential rating or range of ratings and all other preliminary indications of a rating," even if there have been subsequent changes to the security. We are concerned that this definition could be read to encompass the discussions about potential offerings that issuers have with ratings agencies on a daily basis, even when the final security bears little resemblance to a product that was originally discussed. Requiring the same disclosure for each such preliminary discussion as would be required for the final credit rating would be excessively burdensome for issuers and potentially confusing for investors.

4. *The proposed disclosures relating to potential conflicts of interest are excessively burdensome as written and may be unnecessary in light of other Commission regulations.*

We recognize the Commission's effort to address potential conflicts of interest, and we believe that material information related to such conflicts would be useful to investors. However, the fee-related disclosures proposed for issuers would appear to be largely redundant in light of the revenue-related disclosure requirements separately proposed by the Commission for NRSROs. Those proposals would require each NRSRO to publish annually a report listing, with respect to each person who has paid for a credit rating, (i) the percentage of net revenue attributable to that person that was derived from products and services other than credit rating services, (ii) the relative standing of the person in terms of net revenue contributed to the NRSRO, and (iii) the identity of all outstanding ratings paid for by that person. The NRSRO would then be required to include a reference to this report in every publication containing a credit rating.[4] Because of the substantial overlap between the disclosures suggested in the Proposing Release and those in the proposed NRSRO disclosures, we would urge the Commission to refrain from adopting any such issuer disclosure requirements before a final decision has been made on the proposed NRSRO disclosure rules.

In addition, certain aspects of the proposed conflict of interest disclosure requirements may prove particularly burdensome for some issuers. For example, the Proposing Release currently contemplates the disclosure of certain fees paid by the issuer

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4 *See Proposed Rules, supra* note 2.

or its affiliates during the issuer's last completed fiscal year and any subsequent interim period *up to the date of filing*. As you are aware, many large issuers file pricing supplements and free writing prospectuses under shelf registration statements on an almost daily basis. For such issuers, the requirement to track fees paid for non-rating services up to the date of each filing would prove extremely burdensome.[5] Accordingly, to the extent that the Commission decides to require disclosures by issuers of fees paid to credit rating agencies, we believe that any such disclosure requirements should be consistent with and no greater, with respect to scope and timing, than those implemented for NRSROs.

B. Comments on the Proposed Triggers for Required Disclosure

1. *Disclosure requirements should not be triggered by the reference to a credit rating by a member of the underwriting syndicate or selling group in response to an investor.*

The disclosure requirements contemplated in the Proposing Release would be triggered when any member of the underwriting syndicate or selling group discloses a credit rating in response to a direct inquiry from an investor, even when that rating is not otherwise disclosed in any oral or written selling efforts. We believe such an approach would present two primary concerns. First, any issuer seeking to avoid triggering the rule's disclosure requirements would be forced to effectively ignore requests from investors about credit ratings. While it may be reasonable to impose certain disclosure requirements on issuers who affirmatively promote their credit ratings in marketing materials, a rule that would prevent issuers from responding to informational requests from investors would appear to be contrary to the Commission's goals of promoting greater transparency.

Second, especially in a large offering, it would be difficult for an issuer to know whether any member of an underwriting syndicate or extended selling group has disclosed a credit rating in response to an investor inquiry, even if the issuer's marketing plan explicitly has proscribed such disclosure. Consequently, the issuer could be found in violation of the rule through no fault of its own, without any knowledge on its part, as a result of a rating disclosure by a member of the underwriting syndicate or by a selling group participant with which the issuer has no direct contractual relationship. To avoid such an inequitable result, the Commission should permit distribution participants to refer to information published by a rating agency, without deeming the issuer in such circumstances to have "used" a rating in connection with the offering.

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5 Moreover, the proposed requirement is far more rigorous than the current requirements with respect to age of financial statements and other kinds of information about the issuer, much of which arguably is of far greater importance to investors.

2. *Disclosure requirements should not apply to Exxon Capital exchange offers or registered resales of privately-offered securities.*

The Commission has proposed to require disclosure in the subsequent registered offering when a credit rating is used in connection with the private offering component of an "Exxon Capital" exchange offer. We believe that such a requirement would present an impediment to the efficiency of the high yield debt markets, in which Exxon Capital exchange offers have become an important part, and is unnecessary for investor protection. The market for a high yield debt offering is institutional in character, by definition at the time of the unregistered offering and, we believe, in fact at the time of the related exchange offer.[6] We see little utility in rules that would expand the information required to be disclosed to this investor population, particularly information that is already well known to them.

However, even if the Commission decides to require disclosures with respect to Exxon Capital exchange offers, such requirements should not extend to registered resales of securities where the credit rating is not used in the registered offering. The registered secondary offering is wholly distinct from the initial private placement. While there may be a requirement in the initial offering documents for the provision by the issuer of a resale registration statement, there generally is no guarantee that resales will be made under the registration statement; that decision will be made by the selling security holder based on its circumstances and market conditions, among other factors.[7] A selling security holder in a registered secondary offering typically will have had no influence over the issuer's decision to "use" the credit rating in the private offering. At the same time it will have prospectus liability under Section 12(a)(2) and, potentially, underwriter liability under Section 11 in connection with the secondary offering. In these circumstances it strikes us as anomalous and unfair effectively to require the selling security holder to "use" the credit rating in the secondary offering (and to bear liability for that use), simply because the issuer chose to use the credit rating in an entirely separate, unregistered transaction. Such a rule could make registered resales significantly less attractive and thereby raise the cost of capital.

3. *Disclosures should not be required with respect to unsolicited ratings.*

In its request for comment, the Commission asks whether the issuer disclosure requirement should apply in connection with all unsolicited ratings, regardless of whether they are used in connection with a registered offering. We believe that such a

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6 *See* Report of Charles C. Cox, accompanying the Comment Letter of Latham & Watkins to Rel. Nos. 33-7606 and 33-7606A (September 9, 1999), *available at* http://www.sec.gov/rules/proposed/s73098/latham1.htm.

7 This stands in contrast to the near certainty that an Exxon Capital exchange offer, once made, will be accepted by security holders.

disclosure requirement would be overly burdensome and inequitable, and that such a requirement could lead to an undesirable reduction in unsolicited ratings.

Again, it is inequitable and excessively burdensome to apply substantive disclosure requirements to issuers as a result of circumstances beyond their control, such as with respect to unsolicited ratings. In certain circumstances, an issuer may not even be aware that such ratings have been issued, and the timing of the unsolicited ratings could seriously interfere with the issuer's offering, presenting a "speed bump" that impedes the smooth execution of transactions. In addition, if the proposed disclosure requirements are imposed by the Commission, we are concerned that issuers may attempt to dissuade credit rating agencies from providing unsolicited ratings in an effort to reduce the disclosure burden. For example, issuers simply may decide not to patronize rating agencies that issue unsolicited ratings for their offerings. Such a result could lead to a decline in the issuance of unsolicited ratings and would impede one of the principal objectives of the Commission.

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We appreciate this opportunity to comment on the proposed rules and would be happy to discuss any questions with respect to this letter. Any such questions may be directed to Robert S. Risoleo (202-956-7510) in our Washington, D.C. office or to Robert E. Buckholz, Jr. (212-558-3876) in our New York office.

Very truly yours,

/s/ SULLIVAN & CROMWELL LLP