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November 29, 2010

Via E-mail: rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Attention: Elizabeth M. Murphy,
Secretary, Securities and Exchange Commission

Re: Comments on Proposed Amendments to Regulation S-K under the Securities Act of 1933 and Securities Exchange Act of 1934 Affecting Disclosures of Short-Term Borrowings; File No S7-22-10.

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Securities Regulation of the New York City Bar Association in response to the Securities and Exchange Commission's proposed rules[1] that would require registrants to provide additional disclosure of their short-term borrowing activities in periodic reports and registration statements. The proposed rules would amend Item 303 of Regulation S-K under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"), and make certain conforming changes to other Commission forms.

Our Committee is composed of lawyers with diverse perspectives on securities issues, including members of law firms, counsel to corporations, investment banks, investors, and academics. Please note that Mr. Jeffrey T. Kern, a member of the Staff of the Financial Industry Regulatory Authority ("FINRA"),

1 Short-Term Borrowings Disclosure, File No. S7-22-10, 75 FR 59866 (September 28, 2010) (to be codified at 17 C.F.R. 229.303) (the "proposed rules").

who is a member of our Committee, did not participate in the preparation of this letter or the decision by our Committee to submit this letter to the Commission.

The Committee supports the Commission in its efforts to improve the disclosure of registrants' short-term borrowing activities. We have several suggested revisions to the proposed rules, however, which we believe would clarify the application of the disclosure requirements to particular registrants, improve the clarity of the required disclosure and strike a better balance between the benefits to investors provided by additional disclosure and the costs to registrants associated with that disclosure.

OVERVIEW OF THE PROPOSED AMENDMENTS

The proposed amendments would add a new paragraph (6) to Item 303(a) of Regulation S-K, requiring quantitative and qualitative disclosures of a registrant's short-term borrowing activities during an annual reporting period. Amendments to Item 303(b) of Regulation S-K would create parallel reporting obligations in respect of interim periods.[2]

Under the new disclosure rules, registrants would be required to make a set of specific disclosures regarding short-term borrowing activities, including the following quantitative measures:

- outstanding period-end amounts of short-term borrowings, categorized by a minimum of four specified categories of short-term obligation;[3]

- for each such category, the average amount of short-term borrowings outstanding during the reporting period;[4]

- the weighted-average interest rate applicable to the short-term borrowings described in each of the first two bullet points;[5] and

- for each category, the maximum amount of short-term borrowings outstanding during the period.[6]

The proposed rules also require a qualitative discussion of short-term borrowing activities, including an itemized list of disclosure points that must be covered.

For quarterly reports under the Exchange Act, the disclosures would cover the interim periods to which the quarterly report applies (typically the most recent three-month and year-to-date periods). For annual reports under the Exchange Act, the disclosures would cover the fourth quarter and last three annual periods, while for registration statements under the Securities Act or the Exchange Act, the disclosures would cover the last three annual periods and any interim period for which financial statements are required.

The committee's comments on several of the proposed amendments follow.

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[2] Proposed Instruction 8 to Item 303(b) of Regulation S-K

[3] Proposed S-K Item 303(a)(6)(i)(B)

[4] Proposed S-K Item 303(a)(6)(i)(A)

[5] Proposed S-K Item 303(a)(6)(i)(A) and (B)

[6] Proposed S-K Item 303(a)(6)(i)(C)

ANALYSIS OF THE PROPOSED AMENDMENTS

Definition of "Financial Company"

The definition of "Financial Company" is too vague and includes overbroad criteria.

The proposed rules would require a registrant that is a "financial company"[7] to disclose its maximum short-term borrowings and its average amount of short-term borrowings outstanding over each reporting period, in each case calculated on the basis of amounts outstanding as of the end of each day over the course of the reporting period. Registrants that are not financial companies would need to disclose such amounts calculated only on the basis of month-end figures (or, for average amounts, a disclosed period not exceeding one month in length).

For many registrants, we expect that the determination of maximum and average amounts on the basis of daily figures will require the maintenance of extensive additional reporting systems and procedures. As noted in the proposing release, many "true" financial companies will already have these systems in place, in order to meet existing disclosure or regulatory obligations. We understand, however, that many non-bank financial companies and many foreign financial companies (including, in some cases, foreign banks) may lack the internal reporting mechanisms necessary to generate the required information. For those registrants currently lacking such capability, the additional costs associated with implementing adequate daily reporting mechanisms could be very extensive. These costs would include both implementation and maintenance costs for the systems and procedures themselves, as well as costs associated with the testing and assessment of such systems and procedures as part of management's assessment of internal controls over financial reporting , and related additional audit expense. Accordingly, we believe that the Commission should exercise caution in defining those "financial companies" that will be caught by the daily-basis reporting requirements and, in particular, very carefully consider whether to include those registrants that are not currently subject to the requirements of Industry Guide 3, Statistical Disclosure by Bank Holding Companies. In shaping these requirements, the Commission should ensure, first, that the definition of "financial company" contains specific and objectively determinable criteria; and second, that the definition only encompasses those registrants for which daily-basis reporting would provide important information to investors. In addition, to the extent that registrants not subject to Industry Guide 3 reporting are treated as "financial companies" for purposes of the rules, we believe that such registrants should be provided with a phase-in period to allow time for the implementation of necessary systems and procedures.

The proposed rules would define a "financial company" as a registrant that "is engaged *to a significant extent* in the business of lending, deposit-taking, insurance underwriting or providing investment advice…" [emphasis added]. In our view, the phrase "significant extent" is too vague to serve as a meaningful threshold, since it would be subject to a wide range of potential interpretations, and it would be difficult for counsel to give meaningful guidance to clients as to whether or not they were a financial company for purposes of the rules. In light of the significant additional reporting burden placed on financial companies, and the uncertainty that would be created by a subjective standard, we believe that an objective threshold should be established. We propose such a standard below.

We also believe that the categories of business activities that could cause a registrant to become a financial company are too broad. In particular, we do not believe that "providing investment advice" should, alone, result in a registrant becoming subject to the more onerous reporting obligations. The

[7] This term would be defined under the new Item 303(a)(6)(iv) of Regulation S-K.

provision of investment advice does not in itself create the type of liquidity needs that face registrants engaged in deposit-taking, lending or insurance underwriting. The additional compliance and reporting costs that would be imposed on many investment advisers would, in many cases, far outweigh any benefits to investors from the additional disclosure.

The inclusion of all brokers and dealers in the definition of financial company also goes too far, in our view.[8] While we agree that many broker-dealers are appropriately treated as financial companies, this treatment should arise only for those broker-dealers engaged in business activities that create short-term liquidity requirements significantly greater than those faced by non-financial companies. We suggest that the Commission use its existing rules in the area of broker-dealer regulation as a basis on which to distinguish broker-dealers that are true financial companies from those for which daily liquidity disclosures would not add meaningfully to the information available to investors. Specifically, we suggest excluding from the definition of financial company those broker-dealers that are exempt from the customer protection rule pursuant to Rule 13c3-3(k)(2) and are not otherwise subject to minimum net capital requirements above a certain threshold prescribed in the final rules.

For similar reasons, we believe that commodity trading advisors and mortgage REITs should not be included in the enumerated list of entities in the proposed S-K Item 303(a)(6)(iv) that are *per se* financial companies. Neither of these types of entities is necessarily engaged in businesses for which the management of daily liquidity is of particular concern.

We suggest that the Commission consider adopting a definition of financial company that combines a shorter list of *per se* financial companies (which would include those covered in the proposed rules, other than brokers, dealers, investment advisers, commodity trading advisors and mortgage REITs), with an objective quantitative standard for other entities. These other entities would be financial companies if they were engaged in the business of deposit-taking, lending or insurance underwriting, and the significance of that business surpassed a specific numerical threshold set forth in the final rules. For example, the Commission might deem registrants to be financial companies if their deposit-taking, lending or insurance underwriting businesses accounted for more than either 20% of consolidated net assets or 25% of consolidated revenues, calculated on a rolling three-year basis. In addition, as discussed above, we believe that brokers and dealers should also be included in the definition as *per se* financial companies, but subject to an exemption for those broker-dealers not engaged in business activities for which short-term funding practices are of special importance.

Quantitative Disclosure Requirements

The prescribed categories of short-term debt should be revised for non-financial companies.

The proposed rules would require all registrants to report short-term borrowings falling under five categories, including repurchase arrangements, bank borrowings and commercial paper.[9] While we agree with the general approach of tying the reportable categories to short-term obligation line items on the balance sheet, we believe that it would be beneficial to distinguish between financial companies and other registrants in prescribing the elements of short-term borrowing that must be disclosed. Financial companies will typically engage in more complex funding arrangements than do non-financial companies,

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8 The proposed S-K Item 303(a)(6)(iv) definition includes a list of "*per se*" financial companies, which includes brokers and dealers.

9 The categories are set forth in proposed S-K Item 303(a)(6)(iii)

and we believe that certain types of borrowing, such as repurchase transactions, are uncommon for companies not engaged in financial services. Accordingly, in the interest of simplified and more meaningful disclosure, we believe that non-financial company registrants should be permitted to report fewer categories of short-term borrowings than financial companies. [10]

Specifically, we propose that registrants other than financial companies be permitted to report all short-term loan obligations (whether from banks, factors or other lenders) as a single category, all commercial paper obligations as a separate category and then any other categories of short-term borrowing required to be reflected on the balance sheet. There is no reason, in our view, for separate disclosure by non-financial companies of borrowings from banks and those from "factors or other financial institutions", as would be required by the proposed rules. While Rule 5-02 of Regulation S-X requires these categories to be distinguished in the financial statements, this distinction is not required on the face of the balance sheet and its inclusion in the tabular disclosure would generally not add meaningfully to an analysis of short-term borrowing activities. The nature of the entity to which short-term obligations are owed is usually not of particular interest to an investor; the markets in which that borrowing is conducted (e.g. syndicated lending versus commercial paper markets) is typically more material. We also note that Rule 12b-20 requires registrants to provide any additional disclosure necessary to make the information presented in the table not misleading. While we do not believe it is necessary to do so, the Commission might consider making reference to this rule in an instruction to proposed S-K Item 303(a)(6), as an alternative to prescribing additional separate line-item disclosure in the table.

The proposed disaggregation rules should be changed.

The proposed rules would require registrants to disaggregate amounts within a particular category by "currency, interest rate or other meaningful category" to the extent that such a disaggregated presentation is necessary "to promote understanding or to prevent aggregate amounts from being misleading".[11]

Although we agree that disaggregation should be required where necessary to prevent misleading disclosure, we do not believe that it should be required solely "to promote understanding". Such a standard is vague, unduly subjective and will likely lead, in our view, to a wide variation in disclosure practices, potentially affecting the comparability of disclosures from period-to-period or among issuers.

Apart from the general principle regarding avoidance of misleading disclosure, we do not believe that the proposing release clearly articulates a rationale for requiring disaggregation on any other, more specific basis. We think that disaggregation should be required only to the extent that the purpose of the requirement can be clearly explained. If the final rules do mandate disaggregation according to any particular criteria, we suggest that the Commission adopt objective, quantitative standards for disaggregation. We believe that such quantitative standards will promote uniformity of disclosure, as well as improve the readability of the tabular presentation. For example, the final rules might require disaggregation of a particular category if it exceeded 20% of a registrant's total short-term borrowings.

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[10] We also note that, under the guidance provided by the Commission in its companion interpretative release on presentation of liquidity and capital resources, disclosure of short-term borrowings not specifically covered by the prescribed categories would be required under the current S-K Item 303 where there is a material effect on liquidity. See Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis; Release No. 33-9144, 75 FR 59894 (the "Companion Interpretive Release").

[11] Proposed S-K Item 303(a)(6)(i)(D)

The quantitative disaggregation standards would remain subject to the overriding provision that disaggregation is required where necessary to avoid misleading disclosures.

The look-back time periods should correspond with financial statement requirements.

Because short-term obligations are balance sheet items, we believe that the required look-back period should be two years, rather than the three years required by the proposed rules. This would align the time period for which short-term borrowings disclosure is needed with the requirement in Rule 3-01 of Regulation S-X that two years of audited balance sheets be included in annual report filings and registration statements. In our view, two years of information regarding the historical short-term funding practices of a registrant will generally provide a sufficient basis on which to analyze current financial condition and prospects.

Qualitative disclosure requirements

The requirement to disclose a "business purpose" for each category of borrowing is unnecessary.

The proposed rules would require registrants to discuss, among other items, the "business purpose" of each category of short term borrowing for which quantitative disclosure is required.[12] In light of the other requirements imposed on the qualitative discussion of short-term borrowing, we believe that this is unnecessary and unlikely to elicit any additional useful information from registrants.

In our view, a general discussion of the business purposes underlying a registrant's short-term borrowing activities would provide more meaningful disclosure than would a recitation of similar information for each of several categories of short-term debt. We suggest, therefore, that the final rules require registrants to discuss business purpose only in respect of short-term borrowing generally, with distinctions between categories drawn only where material to an understanding of the registrants' liquidity position.

The requirement to disclose the reasons for maximum outstanding amounts should be qualified.

The proposed rules would require registrants to disclose reasons for the maximum outstanding amounts of short-term borrowing in each reported period. For most registrants, and for most reported periods, this information is unlikely to be of particular value, since maximum short-term borrowing will often be relatively stable over time, subject perhaps to natural statistical variation. Accordingly, many registrants will have nothing that is meaningful to say about maximum short-term borrowings over the course of individual reporting periods.

In order to avoid repetitive or superfluous disclosure, we suggest that a materiality principle be incorporated into the final rules. Information on maximum outstanding amounts will often be of interest, for example, in circumstances where maximum short-term borrowing has shown a significant jump or decline over historical levels, where the business cycle or characteristics of the registrant's industry have led to material changes in maximum amounts or where the maximum amount is substantially different than the period-end amount. An explanation in the latter circumstance is already mandated by the proposed rules;[13] we believe that an explanation of maximum amounts in other cases should be required only where the discussion would be material to an understanding of the registrant's liquidity position.

[12] Proposed S-K Item 303(a)(6)(ii)(A)

[13] Proposed S-K Item 303(a)(ii)(C)

We also note that, in many circumstances, significant changes to borrowing activities (whether short-term or long-term) must be discussed in the liquidity and capital resources discussion mandated by the existing paragraphs (1) and (2) of Item 303(a) of Regulation S-K.[14] We suggest, therefore, that the final rules make clear that no discussion of maximum amounts is necessary under the new disclosure requirements if the subject-matter is already discussed under one of the existing headings of Management's Discussion and Analysis.

A discussion of maturities should be required where material.

We believe that the maturity profile of a registrant's short-term obligations is a potentially important element of a discussion of short-term borrowings. We do not believe that maturities should be included in the quantitative disclosure, because this information will often be immaterial (since short-term borrowings are by their nature limited in duration) and would unduly complicate the tabular presentation. In our view, however, registrants should be required to include a discussion of maturities in circumstances where it would add meaningfully to the disclosure. In particular, we think such a discussion should be required where there has been a recent material change to the maturity profile of the registrant's short-term obligations, where the distribution of maturities could have a material effect on liquidity requirements or where a discussion of maturities is necessary to a full understanding of a registrant's short-term borrowing practices.

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Members of the Committee would be pleased to answer any questions you may have concerning our comments.

Respectfully Submitted,

/s/ Robert E. Buckholz, Jr.

Committee on Securities Regulation

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[14] S-K Item 303(a)(1) requires discussion of "known…commitments…that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way" and a description of "internal and external sources of liquidity"; and Item 303(a)(2)(ii) requires a description of "material trends…in the registrant's capital resources", and any "expected material changes in the mix and relative cost of such resources". The Companion Interpretive Release also points out that reliance on short-term financing can constitute a trend or uncertainty for which disclosure under S-K Item 303(a) is required.

Securities Regulation Committee

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