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March 25, 2013

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

Securities and Exchange Commission,
100 F Street, N.E.,
Washington, DC 20549-0609.

Attention: Elizabeth M. Murphy, Secretary

Re: List of Rules to be Reviewed Pursuant to the Regulatory Flexibility Act; File No. S7-12-12

Ladies and Gentlemen:

We appreciate the opportunity to comment, in the context of the Commission's review of various rules pursuant to Section 610 of the Regulatory Flexibility Act,[1] on Rule 155 under the Securities Act of 1933, relating to integration of abandoned offerings. While we believe that Rule 155 is a very useful provision that should be retained, we are writing to suggest that the conditions of Rule 155(b), relating to abandoned private offerings followed by registered offerings, could be substantially relaxed, to the mutual benefit of issuers and investors.

[1] Release Nos. 33-9370; 34-68309; IA-3506; IC-30282 (December 4, 2012).

Rule 155(b) provides that a private offering will not be considered part of an offering for which the issuer later files a registration statement, subject to four conditions which may be summarized as follows:

(1) no securities were sold in the private offering;

(2) all offering activity in the private offering is terminated prior to filing of the registration statement;

(3) preliminary and final prospectuses used in the registered offering contain specific detailed disclosure with respect to the private offering; and

(4) the issuer waits 30 days after terminating the private offering to file a registration statement, unless all offerees in the private offering were accredited investors or satisfy the knowledge and experience standard of Rule 506(b)(2)(ii).

We believe that condition (3), in particular, acts as an impediment to reliance on the Rule 155(b) safe harbor, while not benefiting investors, and that condition (4) serves no useful purpose and should also be deleted.

Our premise here is that the investor will always be better off if a given purchase of a security occurs in a registered offering rather than a private placement. Registration means that the investor benefits from the heightened (and much more specific) Securities Act disclosure requirements, backed up by the dramatically enhanced liability standards imposed by the Securities Act on issuers and other offering participants. It follows that Rule 155(b) should be designed to facilitate the transition from private to public offerings. Based on anecdotal experience, however, we believe that condition (3) is perceived by issuers and their financial advisors to be a significant impediment to the use of Rule 155(b). The concern is that an uncompleted private placement, when disclosed as contemplated by condition (3), will be seen by the market as a failure and a sign of weakness, potentially prejudicing the issuer's public market valuation, whatever the actual reasons for the switch to a registered offering, and

however the switch may be explained. In some cases, the negative inference will be justified; there may be genuine questions as to the issuer's need for capital or ability to raise it. But the existing prospectus disclosure requirements—as to liquidity and capital resources, in MD&A, as well as in risk factors—should fully address those matters, to the extent material to an investor's understanding of the issuer. We therefore think that condition (3) is not in fact advancing any investor protection interest, while it is discouraging issuers from relying on Rule 155(b).

The release adopting Rule 155[2] stated that the condition (3) disclosure was intended to reduce confusion among investors about what information they should rely upon to make their investment decision. With respect, we find that explanation unpersuasive. First, we would expect most issuers to provide generally consistent disclosure in both the private and the public offerings. The public offering prospectus will, in Rule 155(b) situations, be the most recent disclosure document, and it will typically be the more detailed disclosure document, given the more specific prospectus disclosure requirements applicable in the registered offering, so we think investors would naturally look to the public offering prospectus in making an investment decision. To the extent the issuer provided to investors in the private offering information that it omits from the public offering prospectus—for example, financial projections—the position is really no different from the position in respect of any other information provided to investors in a public offering outside of the prospectus. That additional information would be potentially subject to Section 12(a)(2) claims from investors who received it and then purchased in the public offering. So we do not believe investors would be prejudiced by deletion of condition (3) from the Rule, or that any meaningful confusion would result.

As to condition (4), the adopting release stated that the 30-day waiting period "provides an additional protection against the possibility of issuers abusing the safe harbor." With respect, we do not understand how the safe harbor is abused by a rapid switch to a

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[2] Release No. 33-7943 (January 27, 2001).

registered offering, in which investors get the benefit of the enhanced Securities Act disclosure and liability standards. Since the threshold for avoiding the 30-day waiting period is relatively low, however, we do not believe this condition is as serious an impediment to use of Rule 155(b) as is condition (3).

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If you would like to discuss our letter, please feel free to contact Robert E. Buckholz at 212-558-3876 or Robert W. Downes at 212-558-4312.

Very truly yours,

Sullivan & Cromwell LLP

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