April 10, 2019

Via Email: rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attention: Ms. Vanessa Countryman, Acting Secretary

Re: File No. S7-19-18
Release No. 33-10526; 34-83701
FINANCIAL DISCLOSURES ABOUT GUARANTORS AND ISSUERS OF GUARANTEED SECURITIES AND AFFILIATES WHOSE SECURITIES COLLATERALIZE A REGISTRANT'S SECURITIES

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee and the Law and Accounting Committee (the "Committees" or "we") of the Business Law Section (the "Section") of the American Bar Association (the "ABA") in response to the request for comments by the Securities and Exchange Commission (the "Commission") in the proposing release referenced above (the "Proposing Release"). In the Proposing Release, the Commission has proposed amendments (the "Proposed Amendments") to the financial disclosure requirements in Regulation S-X for guarantors and issuers of guaranteed securities registered or being registered, and issuers' affiliates whose securities collateralize securities registered or being registered.

The comments expressed in this letter represent the views of the Committees only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore should not be construed as representing the official position of the ABA. In addition, these comments do not represent the official position of the Section, nor do they necessarily reflect the views of all members of the Committees.

Overview

The Committees support the general approach taken in the Proposing Release with respect to amending Items 3-10 and 3-16 of Regulation S-X. Specifically, we agree with the Commission's proposal to reduce the burdens associated with furnishing financial information pursuant to these items. We agree with the Commission's view that revising these rules would:

- reduce the cost of compliance for registrants and encourage potential issuers to conduct registered debt offerings,
- benefit investors by simplifying and streamlining the disclosure provided to them about registered transactions and improve transparency in the market to the extent more offerings are registered, and

- reduce the burden associated with providing guarantees or pledges of affiliate securities as collateral.

Although we support the general approach the Commission has taken, we have the following specific comments:

1. Exclusion of Certain Financial Information

The Release notes that "[i]n order to present the assets, liabilities, and operations of the Obligor Group accurately, it is necessary to exclude the financial information of subsidiaries not obligated under the guaranteed security." Under the current rule, information is presented with respect to all subsidiaries, including non-guarantor subsidiaries, on the basis of the equity method of accounting.

We support the Commission's proposal to exclude non-issuer and non-guarantor subsidiaries from the Summarized Financial Information of the Obligor Group, even if those non-issuer and non-guarantor subsidiaries would be consolidated by an issuer or guarantor. The Commission proposes allowing the parent company to determine which method best meets the objective of excluding the financial information of non-issuer and non-guarantor subsidiaries from the Proposed Alternative Disclosures (as such term is defined in the Proposing Release), so long as the selected method is disclosed and used for all non-issuer and non-guarantor subsidiaries for all classes of guaranteed securities for which the disclosure is required, and is reasonable under the circumstances. We understand that some commenters have suggested that the method of exclusion be consistent with concepts that are consistent with U.S. Generally Accepted Accounting Principles (U.S. GAAP) or, if applicable, International Financial Reporting Standards ("IFRS"). Although we believe that many issuers will likely determine an exclusion methodology based upon those principles, we support the flexibility the Commission has proposed, for the following reasons:

a. Some public debt structures include subsidiary guarantees for the purpose of providing public debt investors recourse to the same entities that have provided guarantees to commercial banks or other lenders. In these situations, the identity of a guarantor, and the basis upon which it is included or excluded, may be based upon the provisions of the applicable credit agreement. The purpose of a subsidiary guarantee in this context is primarily to avoid the public debtholders being structurally subordinated to the rights of other lenders. Imposing a requirement that any exclusion be based on criteria relating to GAAP or IFRS may therefore be inconsistent with the circumstances giving rise to the exclusion.

b. Requiring an issuer to justify an exclusion based on concepts that are consistent with U.S. GAAP or IFRS would add an unnecessary element of complexity to the presentation. Assuming an explanation is provided regarding the basis for the exclusion, and the exclusion is applied consistently, investors will have a reasonable basis to understand the financial presentation. To also require that

exclusion be based on "concepts that are consistent with" U.S. GAAP or IFRS would require an analysis of the applicable U.S. GAAP or IFRS principles, a determination of what concepts would be "consistent" with such principles, and an application of those concepts to the exclusion. Not only would these determinations be subject to potential second-guessing regarding the degree to which a particular exclusion principle would be "consistent" with U.S. GAAP or IFRS, but the exclusion disclosure would be expanded and would not, in our view, necessarily be meaningful to investors.

2. Proposed addition of Rule 13-01(a)(5) and Rule 13-02(a)(5)

Current Rule 3-10(i)(11) provides that a registrant's disclosures may not omit any financial or narrative information about each guarantor if that information would be material to investors to evaluate the sufficiency of the guarantee(s). Proposed Rules 13-01(a)(5) and 13-02(a)(5) would expand that requirement to mandate the disclosure of "any" quantitative or qualitative information that would be material to making an investment decision with respect to the guaranteed or collateralized security. We do not support this proposed expansion, insofar as the proposed Rules introduce a stand-alone materiality test going beyond existing materiality definitions. In our view, current affirmative line-item disclosure requirements, combined with the requirement in Rule 12b-20 and elsewhere to disclose 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, provides adequate and appropriate investor protection. The imposition of a requirement to disclose "any" quantitative or qualitative information could be read to require the disclosure of information which duplicates other quantitative or qualitative disclosure. Also, as mentioned above, some public debt structures include subsidiary guarantees for the purpose of providing public debt investors recourse to the same entities that have provided guarantees to commercial banks or other lenders. In these situations, the addition of a subsidiary guarantor, or the release of a subsidiary guarantor, may simply parallel the provisions of the applicable credit agreement to provide public debt holders assurance that they will not be structurally subordinated to the rights of other creditors. Requiring disclosure of "any" material quantitative and qualitative factors may therefore impose burdens on issuers that are inconsistent with the context of the guaranty structure.

3. Location of the Disclosures

We agree with the Commission that "the supplemental nature of this information supports providing parent companies with the flexibility to provide the Proposed Alternative Disclosures inside or outside of the consolidated financial statements in registration statements covering the offer and sale of the guaranteed debt securities and any related prospectus, as well as annual and quarterly Exchange Act periodic reports required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed." We also agree that "this proposed optionality

should reduce costs and burdens for parent companies and reduce the potential for delay in offerings that exists under the existing rule due to the need to prepare audited Alternative Disclosures." Further, we agree that this may enable parent companies using this proposed option to be able to register guaranteed debt offerings and go to market more quickly than under the existing rule and allow parent companies to more promptly access favorable market conditions.

We support the flexibility the Commission is proposing. Permitting a company to include the disclosure outside its financial statements could allow it to avoid the cost and time delays associated with providing the information in its financial statements, including the requirement to subject such information to an annual audit. Requiring an audit of this more granular, supplemental information would add cost without necessarily providing a corresponding benefit to investors. By affording companies greater flexibility as to the location of the information, companies would have the ability to determine where the disclosure would be most relevant in their disclosures.

Our sole comment on this matter is that, as proposed, the location flexibility would apply only to registration statements and annual and quarterly Exchange Act periodic reports required to be filed during the fiscal year in which the first bona fide sale of the subject securities is completed. We strongly urge the Commission to consider also allowing companies the flexibility of determining the disclosure location in Exchange Act reports in fiscal years after the first bona fide sale of the subject securities occurs. We believe that this would allow companies to provide disclosure in a location consistent with prior disclosures, and would avoid unnecessary bifurcation of disclosures, such as where disclosures with respect to offerings in prior fiscal years are required in one location, but disclosures with respect to offerings in the current fiscal year may be located elsewhere. The limited scope of the proposed accommodation makes the accommodation less meaningful and helpful to issuers. We suggest that the accommodation be available not only in the initial fiscal year, but thereafter as well.

4. Interim Disclosures

The proposed rules would require the Proposed Alternative Disclosures to be included in a footnote to the parent company's audited annual and unaudited interim financial statements beginning with its annual report filed on Form 10-K or Form 20-F for the fiscal year during which the first bona fide sale of the guaranteed securities is completed. We suggest that interim disclosure be required only if material changes have occurred since the most recent annual period that is required to be presented. Mere duplication of previously reported information would not be meaningful to investors and would, in our view, impose unnecessary burdens on issuers.

5. Smaller Reporting Companies

The Commission notes in the Proposing Release that Note 3 to Rule 8-01 of Regulation S-X requires compliance with existing Rule 3-10 if the subsidiary of an SRC issues securities guaranteed by the SRC or the subsidiary guarantees securities issued by the SRC, except that the periods presented are those required by Rule 8-02 of Regulation S-X. The Commission proposes modifying this requirement slightly to conform it to the streamlined structure of proposed Rule 3-10(a). We support this change. We also encourage the Commission to consult with the Advocate for Small Business Capital Formation and the Office of Small Business Policy in the Division of Corporation Finance, to determine if any accommodations, beyond those in the Proposed Amendments, may assist smaller companies in conducting offerings involving subsidiary guarantees or offerings involving affiliates whose securities collateralize securities registered or being registered.

Conclusion

Subject to the comments set forth above, we support the Commission's proposals to streamline disclosures relating to offerings involving subsidiary guarantees or which involve affiliates whose securities collateralize registered securities. We encourage the Commission's efforts to make access to the capital markets less burdensome to issuers, while preserving important investor protections.

We appreciate the opportunity to comment on the Proposing Release. We are available to meet and discuss these matters with the Commission and/or the Staff and to respond to any questions.

Very truly yours,

/s/ Robert E. Buckholz
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