

**Effective Disclosure in the Investment Grade Fixed Income Offering Process:
Essential Reforms Needed to Protect Investors
October 23, 2009**

The current process for offerings of investment grade fixed income securities is in need of significant improvement. At present, investors do not have sufficient access to critical information at key times in the offering process. The Securities and Exchange Commission (the “Commission”) should, in our view, promptly take steps to improve the existing process, both by developing and proposing changes in current regulations and by fostering increased dialogue among issuers, underwriters and investors. Improvement is needed in each of the following areas:

1. *Expand Information Available upon Announcement of Deal.* Investors currently lack access to material information at the opening of the order books for a new offering, which typically occurs upon the posting of a very brief announcement (*e.g.*, on a Bloomberg screen) or through telephone solicitation early in the business day.
 - The Commission should ensure that investors have access, at the time the order book opens, to a preliminary prospectus or, if there are circumstances in which the Commission determines the delivery of a preliminary prospectus is not feasible, that investors be provided an expanded announcement setting out critical information regarding the terms of the issue(s), applicable indentures, covenants and other key data and containing links to indentures and other available documents.
2. *Improve Access to Documents Incorporated by Reference.* The current offering process depends significantly on incorporation by reference of material disclosure documents, but often does not ensure access to those documents as promptly as needed to inform investor decision-making. Although some documentation provides that documents are available “upon request” or for physical examination at the issuers’ headquarters, the mechanisms for requesting or obtaining such documents do not correspond to the time constraints investors face in reaching their investment decision. The lack of ready access to material documents is especially notable given the ease with which modern technology permits access to occur.
 - The Commission should maximize the ability of investors to access, in a timely matter, through publicly-available hyperlinks or other readily available technology, any documents incorporated by reference. Mere identification of such documents or limiting access to only physical copies is not sufficient given the proliferation and complexity of different indentures, supplements and other relevant materials and the global nature of investing.
3. *Better Disclosure of Information Material to Fixed Income Investors.* Fixed income investors frequently find that offering documents can lack important information of significance to their investment decision. In part, this may reflect a traditional focus on disclosure of items relevant to equity investors.
 - The Commission should undertake a review of its disclosure requirements and implement enhancements to address the needs of fixed income investors, with a particular focus on matters such as use of offering proceeds, covenant descriptions, indenture terms, trustee controls and removal, voting issues, material credit facilities, financial strategy and pro forma or other

financial materials that are necessary to make informed investment decisions. In the case of credit facilities, the governing documents should be made available by hyperlinks as discussed in item 2 above.

4. *Increased Opportunities for Investors to Communicate Issues of Concern to Issuers and the Marketplace.* At present, the ability of investors to communicate with issuers and other market participants is unpredictable and often inadequate. In the Investment Grade offering process, in contrast to the process for equity offerings, it is the exception rather than the norm for investors to have the opportunity to raise questions and issues of concern with issuers or others involved in an offering prior to the time an investment decision needs to be made. Further, uncertainties regarding the application of the relevant legal framework regarding communications between issuers, underwriters and investors frequently chill or prevent discussions among these parties.

- The Commission should take steps to promote effective communication with issuers and other participants in fixed income offerings, including by adopting rules that not only permit but also promote the use in the offering process of investor forums, public conference calls or similar mechanisms designed to provide access to issuer representation and otherwise enhance the investment decision-making process.

5. *Consider the impact of amended rule 144 and concomitant reduction in registration rights on high yield and investment grade bond market.* Historically, many high yield and investment grade bonds were issued in private placements under Rule 144, but were issued to, and tradable among, qualified institutional buyers pursuant to Rule 144A. The majority of high yield placements, and many investment grade placements, included registration rights, requiring the issuer to exchange the privately placed bonds with public bonds within a specified period. Registration rights create a promise of enhanced liquidity which, for the fixed-income buy side, offsets some of the negative characteristics of privately placed bonds (including limited liquidity, reduced disclosure and higher thresholds for issuer and underwriter liability).

- The amendment of Rule 144 to shorten the holding period for privately placed securities has significantly reduced the incidence of registration rights accompanying privately placed corporate bonds, as issuers that are SEC reporting companies know that their privately placed bonds will become freely tradable under Rule 144 much sooner than under the prior iteration of the Rule. We believe that implementation of this amendment of Rule 144 has had a negative impact on fixed income investors. Even after the Rule 144 holding periods expire, privately placed bonds are simply less liquid than publicly issued bonds. Many buy-side fixed income portfolios have limitations on holding privately placed securities, often because of their more limited disclosure, higher liability thresholds, and generally poorer liquidity. We understand the benefits that the SEC wanted to create for equity issuers, particularly smaller reporting companies, by shortening the holding periods and other amendments to Rule 144. Unfortunately, the resulting obsolescence of registration rights for fixed income securities has adverse affects on liquidity and disclosure in the market for privately placed high yield and investment grade debt. The SEC may want to consider whether some specific disclosure requirements would be appropriate for issuers of privately placed high yield and investment grade corporate debt in light of the diminished use of registration rights.