MORRISON | FOERSTER

1290 AVENUE OF THE AMERICAS
NEW YORK, NY 10104-0050

TELEPHONE: 212.468.8000
FACSIMILE: 212.468.7900

WWW.MOFO.COM

MORRISON & FOERSTER LLP

NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SAN DIEGO, WASHINGTON, D.C.

NORTHERN VIRGINIA,
ORANGE COUNTY, DENVER
SACRAMENTO, WALNUT CREEK

TOKYO, LONDON, BEIJING,
SHANGHAI, HONG KONG,
SINGAPORE, BRUSSELS

August 31, 2007

By E-Mail to: rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Attn: Nancy M. Morris, Secretary

Re: Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3
Release No. 33-8812 (File No. S7-10-07)

Ladies and Gentlemen:

This letter is submitted on behalf of Morrison & Foerster LLP in response to the request of the Securities and Exchange Commission (the "Commission" or "SEC") for comments on Release No. 33-8812 (the "Release"). The Release sets forth a proposal (the "Proposal") that would amend the eligibility requirements of Form S-3 and Form F-3 to allow domestic and foreign private issuers to conduct primary offerings of securities on these forms without regard to the size of their public float or the rating of the debt that they are offering, subject to satisfaction of the other eligibility conditions of each respective form and the satisfaction of the other conditions set forth in the Proposal.

The Proposal is one of several proposed modifications to the existing rules governing capital formation and reporting requirements for smaller companies and the Proposal is one of five releases published by the Staff for comment. We refer to these releases, collectively, as the "Smaller Company Proposals."

Overview

We support strongly many of the Staff's initiatives embodied in the Smaller Company Proposals. Sarbanes-Oxley and related reforms have had a disproportionately negative effect on smaller public companies. Smaller public companies face particular capital-raising challenges. Securities offering reform modified the registration, communication and offering process—bringing regulation more in line with market realities. However, the largest public companies, WKSIs, have benefited the most from those changes. Securities offering reform did not address the regulation of unregistered, or

exempt, securities offerings, nor did it address many of the capital-raising concerns of smaller public companies. Given changes in market dynamics, many smaller public companies now regularly raise capital through private offerings, or through hybrid offering techniques, which have many of the features of private offerings. Foreign private issuers also frequently choose to access the U.S. capital markets through exempt offerings in order to avoid subjecting themselves to ongoing U.S. reporting requirements. Despite increased activity in the private and hybrid markets in recent years and significant technological changes affecting communications among market participants, there have not been any changes to the regulation of unregistered securities offerings. In fact, recent SEC statements and comments regarding PIPE transactions and the application of Rule 415 have only led to more confusion and concern on the part of smaller public companies seeking to raise capital through private placements.

We commend the Staff for addressing in these Smaller Company Proposals many of the recommendations made by the Advisory Committee on Smaller Public Companies (the “Advisory Committee”) in its April 2006 final report.

We note that in some respects, the Smaller Company Proposals, and, in particular the Proposal, pick up where securities offering reform seems to have left off. The simplification of the reporting requirements for “smaller reporting companies” and the scaled or reduced disclosure requirements that are proposed to be made available to this broader category of “smaller reporting companies” will benefit smaller public companies. In the context of capital formation, we also believe that the Smaller Company Proposals will provide some benefit to smaller public companies, although the proposals do not provide the kind of broad-based changes to exempt securities offering regulation that would be helpful for capital formation generally.

We believe that the essence of the Proposal (that is, easing the eligibility requirements for the use of a short form registration statement) strikes an appropriate balance between improving the efficiency of capital formation for smaller public companies while preserving investor protection.

Set forth below are an overview of our comments on the Proposal and detailed responses to the Staff’s request for comments.

Eligibility Requirements for the Use of Forms S-3 and F-3. We support broadening the eligibility requirements for the use of Form S-3 and Form F-3 in order to allow domestic and foreign private issuers to conduct primary offerings of securities without regard to the size of their public float and without regard to the rating of the debt that they are offering, provided that the issuers satisfy the other applicable eligibility requirements of each respective form and the other eligibility requirements in the Proposal. As discussed below, we agree that given the availability of current information

for reporting companies, broadening the eligibility requirements without regard to public float will allow a significant number of additional companies to benefit from more flexible and more efficient access to the capital markets. Smaller public companies will have many more financing alternatives if they are able to use a short-form registration statement and conduct "off the shelf" offerings pursuant to Rule 415.

20% of the Public Float Limitation. Under the Proposal, a new transaction requirement would be added that would be set forth in General Instruction I.B.6. to Form S-3 that would allow companies that satisfy the other registrant eligibility requirements for use of Form S-3 but have a public float of less than $75 million to use Form S-3 on a primary basis, even if their securities are not traded on a public securities exchange, provided that such companies do not sell more than the equivalent of 20% of their public float in primary offerings registered on that form over any one-year period. We do not support the 20% public float limitation.

First, the Securities Act of 1933, as amended (the "Securities Act"), has always been and remains a "disclosure" statute. If a public policy determination is made that, as a result of technological and communication changes and as a result of the function of the integrated disclosure system, there is sufficient public information available to investors relating to registrants that satisfy the registrant eligibility requirements for the use of Form S-3, then it is difficult to understand why the SEC would determine that it is appropriate to set a limit on the amount of securities that can be sold by an issuer through a short-form registration statement.

Second, there is no other similar limitation anywhere in the Securities Act; the only comparable regulation is the 20% limitation imposed by the national securities exchanges on listed companies requiring that listed companies seek shareholder approval in connection with private placements completed at a discount to market that would result in the issuance of securities representing 20% or more of the listed companies' public float.

It may be appropriate in the context of a national securities exchange to require shareholder approval for certain actions to be taken; however, if the Staff were to consider the experiences of smaller public companies that have addressed this 20% limitation in connection with financings, we believe that it would find that smaller public companies are routinely able to structure transactions around this limitation. We note that the Staff has observed in the Proposal that the 20% limitation is intended to address concerns about trading volume. Traditionally, concerns about trading volume and the overall liquidity of markets have not been addressed by the Staff. To the extent that the Staff is concerned about market liquidity, it is still not appropriate for these concerns to be addressed in a disclosure statute. If the Staff has concerns about market liquidity, perhaps the Staff should consider whether a better and more appropriate eligibility criterion for use of Form S-3 would be one based on market capitalization.

Third, apart from the troublesome public policy implications associated with the proposed 20% limitation, there are practical issues that would make the application of the rule difficult; we discuss these below in the context of the detailed comment responses. We suggest that the Staff consider removing the 20% public float limitation from the final rules. If the Staff is concerned about disclosure and investor access to current information or to detailed information, then we suggest that the Staff require that smaller public companies that would like to avail themselves of a short-form registration statement, and that would like to be able to conduct offerings "off the shelf" pursuant to Rule 415, subject themselves to more detailed disclosure requirements (beyond those required for companies that meet the $75 million public float test). In order to monitor such an enhanced disclosure regime for smaller public companies, we would recommend the creation of a new short-form registration statement (in effect, a Form S-3/SB). We understand that pursuant to its other related proposals comprising part of the Smaller Company Proposals, the Staff intends to eliminate the "SB" forms; however, in this context, it may be most practical to create a new form for this purpose.

Determination/Calculation of Public Float. We note that the calculation of "public float" in the Smaller Company Proposals differs depending upon the context—for example, the calculation of "public float" for determining whether a company meets the definition of "smaller reporting company" differs from the calculation of "public float" for purposes of the 20% limitation. Having multiple different calculations may be confusing in practice. If the Staff were to adopt the 20% limitation as proposed, we would urge the Staff to reconsider the method of calculation of the public float in order to simplify the calculation because we believe that the proposed method will prove challenging in practice. If the Staff were to adopt the 20% limitation, we further suggest that the Staff reevaluate its proposal regarding aggregation of primary offering sales over a 12-month period.

Fluctuations in the Public Float. We support the Staff's view expressed in the Proposal that it is important to provide companies with flexibility in order to benefit from increases in their public float in the context of the 20% limitation. In the Proposal, the method of calculating the "public float" permits an issuer to benefit from increases in its public float for purposes of the 20% limitation. Similarly, under the Proposal an issuer whose public float increased following the effective date of its Form S-3 to a level in excess of $75 million would no longer be subject to the 20% limitation and would not be required to file a new Form S-3 registration statement. In contrast, if the issuer's public float declined and fell below $75 million, the 20% limitation would be reimposed for subsequent sales. Again, we note that it is difficult to comprehend why, from a disclosure perspective, the mix of public information available to investors will change because an issuer has crossed the $75 million demarcation point. Nonetheless, if the Staff were to adopt the Proposal with the 20% limitation, we suggest that the Staff consider requiring the filing of a short-form amendment in instances where a registrant crossed the $75

million threshold in order to make it possible to monitor those issuances that needed to be aggregated. If the Staff were to implement the suggestion of adopting a new short-form registration statement (as discussed above), it would result in a straightforward filing process or conversion process in order for an issuer to move from one form to another as appropriate.

Application to Primary Offerings. We note that the Staff has recently taken the position that for issuers with a public float of less than $75 million, a resale registration statement may not be available in connection with the registration of securities originally sold to investors in a PIPE. For issuers that are not S-3 eligible on a primary basis, the SEC has said that a resale registration statement may not be available if the issuer sold a disproportionately large number of securities in a PIPE. The SEC views the purported secondary offering as a primary offering, with the selling security holders acting as underwriters selling their securities on the issuer's behalf. Registration statements under these circumstances contemplate that the selling security holders will offer their securities from time to time at then prevailing market prices, or in a "continuous" offering. However, an issuer must be S-3 eligible on a primary basis in order to register a continuous offering. For issuers seeking guidance regarding "primary offerings" and "secondary offerings," the SEC has pointed to 1997 interpretative guidance in which it identified various factors to be assessed in making this determination. These include: the amount of securities involved; how long the securities have been held; whether investors are at market risk from the time they purchase the securities; the circumstances under which the securities were acquired; the relationship between the selling security holders and the issuer; whether the seller is in the business of underwriting securities; and whether it appears the seller is acting as a conduit for the issuer. This determination involves a case-by-case analysis of the facts and circumstances of each transaction. As a guidepost, and not a bright line test, the SEC has indicated that it will subject PIPEs resulting in the issuance of shares in excess of 33% of the issuer's pre-transaction total shares outstanding (held by non-affiliates) to closer scrutiny. The SEC also may subject transactions involving smaller share amounts but raising other concerns (based on the enumerated factors) to more careful analysis. Similarly, transactions involving in excess of 33% of an issuer's pre-transaction float may not necessarily be deemed "primary" offerings—the decision will be based on the specific facts and circumstances, although the size of the offerings does matter. In fact, of all of these factors, size is the most significant. We believe that it would be helpful to reconcile the Staff's views in connection with the availability of a resale statement registration and the Proposal.

Shell Companies. The Proposal does not extend the ability to use to Form S-3 to "shell companies." The revised transaction requirement to be set forth in General Instruction I.B.6. to Form S-3 would require that "the registrant is not a 'shell company' and has not been a 'shell company' for at least 12 calendar months preceding the filing of the registration statement on Form S-3." We support the Proposal's exclusion of shell

companies because there is limited and less fulsome public information available regarding shell companies, blank check companies and special purpose acquisition companies. We believe it is appropriate to require that a full reporting cycle have elapsed in order for a company that was formerly a shell company to become eligible for use of Form S-3.

Foreign Private Issuers. We support making the corresponding amendments to Form F-3 that are made to Form S-3 in order to maintain the equivalency of these forms and to permit foreign private issuers to benefit from the availability of a short form registration statement for primary offerings.

Blue Sky Issues. We support the initiative to make Form S-3 available to issuers that are listed on the OTC Bulletin Board provided that such issuers meet the eligibility criteria. Under current blue sky regulation, even if OTC Bulletin Board issuers were able (following adoption of the Proposal) to avail themselves of a Form S-3 registration statement for primary issuances, there would not be a blue sky exemption since their securities are not "covered securities" under statute. We suggest that the Staff designate all securities registered and sold pursuant to a Form S-3 or F-3 registration statement as "covered securities."

Detailed Comments

We appreciate the opportunity to provide comments on the Proposal, which we believe will provide enhanced flexibility for smaller public companies seeking to raise capital. In its request for comments, the Staff posed a number of questions for consideration. We have grouped our responses to the Staff's questions below by topic.

Eligibility Criteria. As we note above, we believe that the proposed change in the public float eligibility criteria is appropriate in light of the significant technological and communication advances that make it possible for information to be disseminated quickly and effectively, as well as in light of the integrated disclosure system. We do not think that market following or analyst coverage is an important criterion in light of these technological changes. Moreover, given changes in market dynamics and changes affecting financial institutions, many investment banks have reduced the number of companies that they cover from a research perspective. As a result, it is not an important nor is it a helpful factor to consider the number of research analysts publishing research reports about a company in the context of assessing eligibility for short-form registration. We note the Staff's observations concerning the Personal Consumption Expenditures Price Index and the Consumer Price Index; however, we do not believe that it is appropriate to place undue focus on these economic measures in assessing form eligibility requirements. We believe that the Staff should consider the overall regulatory burden imposed on

smaller public companies, including the special challenges relating to capital-raising faced by smaller public companies. Smaller public companies would have much more flexibility in accessing the public markets if they are able to use a shelf registration statement.

Float Test. As noted above, we would urge the Staff to reconsider the 20% float limitation and consider whether the Staff's public policy concerns regarding market liquidity would actually be addressed through the imposition of the proposed limitation. We understand that the public policy basis for the float test originally was based on the presumption that a certain threshold public float reflected that there was sufficient market interest in a company. If one focuses, however, on the availability and the sufficiency of information for investors, then public float alone should not be determinative in assessing eligibility for a short-form registration statement. If, indeed, the Commission is concerned about market liquidity and would like to monitor an issuer's financing choices, then it would seem that a market capitalization or an ADTV test would be more closely aligned with an assessment of market liquidity. We are not suggesting that the Staff adopt either a market capitalization or an ADTV eligibility test instead of the public float test however. As noted above, we do not believe that, in the context of a disclosure statute, it is appropriate for the Staff to regulate an issuer's financing choices due to market liquidity concerns.

20% Limitation. In response to the Staff's requests for comments, we do not believe that the 20% limitation is appropriate. There should not be any limitation imposed if the initial determination regarding the float test and short-form registration eligibility was premised on the availability of public information. Alternatively, if the Staff would like to impose a percentage limitation, perhaps it should consider harmonizing the limitation for resale registration statements (currently the Staff's informal guidance is 33% of the issuer's public float) with this limitation. In response to a related request for comments, we note that if the Staff imposes a limitation based on the market liquidity argument, the limitation should apply to all securities sold pursuant to registered public offerings, regardless of registration form, as well as to securities that are sold in exempt offerings. Again, this would make sense if the Staff's rationale for the 20% limitation is based on public policy concerns about market liquidity. We do not think it appropriate for the SEC to monitor the liquidity or trading market for a security, to limit an issuer's ability to conduct its business and make its own decisions regarding capital formation, or to prescribe through the imposition of restrictions on the amount of different types of securities that can be issued. Market liquidity and availability of adequate issuer information are two very different concerns.

From a practical perspective, we note that the process for calculating the limitation is too cumbersome and will be difficult to apply in practice. The two-step process should be simplified. Smaller public companies will derive very little actual benefit if bankers

and practitioners cannot structure financings with certainty. If the SEC proceeds with the limitation, we suggest that the SEC create a new short-form registration statement form for smaller public companies to use; if there were a new form, as a practical matter, it would be easier to keep track of the amount of securities sold for purposes of the 20% limitation. Once an issuer's float exceeds the $75 million, the issuer would then convert (or amend) its filing to the regular S-3 registration statement form (where no tracking of issuances is required). There should be new filing and effective dates that would correspond to the filing dates of these forms or amendments.

Non-Investment Grade Debt. The issuance of non-investment grade debt should be permitted. As discussed above, if the decision to modify the eligibility criteria is based on the timely availability of adequate public information concerning the issuers, then issuers should be able to make a determination regarding the type of security to be offered. There should not be a cap for the amount of non-investment grade debt that may be sold. This should be left to the issuer and to the market.

Offering Types. We do not believe that the SEC should impose restrictions on the manner of sale. The benefits of the Proposal would be limited if the SEC were to impose restrictions on the manner of sale, such as limiting the Proposal to firm commitment underwritten offerings only. Given changes in the capital markets, there are fewer distinctions that would be relevant to investors between or among various offering types (i.e., between an agency or best efforts transaction, a firm commitment underwritten offering or an at-the-market offering). We agree that the Proposal should apply to at-the-market offerings and that there should not be any restrictions on at-the-market offerings. We would agree that in the case of at-the-market offerings, offers and sales should be made only through registered broker-dealers and that such registered broker-dealers be identified as underwriters in the prospectus.

* * *

Thank you for this opportunity to comment on the Proposal. We would be pleased to discuss our comments at any time. Please contact James R. Tanenbaum at (212) 468-8163 or Anna T. Pinedo at (212) 468-8179.

Sincerely,

Morrison & Foerster LLP