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CAPITAL MARKETS UPDATE

SEC Proposes to Revise Registration Statement Eligibility Requirements and Various Securities Act Rules to Eliminate Reliance on Credit Ratings

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On June 25, 2008, the Securities and Exchange Commission proposed revisions to the eligibility requirements for various registration statement forms that are used by domestic and foreign issuers to register the offer and sale of securities under the Securities Act of 1933. Release Nos. 33-8940; 34-58071. The purpose of the revisions is to eliminate reliance on credit ratings in determining eligibility to use a specific form, typically a short-form registration statement that allows incorporation by reference. The SEC also proposed making similar revisions to various Securities Act rules that referenced credit ratings. The SEC proposed the revisions to "make the limits and purposes of credit ratings clear to investors and ensure that the role assigned to ratings in SEC rules is consistent with the objectives of having investors make an independent judgment of credit risks." The comment period for the proposed revisions expires on September 5, 2008.

Also on June 25, 2008, the SEC proposed revisions to various rules and forms under the Securities Exchange Act of 1934, particularly the broker-dealer net capital requirements and Regulation M (Release No. 34-58070), and to various rules under the Investment Company Act of 1940 and the Investment Advisers Act of 1940 (Release IC-28327), proposing similar changes meant to eliminate the reliance on credit ratings. The proposed changes in the two companion releases are outside the scope of this Capital Markets Update.

Proposed Revisions to Registration Statement Eligibility Requirements

In the release, the SEC has proposed the following revisions:

FORMS S-3 AND F-3

Forms S-3 and F-3 are short-form registrant statements that allow an issuer to rely on reports it has filed or will file under the Exchange Act to satisfy many of its disclosure requirements under the Securities Act. To be eligible to use these forms, an issuer must meet the registrant requirements contained in General Instruction I.A to the forms, and must also meet one of the transaction requirements contained in General Instruction I.B to the forms. One of the current transaction requirements (I.B.2)

allows an issuer to register non-convertible securities on these forms so long as the securities are offered for cash, and provided that such securities at the time of sale have been rated investment grade by at least one nationally recognized statistical rating organization, or NRSRO. The SEC proposes to replace this transaction requirement with one that still allows an issuer to register non-convertible securities on the forms; however, the securities must be offered for cash and, over the previous three years, the issuer must have issued (as of a date within 60 days prior to the filing of the registration statement) for cash (and not exchange) more than $1 billion in non-convertible securities, other than common equity, through registered primary offerings.

In addition, Form S-3 may currently be used for an offering of asset-backed securities, or ABS, if the ABS are rated investment grade by at least one NRSRO and certain other conditions are met (transaction requirement I.B.5). The SEC proposes to replace the investment grade component with one which requires that: (i) initial and subsequent resales be made in minimum denominations of $250,000; and (ii) initial sales may only be made to qualified institutional buyers (as defined in Rule 144A under the Securities Act). For more information on how the proposals affect ABS, please read our Securitization Update titled "SEC Proposes to Reduce Reliance on Credit Ratings in its Forms and Rules" dated July 9, 2008.

FORMS S-4 AND F-4

Like Forms S-3 and F-3, Forms S-4 and F-4 allow eligible issuers to rely on reports they have filed or will file under the Exchange Act to satisfy many of its disclosure requirements. To be eligible, an issuer must meet one of the three requirements contained in General Instruction B to the forms. One of the requirements (B.1.a.B in the case of Form S-4 and B.1.a.ii.B in the case of Form F-4) allows an issuer that is registering non-convertible securities on these forms to incorporate by reference information about the issuer so long as the securities offered have been rated investment grade by at least one NRSRO. The SEC proposes to replace this requirement with the same one discussed above under *Forms S-3 and F-3* that will allow non-convertible securities of issuers that aren't otherwise eligible to be registered on those forms. The SEC also proposes to revise Note E.2.ii to Schedule 14A under the Exchange Act (the proxy statement requirements) in a similar fashion.

FORMS F-1, F-3 AND F-4

Forms F-1, F-3 and F-4 allow foreign private issuers that are registering offerings of securities that have been rated investment grade by at least one NRSRO to provide financial information in accordance with Item 17 of Form 20-F, the annual report form for foreign private issuers, rather than Item 18. Both Item 17 and Item 18 contain a requirement that a foreign private issuer reconcile its financial statements and schedules to US GAAP if they are prepared in accordance with a basis of accounting other than US GAAP or International Financial Reporting Standards. Item 17 only requires a narrative discussion of the reconciling differences, and a reconciliation of net income and cash flows for each year and interim period presented. Item 18

requires all of the information required by US GAAP and Regulation S-X be reconciled. The SEC proposes to replace the investment grade component that allows foreign private issuers registering investment grade debt to use the Item 17 reconciliation requirements with the same requirement discussed above under *Forms S-3 and F-3* that will allow non-convertible securities of issuers that are not otherwise eligible to be registered on those forms.

FORM F-9

Form F-9 can be used by certain Canadian issuers to register investment grade securities that are offered for cash or in connection with an exchange offer, provided the securities are either non-convertible or are not convertible for a period of at least one year from the date of issuance (General Instruction I.A). For purposes of Form F-9, a security is investment grade if it has been rated investment grade by at least one NRSRO, or by at least one Approved Rating Organization (as defined in National Policy Statement No. 45 of the Canadian Securities Administrators). The SEC proposes to replace the provision, with respect to an investment grade rating by at least one NRSRO, with the same requirement discussed above under *Forms S-3 and F-3* that will allow non-convertible securities of issuers that are not otherwise eligible to be registered on those forms. The proposed change would not affect the provision regarding an investment grade rating by at least one Approved Rating Organization.

Proposed Revisions to Securities Act Rules

RULE 134

Rule 134(a)(17) currently permits the disclosure of securities ratings by NRSROs in certain communications deemed not to be a prospectus or free writing prospectus. The SEC proposes to expand this provision to apply to securities ratings provided by any credit rating agency, not just an NRSRO.

RULES 138, 139 AND 168

Rules 138, 139 and 168 each provide, in relevant part, that certain communications are deemed not to be an offer or sale of a security within the meaning of Sections 2(a)(10) and 5(c) of the Securities Act when the communications relate to an offering of non-convertible investment grade securities. Rule 138(a)(2)(ii)(B)(2) addresses a broker's or dealer's publication about securities of a foreign private issuer, which issuer meets the Form F-3 eligibility requirements and is issuing non-convertible investment grade securities. Rule 139(a)(1)(i)(A)(1)(ii) and (a)(1)(i)(B)(2)(ii) addresses a broker's or dealer's publication or distribution of a research report about an issuer, or its securities, where either the domestic or foreign issuer meets the Form S-3 or Form F-3 registrant requirements and will be offering investment grade securities pursuant to current transaction requirement B.2, or where the foreign private issuer meets the Form F-3 eligibility requirements and is issuing non-convertible

investment grade securities. Rule 168(a)(2)(ii)(B) provides that the safe harbor applies to the regular release and dissemination by or on behalf of an issuer of communications containing factual business information, or forward looking information, where the foreign private issuer meets Form F-3 eligibility requirements and is issuing non-convertible investment grade securities. The SEC proposes to revise each rule to replace the requirement of an investment grade rating with the same requirement discussed above under *Forms S-3 and F-3* that will allow non-convertible securities of issuers that are not otherwise eligible to be registered on those forms.

RULE 415

Rule 415 lists the types of offerings that are permitted to be offered on a continuous or delayed basis. One of the enumerated offerings are offerings of mortgage related securities, including such securities as mortgage-backed debt and mortgage participation or pass-through certificates. As a result, mortgage related securities can be offered on a delayed basis even if the offering cannot be registered on a short-form registration statement such as Forms S-3 and F-3. Exchange Act Section 3(a)(41) defines a mortgage related security as, among other things, a security that is rated in one of the two highest rating categories by at least one NRSRO. The SEC proposes to create a new definition of mortgage related security for purposes of Rule 415 based on the definition contained in the Exchange Act and to replace the investment grade component of the definition contained in the Exchange Act definition with the same requirement discussed above under *Forms S-3 and F-3* that will allow ABS to be registered on those forms.

RULE 436

Currently Rule 436(g), in relevant part, provides that a security rating assigned to a class of debt securities, convertible debt securities or preferred stock by an NRSRO shall not be considered a part of a registration statement prepared or certified by a person within the meaning of Sections 7 and 11 of the Securities Act. The consequence of this is that consents are not required of an NRSRO when such a rating is included in a registration statement. The SEC proposes expanding this relief to any credit rating agency, not just NRSROs, in the hope that it may foster competition among credit rating agencies. A corresponding change to eliminate the consent requirement with respect to a rating provided by any credit rating agency was also proposed to be made in Item 10(c) of Regulation S-K.

ITEM 10(C) OF REGULATION S-K

Item 10(c) of Regulation S-K currently permits an issuer to disclose in its SEC filings securities ratings assigned by NRSROs to classes of debt securities, convertible debt securities and preferred stock. The SEC is proposing to replace "NRSRO" with "any credit rating agency" in an attempt to foster greater competition among credit rating agencies. In addition, while the SEC is not currently proposing any other changes to the item, it has asked for comment on whether such ratings should be required, rather than just permitted, to be disclosed.

ITEM 1100(C) OF REGULATION AB

Item 1100(c)(2)(ii)(B) of Regulation AB currently provides that if a significant obligor meets the registrant requirements for Form S-3 or Form F-3, and the pool assets relating to the obligor are non-convertible investment grade rated securities, then an ABS issuer's filings may include a reference to the obligor's financial information rather than presenting the obligor's full financial information. The SEC proposes to revise the item to replace the investment grade standard with one that will allow a reference to a third party's financial information if the third party meets the registrant requirements of Form S-3 or Form F-3 and the pool assets relating to such third party are non-convertible securities, other than common equity, that were issued in a primary offering for cash that was registered with the SEC under the Securities Act.

ITEMS 1112(B) AND 1114 OF REGULATION AB

Instruction 2 to Item 1112(b) of Regulation AB provides that no financial information on a significant obligor is required to be provided if the obligations of the significant obligor as they relate to the pool assets are backed by the full faith and credit of a foreign government and the pool assets are investment grade securities. Instruction 3 to Item 1114 of Regulation AB provides issuers similar relief from providing financial information of a credit enhancement provider when its obligations are backed by the full faith and credit of a foreign government and the enhancement provider has an investment grade rating. The SEC proposes to delete these two instructions, which means that financial information will need to be provided when the obligations of a significant obligor or a credit enhancement provider are backed by the full faith and credit of a foreign government.

If you have any questions regarding the proposed revisions addressed in this Capital Markets Update or the proposed revisions in the two companion releases, please contact the author of this update, Michael Hermsen, any of the other attorneys listed below or any other member of our Capital Markets group.

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