US Securities and Exchange Commission Replaces Credit Ratings as Eligibility Criteria for Short-Form Registration Statements

On July 26, 2011, the Securities and Exchange Commission (SEC) adopted amendments to remove credit ratings as eligibility criteria for registration statements on Form S-3 and Form F-3.[1] This action is in response to Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Eligible issuers may use these short-form registration statements, with information incorporated by reference from other SEC filings, as "shelf" registration statements under Rule 415 pursuant to the Securities Act of 1933 (Securities Act). The shelf registration process permits eligible issuers to offer securities on a less costly and expedited basis. Under the prior rules, issuers could use the short-form registrations statements for various securities offerings, including an offering for cash of non-convertible securities other than common equity that received an investment grade rating by at least one nationally recognized statistical rating organization.

New Eligibility Requirements for Forms S-3 and F-3

New Eligibility Requirements. The amendments eliminate credit ratings as an eligibility measure for Form S-3 and Form F-3 registration statements and add the following alternative tests as replacement eligibility criteria:

- The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years;
- The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act;
- The issuer is a wholly-owned subsidiary of a well-known seasoned issuer as defined under the Securities Act; or
- The issuer is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer.

As is currently the case, an issuer using Form S-3 or Form F-3 would also have to satisfy the other relevant criteria, which did not change as a result of the adoption of new eligibility criteria to replace credit ratings. The SEC envisions that the change in eligibility requirement will not generally result in fewer issuers being able to use short-form registration statements or the shelf registration procedure. The adopting release stated that "we are not aware of anything in the legislative history to indicate that Congress intended to substantially alter the pool of issuers eligible for short-form registration and access to the shelf registration process." The release further asserted that the amendments "should preserve short-form eligibility for widely followed issuers." In her opening statement at the

SEC meeting where the replacement eligibility criteria were adopted, SEC Chairman Mary L. Shapiro stated that the SEC expects that "just about all issuers that currently could rely on the existing test would be able to qualify for the revised forms."

Timing. The new rules become effective on September 2, 2011. However, as a temporary grandfather provision, the SEC is permitting issuers to use Form S-3 or Form F-3 for a period of three years from the effective date of the amendments if they would have been eligible to register the securities offerings on that form under the prior credit ratings test. To rely on this grandfather provision, the issuer must disclose in the registration statement that it has a reasonable belief that it would have been eligible to register the securities under the prior ratings eligibility standard, as well as the basis for this belief.

Other Amendments

Rescission of Form F-9. The SEC rescinded Form F-9, which certain Canadian registrants use to register investment grade debt or preferred securities meeting certain criteria. This change was made because the SEC believes that regulatory developments in Canada have rendered that form unnecessary. To ease the transition for issuers that previously filed registration statements on Form F-9, the SEC revised Form 40-F, which certain Canadian registrants use to register securities under the Securities Exchange Act of 1934 (Exchange Act) and to file reports that it requires. Issuers that currently are eligible to use Form 40-F to satisfy SEC reporting obligations as to previously sold securities may continue to use Form 40-F if they filed and sold securities under a Form F-9 before the effective date of the rescission of that form. In addition, any issuer that discloses in the registration statement that it has a reasonable belief that it would have been eligible to file on Form F-9 as of December 30, 2012, and discloses the basis for that belief, may file a final prospectus for an offering on Form F-10 on or prior to December 31, 2015 even if it does not satisfy the parent guarantee or public float requirements of Form F-10. The rescission of Form F-9 and the amendment of Form 40-F, and amendments to remove references to Form F-9 in other forms, become effective December 31, 2012.

Amendments to Cross-Reference New Eligibility Criteria. The SEC amended Form S-4 and Form F-4 under the Securities Act, Schedule 14A under the Exchange Act and Rules 138, 139 and 168 under the Securities Act, each of which had relied on criteria that were similar to the investment grade criteria that the SEC eliminated from Form S-3 and Form F-3. As revised, each of these rules now refers to the new eligibility requirements. These amendments become effective on September 2, 2011.

Rule 134(a)(17). Rule 134(a)(17) under the Securities Act had contained a safe harbor allowing certain communications, such as "tombstone ads" or press releases announcing offerings, not to be deemed a prospectus or free writing prospectus even if they disclose security ratings issued or expected to be issued. The SEC has eliminated the safe harbor for ratings disclosure. Under the amended rule, whether a communication containing ratings disclosure will be considered to be a prospectus would be determined in light of all circumstances of the communication. The amendment to Rule 134(a)(17) becomes effective on September 2, 2011.

Practical Considerations

- If an issuer eligible to use S-3 or F-3 under the current credit ratings standard determines that it cannot meet any of the alternative criteria, it should consult with the Division of Corporation Finance. In light of the statements that the purpose of the rule change was not to reduce the number of eligible issuers, it might be possible to persuade the staff to recommend amendments to correct

such consequence before the expiration of the three-year grandfather provision.

- Neither securities issued in a private placement nor securities issued in a registered exchange offer for securities originally issued in a private placement will be included in determining eligibility under the new criteria.
- In light of the change to Rule 134, careful attention should be paid to securities offerings press releases that contain ratings to determine whether or not they constitute offering materials that will need to be filed with the SEC as a free writing prospectus.
- After Form F-9 has been rescinded, Canadian issuers that have previously registered securities offerings on Form F-9 should determine whether or not they are eligible to use Form F-10 for their securities offerings in the United States. In particular, Form F-10 requires that an issuer have an aggregate market value of the public float of its outstanding securities of $75 million or more. As an alternative, if debt or preferred securities are being issued and the issuer is a majority-owned subsidiary of a company that is eligible to use Form F-10 and the parent fully and unconditionally guarantees the securities being registered, then the issuer can use Form F-10. If a Canadian issuer is not eligible to use Form F-10, it will be required to use Form F-1 or Form F-3 to register securities for sale in the United States. These forms are subject to review and comment by the SEC staff. The consequence of using these forms is that the issuer is subject to the US disclosure requirements and not the Canadian disclosure requirements as exist under Form F-9 today. Accordingly, disclosure documents for such issuers would have to be revised.

Endnotes

[1] See Release No. 33-9245; 34-64975, available at http://www.sec.gov/rules/final/2011/33-9245.pdf.

If you have any questions regarding the new eligibility requirements or other amendments, please contact the author of this Legal Update, Laura D. Richman, at +1 312 701 7304, or any of the lawyers listed below or any other member of our Corporate & Securities group.

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