March 1, 2011

SEC Proposes Amendments to Form S-3 and Form F-3, and Amendments to Ratings Reliance in Other Forms and Rules

The SEC has proposed for public comment amendments to the eligibility requirements for registration statements on Form S-3 and Form F-3 as well as other amendments to rule and form requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934 to remove any reference to credit ratings issued by nationally recognized statistical rating organizations ("NRSROs").

The SEC proposed similar amendments in 2008; however, it did not adopt the 2008 proposals due to commentator opposition at the time. The SEC is now required under Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to modify its regulations to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations standards of credit-worthiness that the SEC determines appropriate. The SEC is therefore re-proposing the amendments to solicit comments on whether the proposed approach is appropriate, what the impact on issuers and other market participants would be and whether there are alternatives that should be considered. The SEC has requested that comments be received on or before March 28, 2011.

Proposed Revisions to Form S-3 and Form F-3

The ability to conduct primary offerings on Form S-3 and Form F-3 confers significant advantages on eligible companies. These forms permit the incorporation of required information by reference to a company's disclosure in its Exchange Act filings, including Exchange Act reports that were previously filed as well as those that will be filed in the future, which allows for automatic updating of the registration statement. Form S-3 and Form F-3 eligibility for primary offerings also enables companies to conduct primary offerings "off the shelf" under Rule 415 of the Securities Act, which provides considerable flexibility in accessing the public securities markets from time to time in response to changes in the market and other factors.

To use Form S-3 or Form F-3, a company must meet the applicable form's eligibility requirements set forth under General Instruction I.A, as well as at least one of the form's transaction requirements set forth under General Instruction I.B. One such transaction requirement of both Form S-3 and Form F-3 permits registrants to register primary offerings of non-convertible securities if the securities are rated "investment grade" by at least one NRSRO. General Instruction I.B.2. currently provides that a security is "investment grade" if, at the time of sale, at least one NRSRO has rated the security in one of its generic rating categories, typically the four highest, which signifies investment grade. This instruction provides issuers (or eligible foreign private issuers in the case of Form F-3) of debt securities whose public float did not reach the required threshold, or who did not have a public float, with an alternate means of becoming eligible to register primary offerings on Form S-3 or Form F-3.

The SEC has proposed to revise General Instruction I.B.2. of Form S-3 and Form F-3 to provide that an offering of non-convertible securities is eligible to be registered on Form S-3 or Form F-3 if the issuer has issued at least $1 billion of non-convertible securities in transactions registered under the Securities Act, other than equity securities, for cash during the past three years (as measured from a date within 60 days of the filing of the registration statement) and satisfies the other relevant requirements of Form S-3 or Form F-3, as applicable.

In determining compliance with the proposed $1 billion threshold, the SEC has proposed to use the same standards that are used in determining whether an issuer is a well-known seasoned issuer ("WKSI"). Specifically:

- issuers would be permitted to aggregate the amount of non-convertible securities, other than common equity, issued in registered primary offerings during the prior three years;
- issuers would be permitted to include only such non-convertible securities that were issued in registered primary offerings for cash; issuers would not be permitted to include registered exchange offers; and
- parent company issuers of guarantees would only be permitted to include in their calculation the principal amount of their full and unconditional guarantees, within the meaning of Rule 3-10 of Regulation S-X, of non-convertible securities, other than common equity, of their majority-owned subsidiaries issued in registered primary offerings for cash during the three-year period.

In calculating the $1 billion amount, issuers generally would be permitted to include the principal amount of any debt and the greater of liquidation preference or par value of any non-convertible preferred stock that were issued in primary registered offerings for cash. Although the proposed standard and the WKSI standard are both based on $1 billion minimum offering history, issuers seeking to rely on the new standard would not be required to qualify as a WKSI. For example, the new Form S-3 and Form F-3 eligibility test could be met by issuers that are "ineligible issuers" as defined in Securities Act Rule 405.

Similar to the SEC's approach with WKSIs, the SEC believes that its proposed amendments to Form S-3 and Form F-3 are appropriate for determining whether an issuer is widely followed in the marketplace so that Form S-3 and Form F-3 eligibility and access to the shelf offering process is appropriate.

The SEC recognized that these amendments might result in some issuers that have issued securities in reliance upon, or that could rely upon, the investment-grade criteria to lose Form S-3 or Form F-3 (and thereby shelf) eligibility. The SEC has suggested several mechanisms to avoid this consequence such as "grandfathering" in the application of the new rules removing the investment grade criteria in order to allow issuers that have recently offered securities on Form S-3 or Form F-3 in reliance on the investment grade criteria to retain Form S-3 or Form F-3 eligibility. The SEC has requested comments regarding such potential mechanisms.

Proposal to Rescind Form F-9

Form F-9 allows certain Canadian issuers to register offerings of investment grade debt or investment grade preferred securities that are offered for cash or in connection with an exchange offer, and which are either non-convertible or not convertible for a period of at least one year from the date of issuance. Under the requirements of Form F-9, a security is rated "investment grade" if it has been rated investment grade by at least one NRSRO, or at least one Approved Rating Organization, as defined in National Policy Statement No. 45 of the Canadian Securities Administrators ("CSA").

Under Form F-9, an eligible issuer has been able to register the offering of investment grade securities using audited financial statements prepared pursuant to Canadian GAAP without having to include a U.S. GAAP reconciliation. However, MJDS filers must reconcile their home jurisdiction financial statements to U.S. GAAP when registering securities on Form F-10. The CSA has recently adopted rules that will require Canadian reporting companies to prepare their financial statements pursuant to International Financial Reporting Standards as issued by the International Accounting Standards Board ("IFRS") beginning in 2011. Foreign private issuers that prepare their financial statements in accordance with IFRS are not required to prepare a U.S. GAAP reconciliation. Since a Canadian issuer will no longer have to perform a U.S. GAAP reconciliation under IFRS, the primary difference between Form F-9 and Form F-10 will be eliminated, the SEC stated. The disclosure requirements for an investment grade securities offering registered on Form F-10 will be the same as the disclosure requirements for such an offering registered on Form F-9, rendering Form F-9 dispensable the SEC stated.

Ratings Reliance in Other Forms and Rules

Amendments to Form S-4, Form F-4 and Schedule 14A

Form S-4 and Form F-4 reflect the Form S-3 and Form F-3 eligibility criteria by allowing registrants that meet the eligibility requirements of Form S-3 or Form F-3 and are offering investment grade securities to incorporate by reference certain information. Schedule 14A permits a registrant to incorporate by reference if the Form S-3 registrant requirements in General Instruction I.A are met and action is to be taken as described in Items 11, 12 and 14 of Schedule 14A,[1] which concerns non-convertible debt or preferred securities that are "investment grade securities" as defined in General Instruction I.B.2 of Form S-3. In addition, Item 13 of Schedule 14A currently allows financial information to be incorporated into a proxy statement if the requirements of Form S-3 (as described in Note E to Schedule 14A) are met.

In light of the proposed amendments to Form S-3 and Form F-3, the SEC has proposed to amend Form S-4 and Form F-4 to be consistent with such proposals. Similarly, the SEC has proposed to amend Schedule 14A to refer to the requirements of General Instruction I.B.2. of Form S-3 rather than to "investment grade securities."

---

[1] Item 11 of Schedule 14A provides for solicitations related to the authorization or issuance of securities other than an exchange of securities. Item 12 provides for solicitations related to the modification or exchange of securities. Item 14 provides for solicitations related to mergers, consolidations and acquisitions.

Amendments to Securities Act Rules 138, 139 and 168

Rules 138, 139 and 168 under the Securities Act provide that certain communications are deemed not to be an offer or sale or offer to sell a security within the meaning of Sections 2(a)(10) and 5(c) of the Securities Act when, among other things, the communications relate to an offering of non-convertible investment grade securities. The SEC has proposed to amend Rules 138, 139 and 168 to be consistent with the proposed revisions to Form S-3 and Form F-3 since, in order to rely on these rules, the issuer must either satisfy the public float threshold of Form S-3 or Form F-3, or issue non-convertible investment grade securities as defined in the instructions to Form S-3 or Form F-3 as proposed to be revised.

Removal of Securities Act Rule 134(a)(17) Safe Harbor

Securities Act Rule 134(a)(17) permits the disclosure of security ratings issued or expected to be issued by NRSROs in certain communications that are deemed not to be a prospectus or free writing prospectus. The SEC has proposed to remove this safe harbor since it believes that providing a safe harbor that explicitly permits the presence of a credit rating assigned by an NRSRO is not consistent with the purposes of Section 939A of the Dodd-Frank Act.

The SEC did note, however, that removal of the safe harbor would not necessarily result in a communication that included this information being deemed to be a prospectus or a free writing prospectus. The proposal simply results in there no longer being a safe harbor for a communication that included this information. Instead, the determination as to whether such information constitutes a prospectus would be made in light of all the circumstances of the communication.

* * *

For a copy of this release, see http://www.sec.gov/rules/proposed/2011/33-9186.pdf.

Mark S. Bergman	+44-20-7367-1601	Edwin S. Maynard	212-373-3024
Andrew J. Foley	212-373-3078	Tong Yu	+(81-3) 3597-6306
David S. Huntington	212-373-3124	Tracey A. Zaccone	212-373-3085
John C. Kennedy	212-373-3025		

NEW YORK
1285 Avenue of the Americas
New York, NY 10019-6064
+1-212-373-3000

BEIJING
Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86-10-5828-6300

HONG KONG
12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852-2846-0300

LONDON
Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44-20-7367-1600

TOKYO
Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81-3-3597-8101

WASHINGTON, D.C.
2001 K Street NW
Washington, DC 20006-1047
+1-202-223-7300

WILMINGTON
500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032
+1-302-655-4410