July 26, 2010

SEC Staff Issues Guidance on Use of Credit Ratings in Securities Offerings

The Dodd-Frank Wall Street Reform and Consumer Protection Act, which was signed into law on July 21, 2010, contains a number of provisions that impact the regulation of credit rating agencies. Among these provisions is an immediately effective requirement that nullifies Rule 436(g) under the Securities Act of 1933. Rule 436(g) had exempted credit rating agencies from being treated as "experts" for purposes of liability under the securities laws in respect of ratings information contained in registration statements. Because of the significant impact this change will have on the use of credit ratings in registered securities offerings, the SEC staff has issued guidance for corporate issuers and no-action relief for asset-backed issuers to assist in managing the transition.

Nullification of Rule 436(g)

Rule 436(g) provided that a credit rating assigned to a class of debt securities, convertible debt securities or preferred stock by a nationally recognized statistical rating organization would not be considered a part of a registration statement prepared or certified by an expert. This meant that credit ratings agencies were not required to provide written consents as a condition to the inclusion of their ratings in registration statements, and were not subject to liability under Section 11 of the Securities Act.

Corporate issuers frequently refer to ratings of their debt securities or preferred stock in their registration statements, prospectuses and periodic reports filed under the Securities Exchange Act of 1934. As a result of the nullification of Rule 436(g), these issuers generally must either obtain the consent of the relevant rating agencies (which may not be possible because a number of rating agencies have indicated their unwillingness to provide such consents) or remove the ratings information from their registration statements or other documents included or incorporated by reference in their registration statements.

Due to the immediate effectiveness of the nullification of Rule 436(g), issuers have raised questions about how to manage the transition, particularly with respect to currently effective registration statements and shelf registration statements that incorporate by reference previously filed Exchange Act reports. Issuers have also expressed concern about situations in which ratings disclosure is required in order to satisfy their disclosure obligations under the securities laws. For example, an issuer may be required to refer to credit ratings in its disclosure when summarizing the material terms of its debt covenants or in the event that a ratings downgrade would cause an increase in the issuer's cost of funds under its debt instruments.

SEC Guidance for Corporate Issuers

In response to these concerns, on July 22, 2010, the SEC staff issued additional Compliance

and Disclosure Interpretations to address various situations impacted by the nullification of Rule 436(g). Notably, the guidance applies to corporate issuers but generally does not apply to issuers of asset-backed securities.

Exception for disclosure-related ratings information. The SEC staff has indicated that "issuer disclosure-related ratings information" is permitted to be included in a registration statement without the consent of a credit rating agency. "Issuer disclosure-related ratings information" is defined as ratings information that relates only to changes to a credit rating, the liquidity of the registrant, the cost of funds for the registrant or the terms of agreements that refer to credit ratings. This would include, for example, risk factor disclosure about the consequences of failure to maintain a rating. It would not include standard disclosure of the credit ratings assigned to an issuer's debt securities. If ratings information other than issuer disclosure-related ratings information is included in, or incorporated by reference into, a registration statement or a prospectus or prospectus supplement first filed on or after July 22, 2010, then the consent of the credit rating agency is required.

Free writing prospectuses and term sheets/press releases. The staff guidance clarifies that consent of a credit rating agency is not required for inclusion of ratings information in free writing prospectuses (compliant with Rule 433 under the Securities Act) and term sheets or press releases (compliant with Rule 134 under the Securities Act). However, if any of these documents is also filed as a prospectus under Rule 424 under the Securities Act, the consent of a credit rating agency is required.

Registration statements on Form S-3 or Form F-3 that became effective prior to July 22, 2010. The staff has indicated that issuers with registration statements on Form S-3 or Form F-3 that became effective prior to July 22, 2010 and that contain ratings information (whether included or incorporated by reference) may continue to use the registration statements without the consent of the credit rating agency until the time the next post-effective amendment is filed, provided that no subsequently incorporated periodic or current reports contain ratings information (other than issuer disclosure-related ratings information). The filing of a post-effective amendment to such a registration statement would require the consent of the credit reporting agency. For shelf registration statements on Forms S-3 and F-3, the filing of the issuer's next annual report on Form 10-K, 20-F or 40-F is deemed to be a post-effective amendment, and consequently, the registration statement may not be used after the annual report is filed without the consent of the credit rating agency.

Registration statements that become effective on or after July 22, 2010. If a registration statement or post-effective amendment becomes effective on or after July 22, 2010 and includes or incorporates by reference ratings information that is not limited to issuer disclosure-related ratings information, the consent of the credit rating agency is required.

No-Action Relief for Asset-Backed Issuers

The disclosure of ratings information is mandated for asset-backed issuers under Regulation AB. In order to facilitate a transition for such issuers following the nullification of Rule 436(g), the SEC staff issued a no-action letter on July 22, 2010 (addressed to Ford Motor Credit Company LLC and Ford Credit Auto Receivables Two LLC). The letter states that the staff will not recommend enforcement action if an asset-backed issuer, as defined in Item 1101 of Regulation AB, omits the ratings disclosure required by Item 1103(a)(9) and 1120 of

Regulation AB from a prospectus that is part of a registration statement relating to an offering of asset-backed securities. The letter further provides that the staff's no-action position will expire with respect to any registered offerings of asset-backed securities comencing with an initial bona fide offer on or after January 24, 2011. In the absence of additional SEC rulemaking during this six-month period, it is unclear how asset-backed issuers will be able to consummate registered offerings after January 24, 2011 without credit rating agency consent.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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