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SEC Adopts Rules Removing Credit Ratings as Short-Form Eligibility Criteria

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On July 26, the Securities and Exchange Commission adopted final rules removing credit ratings as one of the several alternative "transaction" eligibility criteria for companies seeking to use short-form registration statements when registering primary offerings of non-convertible securities. The new rules were adopted pursuant to Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which required U.S. Federal agencies to remove references to, or requirement of reliance on, credit ratings from their regulations and replace such ratings with a standard of credit-worthiness that the agency deemed appropriate.

Previously, issuers that met the "registrant" eligibility criteria were eligible to register primary offerings of non-convertible securities (such as debt securities) on Forms S-3 or F-3 if they had received an investment grade rating from at least one nationally recognized statistical rating organization (NRSRO). The new rules remove references to NRSROs and revise General Instruction I.B.2. of Forms S-3 and F-3 to provide that offerings of non-convertible securities other than common equity are eligible to be registered on Forms S-3 and F-3 if:

- 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 of 1933, over the past three years; or
- 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; or
- The issuer is a wholly-owned subsidiary of a well-known seasoned issuer (WKSI); or
- The issuer is a majority-owned operating partnership of a real estate investment trust that qualifies as a WKSI.

The SEC also adopted a grandfather provision that allows an issuer to use Forms S-3 and F-3 for a period of three years from the effective date of the new rules if the issuer would have been eligible to register non-convertible securities under the old rules that relied on ratings from NRSROs.

It should be noted that if an issuer meets the "registrant" eligibility requirements for Forms S-3 and F-3 then, notwithstanding new General Instruction 1.B.2, it may also be eligible for the use of Forms S-3 and F-3 if it meets one of the other alternative "transaction" eligibility criteria, including having a non-affiliate market capitalization (voting and non-voting common equity) of $75 million or more.

The new rules also revise Form S-4, Form F-4, Schedule 14A and Securities Act Rules 138, 139 and 168 to refer to the new eligibility criteria in Forms S-3 and F-3. Finally, the new rules amend Securities Act Rule 134(a)(17) to remove a safe harbor permitting the disclosure of security ratings issued or expect to be issued by NRSROs in certain communications deemed not to be a prospectus.

Click here to read the final rules.

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