

SEC Adopts New Rules to Replace Use of Credit Ratings in Determining Eligibility for Forms S-3 and F-3

Effective September 2, 2011, the Securities and Exchange Commission (the "SEC") will remove credit ratings as eligibility criteria for registration statements on Forms S-3 and F-3 and replace them with new eligibility requirements, as required by Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The new rules include a grandfather provision for issuers that would have qualified to use Forms S-3 and F-3 under the old rules until September 2, 2014.

Under the old rules, eligible issuers used Forms S-3 and F-3 (each, a "Short Form") to register securities offerings under the Securities Act of 1933. An issuer may use the Short Form if it satisfies the form's registrant requirements and at least one of the transaction requirements. One transaction requirement was that securities be non-convertible (such as debt securities) and have been rated "investment grade" by at least one nationally recognized statistical rating organization, or NRSRO.

The new rules replace the "investment grade" category with four alternative eligible issuer categories. As revised, an issuer will be able to satisfy the transaction requirement if it meets one of the following criteria:

- the issuer has issued (as of a date within 60 days prior to filing) 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 filing) 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, or WKSI, as defined in Rule 405 under the Securities Act; or
- the issuer is a majority-owned operating partnership of a real estate investment trust, or REIT, that qualifies as a WKSI.

The SEC has also adopted rules that revise and replace references in rules and forms that relied on criteria similar to the investment grade criteria. The following rules and forms have been revised to refer to the new eligibility criteria:

- Form S-4 and Form F-4 under the Securities Act;
- Schedule 14A for proxy statements under the Exchange Act of 1934; and
- Rules 138, 139 and 168 under the Securities Act.

In addition, the SEC has amended Rule 134, which allows the disclosure of security ratings issued or expected to be issued by an NRSRO in certain communications by deeming such

communication to be a prospectus or free writing prospectus. The amendments remove the safe harbor for disclosure of credit ratings assigned by NRSROs.

The SEC believes that Congress did not intend for Dodd-Frank to substantially alter access to the use of Short Forms and, therefore, substantially all issuers currently relying on the investment grade category will also qualify under the new categories. However, it is likely that at least some previously eligible issuers will be ineligible to use a Short Form under the new rules if, after the expiration of the grandfather provision, an issuer does not have outstanding, or has not issued in

the prior three years, the requisite amount of SEC registered debt and/or non-convertible preferred stock. While this may be a small group of issuers, it may present a significant obstacle to those companies because they would need to use a longer form registration statement that does not allow forward incorporation by reference. However, issuers that retain a public float of at least \$75 million of common equity held by non-affiliates, such as WKSIs, will continue to be able to use a Short Form.

The final rules can be found at <http://www.sec.gov/rules/final/2011/33-9245.pdf>.

Practice group contacts

For more information, please contact one of the authors listed below, the Dechert attorney with whom you regularly work. Visit us at www.dechert.com/corporate_finance.

If you would like to receive any of our other *DechertOnPoints*, please [click here](#).

Jonathan Angell

London
+44 20 7184 7586
jonathan.angell@dechert.com

Adam M. Fox

New York
+1 212 649 8732
adam.fox@dechert.com

Thomas J. Friedmann

Washington, D.C.
+1 202 261 3313
thomas.friedmann@dechert.com

Sean Geraghty

London
+44 20 7184 7540
sean.geraghty@dechert.com

Craig L. Godshall

Hong Kong, Philadelphia
Hong Kong: +852 3518 4700
Philadelphia: +1 215 994 2491
craig.godshall@dechert.com

Richard A. Goldberg

New York
+1 212 649 8740
richard.goldberg@dechert.com

Christopher G. Karras

London, Philadelphia
London: +44 20 7184 7412
Philadelphia: +1 215 994 2412
christopher.karras@dechert.com

Derick S. Kauffman

Philadelphia
+1 215 994 2562
derick.kauffman@dechert.com

Howard Kleinman

New York
+1 212 698 3567
howard.kleinman@dechert.com

James A. Lebovitz

Philadelphia, New York
Philadelphia: +1 215 994 2510
New York: +1 212 698 3610
james.lebovitz@dechert.com

Stephen M. Leitzell

Philadelphia
+1 215 994 2621
stephen.leitzell@dechert.com

Wayne Rapozo

London
+44 20 7184 7671
wayne.rapozo@dechert.com

David S. Rosenthal

New York
+1 212 698 3616
david.rosenthal@dechert.com

Eric S. Siegel

Philadelphia
+1 215 994 2757
eric.siegel@dechert.com

© 2011 Dechert LLP. All rights reserved. Materials have been abridged from laws, court decisions and administrative rulings and should not be considered as legal opinions on specific facts or as a substitute for legal counsel. This publication, provided by Dechert LLP as a general informational service, may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

U.S. Austin • Boston • Charlotte • Hartford • Los Angeles • New York • Orange County • Philadelphia
Princeton • San Francisco • Silicon Valley • Washington, D.C. • **EUROPE** Brussels • Dublin • London
Luxembourg • Moscow • Munich • Paris • **ASIA** Beijing • Hong Kong