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## SEC Eliminates Use of Credit Ratings in Determining Eligibility for Forms S-3 and F-3

There has been a great deal of focus on credit rating agencies recently. Whether as a result of the debt ceiling and the potential of a downgrade of U.S. government debt, or questions about the role of the credit rating agencies in contributing to the financial crisis, the agencies have found themselves in the spotlight. On July 26, 2011, as mandated by the Dodd-Frank Act, the SEC has eliminated eligibility based on credit ratings for the use of registration statements on Form S-3 and F-3.

Forms S-3 and F-3 are available to issuers that meet certain transaction requirements and have filed on a timely basis all required periodic reports for a period of at least one year. The use of these forms greatly simplifies the preparation of a registration statement by allowing for the incorporation by reference of an issuer's periodic reports and the issuance of securities on an expedited basis by utilizing shelf registration statements. The existing transaction requirements are based on either a public float of at least \$75 million (excluding affiliates) or issuances of debt securities rated investment grade by at least one nationally recognized statistical rating organization. The new rules eliminate the condition based on the rating agencies and replaces it with the following four conditions, one of which needs to be met if an issuer does not otherwise meet the public float condition. Under the new conditions, an issuer must:

- ✚ have issued in primary registered offerings at least \$1 billion in non-convertible securities, other than common equity, in the past three years (tested within 60 days of the filing of a registration statement);
- ✚ have outstanding at least \$750 million of non-convertible securities, other than common equity, issued in primary registered offerings for cash (tested within 60 days of the filing of a registration statement);
- ✚ be a wholly-owned subsidiary of a well-known seasoned issuer; or
- ✚ be a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer.

The new rules grandfather in issuers that would have qualified to use Forms S-3 and F-3 under the old rules for a period of three years from the effective date of the new rules, which will be 30 days from the date published in the Federal Register.

Although there appear to be numerous ways to qualify to utilize Forms S-3 and F-3 under the new rules, issuers that have investment grade rated debt that do not have public floats of at least \$75 million (and do not meet any of the new conditions) will,

following expiration of the grandfathering period, likely have to resort to Rule 144A offerings to issue debt, which will not count towards satisfying any of the new conditions.

The final rules can be found [here](#).

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