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SEC Proposes to Remove Form S-3 Credit Rating Qualification Conditions

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On February 9, the Securities and Exchange Commission proposed rules amending the Securities Act of 1933 and the Securities Exchange Act of 1934 to replace rule and form requirements for securities offerings and issuer disclosure rules that rely on, or make special accommodations for, credit ratings to reflect the requirements of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 939A of the Dodd-Frank Act requires that the SEC (1) review any regulation issued by it that requires the use of an assessment of the credit-worthiness of a security or money market instrument and any references to or requirements in its regulations regarding credit ratings, (2) modify any regulations to remove any reference to or requirement of reliance on credit ratings, and (3) substitute in its regulations a standard of credit-worthiness with alternative requirements. The proposed rules are similar to rules proposed in 2008, which were not adopted by the SEC.

The proposed rules would remove credit ratings as one of the conditions for issuers seeking to use Form S-3 and Form F-3 when registering securities for public sale. The proposed rules would revise Instruction I.B.2 of Form S-3 and Form F-3, which currently permit issuers to register primary offerings of non-convertible securities if they are rated investment grade by at least one nationally recognized statistical rating organization (NRSRO). The revised Instruction I.B.2 would provide that issuers may use Form S-3 or Form F-3 to register an offering of non-convertible securities 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. The proposed rules also would:

- revise Rules 138, 139 and 168 of the Securities Act, Form S-4, Form F-4 and Schedule 14A, which currently reference Form S-3 and Form F-3 eligibility requirements related to credit ratings;
- delete Rule 134(a)(17) of the Securities Act, which currently permits the disclosure of security ratings issued or expected to be issued by NRSROs in certain communications deemed not to be a prospectus or free writing prospectus;
- rescind Form F-9, which permits Canadian issuers, under certain conditions, to register debt or preferred securities that have been rated investment grade by at least one NRSRO, or at one Approving Rating Organization, as defined in the National Policy Statement No. 45 of the Canadian Securities Administrators; and

- remove references to Form F-9 under the Securities Act and Exchange Act.

Under the proposed rules, some issuers that relied on the rating qualification for authority to use Form S-3 or Form F-3 may lose eligibility to use those Forms to conduct offerings. However, issuers may still conduct primary offerings of non-convertible debt securities on Form S-3 if they meet the $75 million public float requirement in Instruction I.B.1 of Form S-3 or if they meet the requirements of Instruction I.B.6 of Form S-3. At a February 9 SEC open meeting, Commissioners Troy Paredes and Kathleen Casey, while supporting the proposed rules, both voiced concerns for the loss of access to capital markets by issuers. Commissioner Paredes stated that he hoped commentators would address whether the proposed rules might limit the number of issuers that are Form S-3 eligible.

The proposed rules are the first in a series of upcoming SEC proposals in accordance with the Dodd-Frank Act to remove references to credit ratings contained within existing SEC rules and regulations.

Comments should be received on or before March 28.

Read more.

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