SIMPSON THACHER MEMORANDUM

SEC Removes Credit Rating Criteria from Form S-3 and F-3 and from Certain SEC Rules

August 31, 2011

The Securities and Exchange Commission recently adopted amendments to remove investment grade criteria from the transaction eligibility requirements of Form S-3 and F-3. The SEC also adopted corresponding amendments to modify certain SEC rules that reference credit ratings.[1] These form and rule changes will generally become effective on September 2, 2011.[2] These changes were made in light of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which requires that the SEC review its regulations with a credit ratings component and "remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness."

A. FORM S-3 AND F-3 ELIGIBILITY REQUIREMENTS

For an issuer to use the short-form registration statement Form S-3 or F-3, two eligibility tests must be satisfied — namely, registrant eligibility under General Instruction I.A and transaction eligibility under General Instruction I.B of these forms. The registrant eligibility requirements generally address the issuer's reporting status and reporting history under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). For example, under General Instruction I.A, registrant eligibility requires, among other things, that the registrant have a class of securities registered pursuant to Section 12(b) of the Exchange Act, a class of equity securities registered pursuant to Section 12(g) of the Exchange Act or otherwise be required to file reports pursuant to the Exchange Act. In addition, registrant eligibility generally requires that the issuer be current and timely its Exchange Act filings for the twelve months prior to the filing of the registration statement and not have defaulted on any debt payments since the last fiscal year for which financial statements have been filed.

In addition to meeting the registrant eligibility requirement, issuers wishing to use Form S-3 or F-3 must satisfy one of the transaction eligibility requirements. In the past, any one of the following offerings could be registered on these short-form registration statements: (1) primary offerings for cash where the registrant's aggregate market value of voting and non-voting equity held by non-affiliates is at least $75 million as of a date within 60 days prior to the date of filing the registration statement; (2) *primary offerings of non-convertible investment grade securities where at least one nationally recognized statistical rating organization ("NRSRO") rated the securities*

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[1] Securities and Exchange Commission Release No. 33-9245; 34-64545, *available at* http://www.sec.gov/rules/final/2011/33-9245.pdf.

[2] The rescission of Form F-9 discussed below will be effective December 31, 2012.

investment grade at the time of sale (also referred to herein as "General Instruction I.B.2"); (3) secondary offerings; (4) rights offerings, dividend or reinvestment plans, conversions or warrants and options; (5) offerings of investment-grade asset backed securities; and (6) limited primary offerings by certain other registrants.[3]

B. SUMMARY OF THE CHANGES TO FORM S-3 AND F-3 ADOPTED BY THE SEC

The SEC's amendments address transaction eligibility described under General Instruction I.B.2, involving primary offerings of non-convertible investment grade securities. Under the revised instructions to Form S-3 and F-3, an offering of non-convertible securities (other than common equity), is registrable on Form S-3 and F-3 without regard to the rating of the offered securities in five circumstances summarized below. The announced regulatory objective of these alternative criteria is to preserve the ability of issuers with a wide market following to continue to access Form S-3 and F-3 while reducing reliance on credit ratings.

1. $1 Billion Non-Convertible Securities (Other than Common Equity) Issued

Under the revised transaction eligibility test for issuances of non-convertible securities (other than common equity), an issuer may meet the transaction eligibility requirement for use of short-form registration statement Form S-3 or F-3 for an issue of such securities 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 registered primary offerings for cash, not exchange, over the prior three years. This measure is similar to the corresponding test for determining an issuer's status as a "well-known seasoned issuer," or "WKSI," as defined under Rule 405 under the Securities Act of 1933, as amended (the "Securities Act").

2. $750 Million in Non-Convertible Securities (Other than Common Equity) Outstanding

Under the revised transaction eligibility criteria, an issuer may also meet the transaction eligibility requirement for use of Form S-3 or F-3 in the case of an offering of non-convertible securities (other than common equity), if 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 registered primary offerings for cash, not exchange.

Application of the $1 Billion and $750 Million Threshold Tests. Both the $1 billion and $750 million thresholds are calculated in the same manner used to determine an issuer's WKSI status. Consequently, each threshold can be measured within the 60-day period prior to the filing of the registration statement, and any applicable registered primary offerings for cash may be aggregated. In addition, a parent company issuer can include in its calculations the principal amount of non-convertible securities (other than common equity), issued by its majority-owned

[3] See General Instructions I.B to Form S-3 and F-3.

subsidiaries in registered primary offerings for cash, provided that such non-convertible securities are fully and unconditionally guaranteed by such parent company issuer.[4]

In calculating the $1 billion and $750 million amounts, issuers will be permitted to include the principal amount of debt securities, as well as the greater of the liquidation preference or par value of non-convertible preferred stock issued in registered primary offerings for cash. In determining the dollar amount of securities issued in the prior three years, issuers will use the same calculation used to determine the dollar amount of securities registered for purposes of determining the fees under Rule 457 of the Securities Act.

3. Wholly-Owned Subsidiaries of WKSIs

Issuers that are wholly-owned subsidiaries of WKSIs will be eligible to use Form S-3 or F-3 for offerings of non-convertible securities (other than common equity). For such issuers, the SEC reasoned that wholly-owned subsidiaries are likely to be followed by analysts who follow the WKSI parent, making it appropriate to provide such subsidiaries with the ability to use short-form registration statements.

4. Majority-Owned Operating Partnership of a REIT that Qualifies as a WKSI

In response to comments that less than wholly-owned subsidiaries of WKSIs should also be permitted to use Form S-3 and F-3, the SEC created a new category of eligibility that permits issuers that are majority-owned operating partnership subsidiaries of a real estate investment trust ("REIT") that qualifies as a WKSI to use Form S-3 or F-3. The rationale for this standard is that REITs do not commonly wholly-own the related operating partnership but instead control the related operating partnership as its general partner. As a result, investors following a REIT parent entity will commonly analyze the operations of the related operating partnership as part of their analysis of such REIT parent.

5. Temporary "Grandfathering" of Issuers Eligible Under Existing Rules

The final circumstance where an issuer can offer non-convertible, non-equity securities on a Form S-3 or F-3 is where the issuer believes that it meets the eligibility criteria based on an investment grade rating of its securities. An issuer that seeks to avail itself of this requirement will be required to disclose in the registration statement that it has a reasonable belief that it would have been eligible to register the securities pursuant to General Instruction I.B.2 of Form S-3 or Form F-3 in existence prior to the new rules, disclose the basis for such belief and file the final prospectus for any such offering on or before the date that is three years from the effective date of the rule amendments. This grandfathering is an effort to ease the transition to the new

[4] In response to comments received in relation to the rule changes as initially proposed, the SEC has also included a new provision permitting insurance company issuers, when registering offerings of insurance contracts, to include in their calculation the purchase payments or premium payments for insurance contracts, including variable insurance contracts, issued in registered offerings over the prior three years, or for the non-convertible securities (other than common equity) outstanding threshold, the contract value as of the measurement date, of any outstanding insurance contracts issued in registered offerings.

rules and provide companies affected by the amendments with a period to adjust to the new rules. Under this eligibility standard, issuers will be able to file a new Form S-3 or F-3, but the final prospectus relating to any offering under a grandfathered Form S-3 or F-3 will need be filed within three years of the effective date of the new rules.[5]

C. RATINGS REFERENCES IN CERTAIN OTHER FORMS AND RULES

1. Form S-4 and F-4 and Schedule 14A

Form S-4 and F-4, which are used to register securities in connection with business combinations or exchange offers, provide that registrants that meet the Form S-3 or F-3 registrant eligibility requirements and are offering investment grade securities may incorporate certain information by reference. Similarly, a Schedule 14A proxy statement permits an issuer to incorporate information by reference if, among other things, the Form S-3 registrant eligibility requirements are met and action is to be taken as described in Items 11, 12 and 14 of Schedule 14A,[6] concerning non-convertible debt or preferred securities that meet the investment grade criteria of General Instruction I.B.2 of Form S-3.

As revised, Form S-4 and F-4 and Schedule 14A omit references to NRSROs, and issuers who wish to incorporate information by reference into these filings will need to (i) meet the registrant eligibility requirements under General Instruction I.A. of Form S-3 or F-3 and (ii) meet one of the new transaction eligibility criteria. In addition, the action to be taken under the proxy statement will need to involve non-convertible securities (other than common equity), and involve a matter described under Item 11, 12 or 14 of Schedule 14A.

2. Securities Act Rules 138, 139 and 168

Securities Act Rules 138, 139 and 168 provide that certain communications are not deemed an offer for sale or offer to sell a security within the meaning of Sections 2(a)(10) and 5(c) of the Securities Act to the extent that the communication relates to an offering of non-convertible investment grade securities. Rules 138 and 139 generally provide safe harbors for broker-dealers in their publication of certain research, and Rule 168 provides a safe harbor for the dissemination by or on behalf of issuers of ordinary course factual and forward-looking information.

As revised, references to investment grade securities in these rules have been eliminated and replaced with references to the new General Instruction I.B.2 of Form S-3 and F-3. These rule changes mean that firms that previously relied on the investment grade rating of an issuer's

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[5] In the adopting release, the SEC identified factors that could indicate a reasonable belief of eligibility, which include, but are not limited to: (i) an investment grade issuer credit rating, (ii) a previous investment grade rating on a security issued in an offering similar to the type the issuer seeks to register that has not been downgraded or put on a watch-list since its issuance or (iii) a previous assignment of a preliminary investment grade rating.

[6] These Schedule 14A Items involve solicitations related to authorizations, issuances, modifications and exchanges of securities, as well solicitations for mergers, consolidations, acquisitions and similar matters.

securities will now need to determine each time they want to publish research if the issuer meets one of the new transaction eligibility requirements, a process that may be more complicated than simply checking the publicly available credit rating of an issuer.

3. Securities Act Rule 134(a)(17)

Securities Act Rule 134 provides a safe harbor shielding certain communications from being deemed a prospectus. The rule enumerates types of information that may be included in communication consistent with the safe harbor. Prior to the amendments, Rule 134(a)(17) permitted disclosure of security ratings issued or expected to be issued by NRSROs. With the new rule changes, the SEC has eliminated credit ratings disclosure from the list of permissible disclosures under the Rule 134 safe harbor. The SEC noted that it believes that providing a safe harbor that explicitly permits the inclusion of credit ratings is inconsistent with the mandate of Section 939A of the Dodd-Frank Act to reduce reliance on credit ratings. The SEC indicated that it does not expect that this rule change will have a material impact on the information available to investors because issuers will (as is common now) be able to disclose a credit rating in a free writing prospectus, such as a pricing term sheet for a debt offering.

4. Rescission of Form F-9

The amendments adopted by the SEC provide for the rescission of Form F-9. Form F-9 is a form currently available to eligible Canadian issuers under the Multijurisdictional Disclosure System ("MJDS"). Form F-9 is used by such issuers to register investment grade debt and preferred securities under the Securities Act, The main benefit of Form F-9 as compared to Form F-10, another MJDS registration statement form, is that an issuer using Form F-9 is not required to include a U.S. GAAP reconciliation of the issuer's Canadian GAAP financial statements. However, in light of Canadian rule changes, Canadian reporting companies are transitioning to International Financial Reporting Standards ("IFRS"). Under SEC rules, foreign private issuers that prepare their financial statements in accordance with IFRS are generally not required to prepare a U.S. GAAP reconciliation and hence, once the transition to IFRS is completed, the reconciliation requirement would generally cease to be relevant. The rescission of Form F-9 becomes effective as of December 31, 2012, a time frame intended to ensure that the transition by Canadian issuers to IFRS is completed prior to elimination of Form F-9.

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