

PUBLICATION

SEC Revises Eligibility Requirements for Use of Short Form Registration

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On July 26, 2011, the SEC adopted new rules pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 that eliminate the use of credit ratings to determine eligibility to use Forms S-3 and F-3. The new rules replace the credit ratings transaction requirement for primary offerings of non-convertible securities with four new tests, at least one of which the issuer must satisfy to use short form registration on Forms S-3 or F-3.

Background

Forms S-3 and F-3 are "short form" registration statements used by eligible issuers to register securities offerings under the Securities Act. Issuers are generally eligible to use short form registration if they meet two categories of criteria. Each issuer must satisfy all of the registrant requirements and at least one of the transaction requirements.

Registrant Requirements. An issuer seeking to use either Form S-3 or Form F-3 must have been subject to the SEC's reporting provisions and must have timely filed all of its periodic reports for at least one year, among other requirements.

Transaction Requirements. Along with all of the registrant requirements, an issuer must also satisfy one of the transaction requirements. Having a public float of more than \$75 million satisfies one of these requirements. If an issuer has a public float of less than \$75 million, it must satisfy one of the other transaction requirements in order to use Form S-3 or Form F-3. Under the previous rules, issuers with public float of less than \$75 million engaged in primary offerings of non-convertible securities were allowed to use Form S-3 and Form F-3 if the securities were rated investment grade by a credit rating agency that is a "nationally recognized statistical rating organization."

New Eligibility Rules

The new rules revised the criteria for primary offerings of non-convertible securities by removing the "investment grade" provision and substituting it with four alternative categories of eligibility for primary offerings of non-convertible securities:

1. The issuer has issued at least \$1 billion in aggregate principal amount of non-convertible securities, other than common equity, in registered primary offerings for cash, not exchange, in the past three years;
2. The issuer has at least \$750 million of non-convertible securities outstanding, other than common equity, issued in registered primary offerings for cash, not exchange;
3. The issuer is a wholly-owned subsidiary of a well-known seasoned issuer, or WKSII, as defined under the Securities Act; or
4. The issuer is a majority-owned operating partnership of a real estate investment trust that qualifies as a WKSII.

The final rules include a temporary grandfather provision that allows an issuer to continue to use Forms S-3 and F-3 for three years from the effective date of the amendment if it would have been eligible to register the securities under the old provision.

Going Forward

The new rules should not impact the ability of issuers to use short form registration if the issuer can satisfy the \$75 million public float requirement. Additionally, the SEC believes that nearly all issuers that could rely on the investment grade criteria should be able to qualify under the new criteria. It is possible, though, that after the expiration of the grandfather period, some issuers that would have relied on the investment grade category will not be able to use Forms S-3 and F-3 because they do not satisfy the new transaction requirements. This group of issuers would be required to use an alternative registration statement, Form S-1, which is less flexible in that it permits less information to be incorporated by reference than the Form S-3.

If you have questions about this ruling or any other SEC rules, please contact your Baker Donelson attorney.