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SEC Revises Short-Form Registration Eligibility for Non-Convertible Debt Offerings

On July 26, 2011, the SEC voted unanimously to adopt new rules that would revise the transaction eligibility criteria for registering primary offerings of non-convertible securities on Forms S-3 and F-3 by replacing the "investment grade ratings" standard with four alternative standards. These changes were adopted to comply with Section 939A of the Dodd-Frank Act, which requires that the SEC remove references to credit ratings in rules and forms under the Securities Act and the Exchange Act. Note that the proposed amendment does not affect a registrant's ability to use Form S-3 or Form F-3 for debt offerings if it meets the alternate transaction eligibility criterion of having at least \$75 million of common equity held by non-affiliated shareholders. As a result, the new rules would generally only impact investment grade issuers that cannot meet the public float test.

Under the current rules, an issuer may use "short-form" registration on Form S-3 or Form F-3 for an offering of non-convertible securities, such as debt securities, if (in addition to meeting the registrant eligibility requirements), the securities are rated investment grade by at least one credit rating agency that is a nationally recognized statistical rating organization. In place of the investment grade criterion, the new rules allow an issuer to use Form S-3 or Form F-3 for an offering of non-convertible securities if the issuer satisfies any one of the following four tests:

- The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least \$1 billion of non-convertible securities other than common equity, in registered primary offerings for cash, not exchange, over the prior three years (similar to the test for determining "well-known seasoned issuer" or WKSJ status); or
- 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; or
- The issuer is a wholly-owned subsidiary of a WKSJ; or
- The issuer is a majority-owned operating partnership of a real estate investment trust that qualifies as a WKSJ.

The new rules also include a temporary grandfathering provision whereby issuers may continue to use Form S-3 or Form F-3 for a period of three years from the effective date of the new rules if they would have been eligible to do so under the old investment grade criterion.

The final rules expanded the eligibility criteria from the proposed rules in order to preserve "short-form" Form S-3 and Form F-3 eligibility for widely followed issuers and will become effective 30 days after publication in the Federal Register. . A complete copy of SEC Release No. 33-9245 can be found at <http://sec.gov/rules/final/2011/33-9245.pdf>.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

Corporate

New York

Carlos T. Albarracín
+1 (212) 408-1081
calbarracin@chadbourne.com

Marc A. Alpert
+1 (212) 408-5491
malpert@chadbourne.com

A. Robert Colby
+1 (212) 408-5571
rcolby@chadbourne.com

William Greason
+1 (212) 408-5527
wgreason@chadbourne.com

Morton E. Grosz
+1 (212) 408-5592
mgrosz@chadbourne.com

Charles E. Hord, III
+1 (212) 408-5353
chord@chadbourne.com

Peter K. Ingerman
+1 (212) 408-5422
pingerman@chadbourne.com

Sey-Hyo Lee
+1 (212) 408-5122
shlee@chadbourne.com

Jonathan M.A. Melmed
+1 (212) 408-1002
jmelmed@chadbourne.com

J. Allen Miller
+1 (212) 408-5454
amiller@chadbourne.com

J. Patrick Narvaez
+1 (212) 408-1161
pnarvaez@chadbourne.com

Marc M. Rossell
+1 (212) 408-1057
mrossell@chadbourne.com

Edward P. Smith
+1 (212) 408-5371
esmith@chadbourne.com

Kevin C. Smith
+1 (212) 408-1092
ksmith@chadbourne.com

London

Claude S. Serfilippi
+44 (20) 7337-8030
cserfilippi@chadbourne.com

Washington

Dana Frix
+1 (202) 974-5691
dfrix@chadbourne.com

Sean P. McGuinness
+1 (202) 974-5680
smcguinness@chadbourne.com

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