

ClientAlert

February 16, 2011

SEC Proposes Amendments to Revise Short-Form Registration Eligibility for Non-Convertible Debt Offerings

On February 9, 2011, the SEC proposed rule amendments that would revise the transaction eligibility criteria to replace the "investment grade ratings" standard for registering primary offerings of non-convertible securities on Forms S-3 and F-3. These changes are being proposed to comply with Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act which requires that the SEC "remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness as [the SEC] shall determine as appropriate for such regulations." 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 proposed amendment would generally only impact investment grade issuers that cannot meet the public float test.

Current SEC rules allow an issuer to 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. The proposed rule amendments would replace the investment grade ratings criterion with the requirement that the issuer has issued over \$1 billion of non-convertible securities, other than common equity, for cash in registered, primary offerings within the previous three years. The new test for eligibility would be similar to the test for determining "well-known seasoned issuer" or WKSJ status. The three-year period would be measured as of a date within 60 days of the filing of the registration statement and calculating the amount of non-convertible securities issued that counts toward the \$1 billion threshold would be consistent with the manner of calculation used in determining whether an issuer is a WKSJ.

The proposed rules are substantially similar to rule changes first proposed in 2008, prior to adoption of the Dodd-Frank Act. At that time, the SEC received a substantial number of comment letters, mostly in opposition to the proposal to replace the investment grade criterion. Although the Dodd-Frank Act requires removal of the investment grade criterion, no specific replacement standard is mandated. In its proposal, the SEC has included a comprehensive list of questions to solicit comments on and urged interested parties to comment on the proposed approach, its potential impact and, in particular, whether there are any other alternatives to the SEC proposal that should be considered. Comments on the proposed rule changes should be submitted to the SEC by March 28, 2011. A complete copy of SEC Release No.33-9186 can be found at sec.gov/rules/proposed/2011/33-9186.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

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

About Chadbourne & Parke LLP

Chadbourne & Parke LLP, an international law firm headquartered in New York City, provides a full range of legal services, including mergers and acquisitions, securities, project finance, private funds, corporate finance, venture capital and emerging companies, energy/renewable energy, communications and technology, commercial and products liability litigation, arbitration/IDR, securities litigation and regulatory enforcement, special investigations and litigation, intellectual property, antitrust, domestic and international tax, insurance and reinsurance, environmental, real estate, bankruptcy and financial restructuring, employment law and ERISA, trusts and estates and government contract matters. Major geographical areas of concentration include Russia, Central and Eastern Europe, the Middle East and Latin America. The Firm has offices in New York, Washington, DC, Los Angeles, Mexico City, São Paulo, London, Moscow, Warsaw, Kyiv, Almaty, Dubai and Beijing. For additional information, visit: <http://www.chadbourne.com/>