

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 229, 230, 232, 239, 240, and 249

[Release No. 33-9186; 34-63874; File No. S7-18-08]

RIN 3235-AK18

SECURITY RATINGS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: This is one of several releases that we will be considering relating to the use of security ratings by credit rating agencies in our rules and forms. In this release, pursuant to the provisions of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, we propose to replace rule and form requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934 for securities offering or issuer disclosure rules that rely on, or make special accommodations for, security ratings (for example, Forms S-3 and F-3 eligibility criteria) with alternative requirements.

DATES: Comments should be received on or before March 28, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an E-mail to rule-comments@sec.gov. Please include File Number S7-18-08 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-18-08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Blair Petrillo, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, or with respect to issuers of insurance contracts, Keith E. Carpenter, Senior Special Counsel in the Office of Disclosure and Insurance Product Regulation, Division of Investment Management, at (202) 551-6795, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to rules and forms under the Securities Act of 1933 (Securities Act),¹ and the Securities Exchange Act of 1934 (Exchange Act).² Under the Securities Act, we are proposing to amend Rules

¹ 15 U.S.C. 77a et seq.

² 15 U.S.C. 78a et seq.

134,³ 138,⁴ 139,⁵ 168,⁶ Form S-3,⁷ Form S-4,⁸ Form F-3,⁹ and Form F-4.¹⁰ We are further proposing to rescind Form F-9¹¹ and amend the Securities Act and Exchange Act forms and rules that refer to Form F-9 to eliminate those references.¹² We are also proposing to amend Schedule 14A¹³ under the Exchange Act.

I. Introduction

We are proposing today to remove references to credit ratings in rules and forms promulgated under the Securities Act and the Exchange Act. We proposed similar changes in 2008 but did not act on those proposals.¹⁴ We are reconsidering the proposals at this time in light of the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”).¹⁵ Section 939A of the Dodd-Frank Act requires that we “review any regulation issued by [us] that requires the use of

³ 17 CFR 230.134.

⁴ 17 CFR 230.138.

⁵ 17 CFR 230.139.

⁶ 17 CFR 230.168.

⁷ 17 CFR 239.13.

⁸ 17 CFR 239.25.

⁹ 17 CFR 239.33.

¹⁰ 17 CFR 239.34.

¹¹ 17 CFR 239.39.

¹² We propose to remove references to Form F-9 in Securities Act Forms F-8 (17 CFR 239.38); F-10 (17 CFR 239.40); F-80 (17 CFR 239.41); and Form F-X (17 CFR 239.42), in Exchange Act Form 40-F (17 CFR 249.240f), and in the following rules: 17 CFR 200.800, 17 CFR 229.10, 17 CFR 230.134, 17 CFR 230.436, 17 CFR 230.467, 17 CFR 230.473, and 17 CFR 232.405.

¹³ 17 CFR 240.14a-101.

¹⁴ See Security Ratings, Release No. 33-8940 (July 1, 2008) [73 FR 40106] (“2008 Proposing Release”). In 2009, we re-opened the comment period for the release for an additional 60 days. See References to Ratings of Nationally Recognized Statistical Rating Organizations, Release No. 33-9069 (Oct. 5, 2009) [74 FR 52374]. Public comments on both of these releases were published under File No. S7-18-08 and are available at <http://www.sec.gov/comments/s7-18-08/s71808.shtml>. Comments also are available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m.

¹⁵ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

an assessment of the credit-worthiness of a security or money market instrument and any references to or requirements in such regulations regarding credit ratings.” Once we have completed that review, the statute provides that we modify any regulations identified in our review to “remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness” as we determine to be appropriate.¹⁶

The amendments we are proposing today are substantially similar to those proposed in 2008.¹⁷ Through both the 2008 comment period and the 2009 comment period, we received 49 comment letters. As discussed in more detail below, most of the commentators were opposed to the proposal to amend Form S-3 and other related forms and rules.¹⁸ However, because the Dodd-Frank Act now provides that we remove references to credit ratings from our regulations, we are re-proposing these amendments to solicit comment on whether the proposed approach is appropriate, what the impact on issuers and other market participants would be and whether there are alternatives that we should consider. We expect that we may receive additional and different comments now

¹⁶ See Section 939A of the Dodd-Frank Act.

¹⁷ The 2008 Proposing Release also included proposals related to offerings of asset-backed securities where the requirements contained references to credit ratings, a proposal to amend Rule 436(g) to apply to credit rating agencies that are not NRSROs, and a proposal to remove references to credit ratings in the U.S. GAAP reconciliation requirements. Those proposals are not being addressed in this release. In April 2010 we proposed to remove references to credit ratings as a requirement for shelf eligibility for offerings of asset-backed securities. See Asset-Backed Securities, Release No. 33-9117 (Apr. 7, 2010) [75 FR 23328]. Among other things, the proposal would have required risk retention by the sponsor as a condition to shelf eligibility. Section 941 of the Dodd-Frank Act contains a requirement that we issue rules jointly with bank regulators regarding risk retention. In light of that requirement, we are not currently addressing rules related to shelf-eligibility for asset-backed offerings. In addition, Section 939G of the Dodd-Frank Act provides that Rule 436(g) shall have no force or effect. Finally, the proposals adopted in Foreign Issuer Reporting Enhancements, Release No. 33-8959 (Sept. 23, 2008)[73 FR 58300], provide that, for fiscal years ending on or after December 15, 2011, all foreign private issuers must provide financial statements in accordance with Item 18 of Form 20-F, which eliminates the reference to credit ratings in that form with respect to reconciliation requirements.

¹⁸ See Section II.A.2 below.

that the modifications to our rules and forms to remove references to credit ratings are set forth pursuant to statute.

We have considered the role of credit ratings in our rules under the Securities Act on several occasions.¹⁹ While we recognize that credit ratings play a significant role in the investment decision of many investors, we want to avoid using credit ratings in a manner that suggests in any way a “seal of approval” on the quality of any particular credit rating or nationally recognized statistical rating organization (“NRSRO”). Similarly, the legislative history indicates that Congress, in adopting Section 939A, intended to “reduce reliance on credit ratings.”²⁰ In today’s proposals, we seek to reduce our reliance on credit ratings for regulatory purposes while also preserving the use of Form S-3 (and similar forms) for issuers that we believe are widely followed in the market. Nevertheless, our proposal would cause some issuers that have relied or that could rely upon the investment-grade criteria to lose eligibility for Form S-3 or Form F-3. To the extent the proposals may result in loss of Form S-3 or Form F-3 eligibility for issuers currently eligible to use the form, we are also requesting comment on other or additional eligibility criteria that may be appropriate to retain eligibility for these issuers.

¹⁹ See the 2008 Proposing Release for a discussion of the history and background of references to credit ratings in rules and regulations under the Securities Act. See also Credit Ratings Disclosure, Release No. 33-9070 (Oct. 7, 2009) [74 FR 53086], which includes a proposal to require disclosure regarding credit ratings under certain circumstances.

²⁰ See Report of the House of Representatives Financial Services Committee to Accompany H.R. 4173, H. Rep. No. 111-517 at 871 (2010). The legislative history does not, however, indicate that Congress intended to change the types of issuers and offerings that could rely on the Commission’s forms.

II. Proposed Amendments

A. Primary Offerings of Non-convertible Securities

1. Background of Form S-3 and Form F-3

Forms S-3 and F-3 are the “short forms” used by eligible issuers to register securities offerings under the Securities Act. These forms allow eligible issuers to rely on reports they have filed under the Exchange Act to satisfy many of the disclosure requirements under the Securities Act. Form S-3 and Form F-3 eligibility for primary offerings also enables form eligible issuers to conduct primary offerings “off the shelf” under Securities Act Rule 415.²¹ Rule 415 provides considerable flexibility in accessing the public securities markets in response to changes in the market and other factors. Issuers that are eligible to register these primary “shelf” offerings under Rule 415 are permitted to register securities offerings prior to planning any specific offering and, once the registration statement is effective, offer securities in one or more tranches without waiting for further Commission action. To be eligible to use Form S-3 or F-3, an issuer must meet the form’s eligibility requirements as to registrants, which generally pertain to reporting history under the Exchange Act,²² and at least one of the form’s transaction requirements.²³ One such transaction requirement permits registrants to register primary

²¹ 17 CFR 230.415.

²² See General Instruction I.A. to Forms S-3 and F-3. In order to satisfy the issuer eligibility requirements of Form S-3 and Form F-3 for non-ABS offerings, an issuer must be a U.S. company (for Form S-3 only), must have a class of securities registered under Section 12(b) or 12(g) of the Securities Exchange Act of 1934 or be required to file reports pursuant to Section 15(d) of the Exchange Act, must have been a reporting company for at least 12 months, must have filed its reports timely during that 12 month period, and must not have defaulted on any debt or failed to pay a dividend with respect to preferred stock since the end of the last fiscal year.

²³ See General Instruction I.B to Forms S-3 and F-3. In addition to permitting offerings of investment grade securities, an issuer who meets the eligibility criteria in Instruction I.A. may use Form S-3 or Form F-3 for primary offerings if the issuer has a public float in excess of \$75 million (or for other primary offerings if the issuer does not have the minimum public float as described in note 31 below), transactions involving secondary offerings, and rights offerings, dividend

offerings of non-convertible securities if they are rated investment grade by at least one NRSRO.²⁴ Instruction I.B.2. provides that a security is “investment grade” if, at the time of sale, at least one NRSRO has rated the security in one of its generic rating categories, typically the four highest, which signifies investment grade.

The Form S-3 investment grade requirement was originally proposed in 1981.²⁵ In 1954, the Commission adopted a short form registration statement on Form S-9, which permitted the registration of issuances of certain high quality debt securities.²⁶ The criteria for use of Form S-9 related primarily to the quality of the issuer.²⁷ While these eligibility criteria set forth the type of issuer of high quality debt for which Form S-9 was intended, the Commission believed that certain of its requirements may have overly restricted the availability of the form.²⁸ At that time, the Commission believed that credit ratings were a more appropriate standard on which to base Form S-3 eligibility than specified quality of the issuer criteria, citing letters from commentators indicating that

reinvestment plans, warrants and options. In addition, certain subsidiaries are eligible to use Form S-3 or Form F-3 for debt offerings if the parent company satisfies the eligibility requirements in Instruction I.A. and provides the subsidiary a full and unconditional guarantee of the obligations being registered by the subsidiary.

²⁴ See General Instruction I.B.2. to Forms S-3 and F-3.

²⁵ See Reproposal of Comprehensive Revision to System for Registration of Securities Offerings, Release No. 33-6331 (Aug. 6, 1981) [46 FR 41902] (“the S-3 Proposing Release”).

²⁶ Form S-9 was rescinded on December 20, 1976, because it was being used by only a very small number of registrants. The Commission believed the lack of usage was due in part to interest rate increases which made it difficult for many registrants to meet the minimum fixed charges coverage standards required by the form. Adoption of Amendments to Registration Forms and Guide and Rescission of Registration Form, Release No. 33-5791 (Dec. 20, 1976) [41 FR 56301].

²⁷ The criteria included requiring net income during each of the registrant’s last five fiscal years, no defaults in the payment of principal, interest, or sinking funds on debt or of rental payments for leases, and various fixed charge coverages. The use of fixed charges coverage ratios, typically 1.5, was common in state statutes defining suitable debt investments for banks and other fiduciaries.

²⁸ See the S-3 Proposing Release, supra note 25.

short form prospectuses are appropriate for investment grade debt because such securities are generally purchased on the basis of interest rates and security ratings.²⁹

When the Commission adopted Form S-3, it included a provision that a primary offering of non-convertible debt securities may be eligible for registration on the form if rated investment grade.³⁰ This provision provided issuers of debt securities whose public float did not reach the required threshold, or that did not have a public float, with an alternate means of becoming eligible to register offerings on Form S-3.³¹ Consistent with Form S-3, the Commission adopted a provision in Form F-3 providing for the eligibility of a primary offering of investment grade non-convertible debt securities by eligible foreign private issuers.³²

Since the adoption of those rules relating to security ratings and Form S-3 and Form F-3, other Commission forms and rules relating to securities offerings or issuer

²⁹ See Adoption of Integrated Disclosure System, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380]. Later, in 1992, the Commission expanded the eligibility requirement to delete references to debt or preferred securities and provide Form S-3 eligibility for other investment grade securities (such as foreign currency or other cash settled derivative securities). See Simplification of Registration Procedures for Primary Securities Offerings, Release No. 33-6964 (Oct. 22, 1992) [57 FR 48970].

³⁰ See General Instruction I.B.2. of Form S-3.

³¹ Pursuant to the revisions to Form S-3 and Form F-3 adopted in 2007, issuers also may conduct primary securities offerings on these forms without regard to the size of their public float or the rating of debt securities being offered, so long as they satisfy the other eligibility conditions of the respective forms, have a class of common equity securities listed and registered on a national securities exchange, and the issuers do not sell more than the equivalent of one-third of their public float in primary offerings over any period of 12 calendar months. See Revisions to Eligibility Requirements for Primary Offerings on Forms S-3 and F-3, Release No. 33-8878 (Dec. 19, 2007) [72 FR 73534].

³² General Instruction I.B.2. of Form F-3. See Adoption of Foreign Issuer Integrated Disclosure System, Release No. 33-6437 (Nov. 19, 1982) [47 FR 54764]. In 1994, the Commission expanded the eligibility requirement to delete references to debt or preferred securities and provide Form F-3 eligibility for other investment grade securities (such as foreign currency or other cash settled derivative securities). See Simplification of Registration of Reporting Requirements for Foreign Companies, Release No. 33-7053A (May 12, 1994) [59 FR 25810].

disclosures have included requirements that likewise rely on securities ratings.³³ Among them are Form F-9,³⁴ Forms S-4 and F-4,³⁵ and Exchange Act Schedule 14A.³⁶

As discussed in more detail below, we are proposing today to revise Instruction I.B.2. of Form S-3 and Form F-3 to provide that an offering of non-convertible securities is eligible to be registered on Form S-3 and Form F-3 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 (as measured from a date within 60 days of the filing of the registration statement) and satisfies the other relevant requirements of Form S-3 or Form F-3.

2. Comments Received on the 2008 Proposing Release

In 2008, we proposed to replace the investment grade criterion in Instruction I.B.2. in Form S-3 (and the corresponding provision in Form F-3) with the requirement that 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 (as measured from a date within 60 days of the filing of the registration statement) and satisfied the other relevant requirements of Form S-3 or Form F-3. As noted above, we received 49 comment letters regarding the 2008 Proposing Release.

Most commentators opposed the proposal to modify Form S-3 and Form F-3 to remove

³³ This release addresses rules and forms filed by issuers under the Securities Act and Schedule 14A under the Exchange Act. In separate releases to be considered at a later date, the Commission intends to propose rules to address other rules and forms that rely on an investment grade ratings component.

³⁴ See General Instruction I. of Form F-9.

³⁵ See General Instruction B.1 of Form S-4 and General Instruction B.1(a) of Form F-4.

³⁶ See Note E and Item 13 of Schedule 14A.

references to credit ratings.³⁷ When the 2008 Proposing Release was published (and when we sought additional comment in 2009), however, we were not subject to Section 939A of the Dodd-Frank Act.

In addition to the commentators who were generally opposed to amending Form S-3 and Form F-3, several commentators were opposed to replacing the reference to credit ratings with a requirement that in order to be eligible to use Form S-3 and Form F-3, companies would have to have issued at least \$1 billion of non-convertible securities in offerings registered under the Securities Act, other than equity securities, for cash during the previous three years.³⁸ Two commentators believed the proposal would make Form S-3 less available to high quality investment grade issuers, weakening their ability to efficiently raise funds in the public market while potentially opening up short form registration to non-investment grade issuers.³⁹ One commentator believed that the amount of its outstanding debt securities is not relevant to its market following and that

³⁷ See letters from American Bar Association dated September 12, 2008 (“ABA I”) and October 10, 2008 (“ABA II”); American Electric Power dated September 4, 2008 (“AEP”); Boeing Capital Corporation dated September 24, 2008 (“Boeing”); Charles Schwab & Co., Inc. dated September 5, 2008 (“Schwab”); Constance Curnow dated August 28, 2008 (“Curnow”); Davis Polk & Wardwell dated September 4, 2008 (“Davis Polk”); Debevoise & Plimpton dated September 3, 2008 (“Debevoise”); Dominion Resources, Inc. dated September 5, 2008 (“Dominion”); Edison Electric Institute dated September 5, 2008 (“EEI I”) and December 3, 2009 (“EEI II”); Incapital, LLC dated September 5, 2008 (“Incapital”); Manulife Financial Corporation dated September 5, 2008 (“Manulife”); Mayer Brown LLP dated September 4, 2008 (“Mayer Brown”); Mortgage Bankers Association dated September 5, 2008 (“MBA”); PNM Resources, Inc. dated September 5, 2008 (“PNM I”) and December 8, 2009 (“PNM II”); Securities Industry and Financial Markets Association dated September 4, 2008 (“SIFMA I”) and December 8, 2009 (“SIFMA II”); Southern Company dated September 5, 2008 (“Southern I”) and December 8, 2009 (“Southern II”); WGL Holdings, Inc. dated September 10, 2008 (“WGL”); Wisconsin Energy Corporation dated September 5, 2008 (“Wisconsin Energy”); and Xcel Energy Inc. dated December 8, 2009 (“Xcel”).

³⁸ See letters from AEP, Boeing, Dominion, EEI I, EEI II, Southern I, Southern II, PNM I, PNM II, WGL, Wisconsin, ABA II, Xcel.

³⁹ See letters from SIFMA and Boeing.

increasing the amount of debt issued would not increase its market following.⁴⁰ Some commentators thought the \$1 billion threshold should be lower.⁴¹ One commentator suggested that a range of \$300 to \$500 million would be more consistent with the threshold for equity issuers.⁴² Several commentators objected to the three year look-back period.⁴³ Some of these commentators thought that the amount of outstanding debt (as opposed to the amount of debt issued over a three-year period) of an issuer provides a more reliable measure of market interest for debt securities than public float provides for investors in equity securities.⁴⁴

Commentators also disputed our preliminary belief that few issuers who are currently eligible to use Form S-3 and Form F-3 would not be eligible to use Form S-3 and Form F-3 if the proposal were adopted.⁴⁵ One commentator estimated that 25-30 electric utilities would be adversely affected by the proposal.⁴⁶ We received specific comments from utility companies, real estate investment trusts (REITs) and commentators representing issuers of insurance contracts stating that the proposal would

⁴⁰ See letter from WGL.

⁴¹ See letters from National Association of Real Estate Investment Trusts dated September 5, 2008 (“NAREIT”); Xcel, PNM II, Southern II and EEI II.

⁴² See letter from NAREIT.

⁴³ See letters from Dominion, EEI I, EEI II, PNM II, Southern II and Xcel.

⁴⁴ See letters from WGL and NAREIT.

⁴⁵ In the 2008 Proposing Release, we estimated that six issuers who had filed on Form S-3 in the first half of 2008 would have been required to use Form S-1 if the proposal had been in place. See 2008 Proposing Release, supra note 14, at 40111. Commentators indicated that they thought a greater number of issuers would be affected if the proposal were adopted. See letters from ABA II, EEI II, Southern II and PNM II.

⁴⁶ See letter from EEI I.

no longer allow them to use Form S-3 and the shelf offering process.⁴⁷ Some commentators also believed that if the proposal were adopted these companies would conduct more private and offshore offerings.⁴⁸ Some of these commentators also believed that if the proposals were adopted raising funds in the private markets would increase the cost of capital.⁴⁹

As discussed in more detail below, the 2008 Proposing Release also included proposed changes to other Securities Act and Exchange Act rules and forms similar to those proposed today, although we did not receive significant feedback on those proposed changes.

3. Proposal

(i) Replace Investment Grade Rating Criterion with Minimum Registered Debt Issuance Threshold

Today we are proposing to revise the transaction eligibility criteria for registering primary offerings of non-convertible securities on Forms S-3 and F-3. Notwithstanding the comments we received on the 2008 Proposing Release, we preliminarily believe that the proposal discussed below is the most workable alternative for determining whether an issuer is widely followed in the marketplace so that Form S-3 and Form F-3 eligibility and access to the shelf offering process is appropriate. Nevertheless, as discussed in section (ii) below, we also recognize that this proposal would cause some issuers that have used or that could rely upon the investment-grade criteria to lose Form S-3 or Form

⁴⁷ See letters from AEP, APS, Dominion, EEI I, EEI II, Manulife, Merrill, PNM I, PNM II, Southern I, Southern II, WGL, Wisconsin Energy, NAVA, Inc., dated September 5, 2008 (“NAVA”), NAREIT, Sutherland dated September 5, 2008 (“Sutherland I”), Sutherland dated December 8, 2009 (“Sutherland II”), and Xcel.

⁴⁸ See letters from ABA I, ABA II, PNM II, Southern II and Xcel.

⁴⁹ See letters from Xcel, EEI II and Southern II.

F-3 (and thereby shelf) eligibility. The legislative history does not indicate that Congress intended to change the types of issuers and offerings that could rely on the Commission's forms. Accordingly, we have considered several mechanisms to avoid this consequence, including attempting to replace the investment grade criteria with other criteria intended to replicate key characteristics of investment-grade securities, identifying certain classes or characteristics of issuers that are most likely to rely solely upon the investment grade criteria for Form S-3 or Form F-3 eligibility in order to craft special eligibility criteria for these issuers, or providing for "grandfathering" in the application of new rules removing the investment-grade criteria in order to allow issuers that have recently offered securities on Form S-3 or Form F-3 in reliance on the investment grade criteria to retain Form S-3 or Form F-3 eligibility. Each of these mechanisms is a means to provide consistency in the treatment of these issuers for purposes of establishing eligibility for Form S-3 or Form F-3. We have included extensive requests for comment regarding potential mechanisms that might allow more consistent treatment of these issuers to the greatest extent possible.

As proposed, the instructions to Forms S-3 and F-3 would no longer refer to security ratings by an NRSRO as a transaction requirement to permit issuers to register primary offerings of non-convertible securities for cash. Instead, these forms would be available to register primary offerings of non-convertible securities if the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) for cash at least \$1 billion in non-convertible securities in offerings registered under the Securities Act, other than common equity, over the prior three years.⁵⁰

⁵⁰ See proposed General Instruction I.B.2. of Forms S-3 and F-3. We are also proposing to delete Instruction 3 to the signature block of Forms S-3 and F-3.

We are proposing to revise the form eligibility criteria using the same method and threshold by which the Commission defined an issuer of non-convertible securities, other than common equity, that does not meet the public equity float test as a “well-known seasoned issuer” (WKSI).⁵¹ Similar to our approach with WSIs, we believe that having issued \$1 billion of registered non-convertible securities over the prior three years would generally correspond with a wide following in the marketplace. These issuers generally have their Exchange Act filings broadly followed and scrutinized by investors and the markets.⁵² We believe that a wide following in the marketplace makes Form S-3 and Form F-3 appropriate for these issuers because information about them is generally readily available. As a result, we believe replacing the investment grade criterion with a standard based on the definition of WSIs is appropriate. This approach is designed to identify those issuers that are followed by the markets such that it is appropriate to allow incorporation by reference of subsequently filed Exchange Act reports into the Securities Act registration statement and delayed offerings off of the shelf. We realize, however, that some offerings by issuers of lower credit quality may be registered for sale on Form S-3 and Form F-3 if our proposal is adopted. We solicit comment on whether our proposal would result in companies for whom Form S-3 and Form F-3 would not be appropriate now being able to register offerings on Form S-3 or Form F-3.⁵³

⁵¹ See Securities Offering Reform, Release No. 33-8591 (Jul. 19, 2005) [70 FR 44722]. For purposes of debt issuers, an issuer is a well-known seasoned issuer if it satisfies the various requirements for WSIs in Securities Act Rule 405 (such as not being an “ineligible issuer” or an issuer of asset-backed securities) and it has issued within the last three years at least \$1 billion aggregate principal amount of non-convertible securities, other than equity, for cash in primary offerings registered under the Securities Act.

⁵² See Securities Offering Reform, Release No. 33-8501 (Nov. 3, 2004) [69 FR 67392].

⁵³ All issuers also would be required to satisfy the other conditions of the Form S-3 and Form F-3 eligibility requirements, including those regarding reporting status.

In determining compliance with the proposed \$1 billion threshold, we would use the same standards that are used in determining whether an issuer is a WKSI.⁵⁴

Specifically:

- issuers would be permitted to aggregate the amount of non-convertible securities, other than common equity, issued in registered primary offerings during the prior three years;
- issuers would be permitted to include only such non-convertible securities that were issued in registered primary offerings for cash – they would not be permitted to include registered exchange offers;⁵⁵ and
- parent company issuers only would be permitted to include in their calculation the principal amount of their full and unconditional guarantees, within the meaning of Rule 3-10 of Regulation S-X,⁵⁶ of non-convertible securities, other than common equity, of their majority-owned subsidiaries issued in registered primary offerings for cash during the three-year period.

Also consistent with the WKSI standard, the aggregate principal amount of non-convertible securities that would be permitted to be counted toward the \$1 billion issuance threshold would be issued in any registered primary offering for cash, on any

⁵⁴ See Securities Offering Reform, *supra* note 51.

⁵⁵ Issuers would not be permitted to include the principal amount of securities that were offered in registered exchange offers by the issuer when determining compliance with the \$1 billion non-convertible securities threshold. A substantial portion of these offerings involve registered exchange offers of substantially identical securities for securities that were sold in private offerings. In those cases, the original sale to an “initial purchaser” in a private offering is made in reliance upon, for example, the exemption of Securities Act Section 4(2), and is often immediately followed by a resale by the initial purchasers to investors pursuant to the safe harbor provided by Rule 144A. Such a transaction is not registered and is not carried out under the Securities Act’s disclosure or liability standards. Moreover, in the subsequent registered exchange offers, purchasers may not be able, in certain cases, to avail themselves effectively of the remedies otherwise available to purchasers in registered offerings for cash.

⁵⁶ 17 CFR 210.3-10.

form (other than Form S-4 or Form F-4). In calculating the \$1 billion amount, issuers generally would be permitted to include the principal amount of any debt and the greater of liquidation preference or par value of any non-convertible preferred stock that were issued in primary registered offerings for cash.⁵⁷

Although the proposed standard and the WKSI standard are both based on a \$1 billion minimum offering history, issuers seeking to rely on the new standard would not be required to qualify as a WKSI. Specifically, unlike WSIs, the new Form S-3 and Form F-3 eligibility test could be met by issuers that are “ineligible issuers” as defined in Rule 405.

(ii) Impact of Proposals

We preliminarily anticipate that under the proposed threshold some high yield debt issuers that are not currently eligible to use Form S-3 would become eligible. On the other hand, the proposed changes would result in some issuers currently eligible to use Form S-3 and Form F-3 becoming ineligible. Based on a review of non-convertible securities issued in the U.S. from January 1, 2006 through August 15, 2008, we estimate that approximately 45 issuers who were previously eligible to use Form S-3 (and who had made an offering during the review period) would no longer be able to use Form S-3 for

⁵⁷ In determining the dollar amount of securities that have been registered during the preceding three years, issuers would use the same calculation that they use to determine the dollar amount of securities they are registering for purposes of determining fees under Rule 457. 17 CFR 230.457.

offerings of non-convertible securities other than equity securities.⁵⁸ As noted below, the data does not measure the effect of the proposed rules on issuers who were previously eligible to use Form S-3 but did not make a public offering during the review period. We further estimate that approximately eight issuers who were previously ineligible to use Form S-3 or Form F-3 would be eligible to use those forms if the proposals are adopted.

⁵⁸ Our staff used a commercial database to determine offerings of non-convertible debt and preferred securities made during the review period. They then used filters available through other commercial databases to exclude from the sample issuers of unregistered offerings (when identifiable), issuers with a free float capitalization in excess of \$75 million and issuers who had guarantees from a parent with a free float capitalization in excess of \$75 million. Free float capitalization is the proportion of shares available to ordinary investors (generally excluding employee holdings and holdings of 5% or more of the shares) multiplied by the market capitalization of the company. As a result, free float capitalization excludes shares in its calculation that would be included in the determination of market capitalization for purposes of determining eligibility under Instruction I.B.1. of Form S-3. The staff believes that using the free float definition did not affect the estimate of companies who made offerings during the review period who would no longer be eligible to use Form S-3 because it resulted in additional companies in the review sample. The staff then used additional computer-based filters to estimate the number of issuers who made offerings during the review period who would not have satisfied the eligibility criteria for Form S-3 and F-3 if the proposal was adopted because they had issued less than \$1 billion of non-convertible securities over the previous three years. Because the commercial databases used do not unambiguously identify registered offerings and because commercial databases sometimes contain data-entry errors, the staff then reviewed this set of issuers manually by comparing the issuance data from the commercial databases to filings in the EDGAR database. The staff's review resulted in the exclusion of issuers who did not appear in the EDGAR database (and had thus never made a registered offering), issuers who appear in EDGAR but had either never made a registered offering or who had not completed a registered offering within the timeframe for the sample and whose registered offerings were so rare that they likely would not have been included in the data set even if the timeframes had been shifted forward or back, issuers who had filed automatic shelf registration statements, issuers whose debt was guaranteed by a parent who was eligible to use Form S-3 or Form F-3, issuers of asset-backed securities, issuers who had registered offerings on Form N-2 and issuers who had issued in excess of \$1 billion of non-convertible securities within the previous three years. This review resulted in an estimate of approximately 40 companies who made offerings during the review period who would no longer be eligible to use Form S-3 or Form F-3 if the proposals are adopted. Based on a review of filings made by issuers of certain insurance company contracts during the review period, the staff estimates that approximately five issuers of certain insurance contracts registered on Form S-3 during this time period would be ineligible to use Form S-3 if the proposals are adopted. Those five issuers have been included in the 45 issuers noted in the text above. See note 61 and related text for a discussion of the insurance contracts.

While the data may be helpful in considering the potential general effect of the proposed amendment, the scope of the data is limited. We note that a survey covering a different time period would have produced different results, particularly in light of market volatility in the time period. In addition, the data reviewed does not take into account issuers who would have been eligible to offer non-convertible securities on Form S-3 solely in reliance on Instruction I.B.2., but chose not to do so.

Request for Comment

We request comment on all aspects of the proposal. We have included specific questions below in order to facilitate responses from interested parties. In particular, in light of comments received on the 2008 Proposal, we have included requests for comment related to provisions of the proposals that may have a significant effect on utility companies, issuers of insurance contracts and REITs. We also seek comment from other categories of issuers who would be similarly affected by our proposals.

1. We recognize that the proposals, if adopted, could change the number and types of issuers currently eligible to use Form S-3 or Form F-3. Should Section 939A of the Act be read as simply requiring the removal of references to credit ratings but otherwise have no effect on the number and type of issuers eligible to use our forms? If so, should the new eligibility criteria be designed to replicate, as closely as possible, the existing pool of eligible issuers? What would be the advantages and disadvantages of such an approach?
2. Is the cumulative registered offering amount for the most recent three-year period the appropriate threshold at which to differentiate issuers? If so, is \$1 billion appropriate? If not, should the threshold be higher (e.g., \$1.25 billion) or lower (e.g., \$500 or \$750 million), and, if so, at what level should it be set? Please explain your reasoning for a different threshold. We estimate, based on our staff's review of non-convertible offerings, that a threshold of \$750 million would result in approximately four of the companies excluded under the \$1 billion threshold being eligible to use

Form S-3, and that a threshold of \$500 million would result in approximately 11 of the issuers excluded under the \$1 billion threshold being eligible to use Form S-3.

3. Are there any transactions that currently meet the requirements of current General Instruction I.B.2. that would not be eligible to use the form under the proposed revision? Are there any transactions that do not meet the current Form S-3 or Form F-3 eligibility requirements for investment grade securities, but now would be eligible under the proposed revision, that should not be eligible? If practicable, provide information on the frequency with which such offerings are made.
4. We understand based on comments received on the 2008 Proposing Release and our staff's review of offerings of non-convertible securities that wholly owned, state-regulated operating subsidiaries of utility companies currently are eligible to register offerings in reliance on Instruction I.B.2. of Form S-3 and would no longer be eligible to use Form S-3 if the proposals are adopted because they would not be able to satisfy the \$1 billion threshold.⁵⁹ Should we include a provision in Forms S-3 and F-3 that would allow these companies to continue to register offerings of non-convertible securities on Form S-3 or Form F-3 even if they do not satisfy the \$1 billion threshold? Would the regulation by state utility commissions indicate that Form S-3 and Form F-3 are appropriate for

⁵⁹ Our staff review of filings between January 1, 2006 and August 15, 2008 indicates that an estimated 29 utility companies that used Form S-3 during the relevant period would be ineligible under the proposed amendments. One commentator on the 2008 Proposing Release indicated that the proposal would affect 25-30 utility companies. See note 46 above.

these issuers?⁶⁰ Should we condition such eligibility on the issuer's parent also being eligible to register a primary offering on Form S-3 or F-3? Are there other conditions we should consider? Are there reasons these companies should not be able to file on Form S-3 or F-3? Would such a provision result in issuers who are not currently eligible to use Form S-3 or F-3 becoming eligible? If so, would this result be appropriate? If such a provision would result in issuers who are not currently eligible to use Form S-3 or F-3 becoming eligible, what would be the impact on the substance of information available to investors and its accessibility? If it should be limited, how could the provision be tailored so that it would be limited to issuers currently eligible to file on Form S-3 or F-3? Should a provision for Form S-3 eligibility have different conditions than a provision for Form F-3 eligibility?

5. We understand based on comments received on the 2008 Proposing Release and our staff's review of offerings of non-convertible securities that issuers of certain insurance contracts (e.g., contracts with so-called "market value adjustment" features⁶¹ and contracts that provide

⁶⁰ One commentator on the 2008 Proposing Release indicated that "state regulators, typically through public utility commissions, regulate the operations of many U.S. investor owned electric utilities. Typically, a regulated utility may not issue debt securities without the prior approval of its state utility commission, which premises approval on a determination that the issuance is consistent with the public good." See letter from EEI.

⁶¹ Market value adjustment ("MVA") features have historically been associated with annuity and life insurance contracts that guarantee a specified rate of return to purchasers. In order to protect the insurer against the risk that a purchaser may take withdrawals from the contract at a time when the market value of the insurer's assets that support the contract has declined due to rising interest rates, insurers sometime impose an MVA upon surrender. Under an MVA feature, the insurer adjusts the proceeds a purchaser receives upon surrender prior to the end of the guarantee period to reflect changes in the market value of its portfolio securities supporting the contract.

guaranteed benefits in connection with assets held in an investor's mutual fund, brokerage, or investment advisory account) currently eligible to register offerings in reliance on Instruction I.B.2. of Form S-3 would no longer be eligible to use Form S-3 if the proposals are adopted because they would not be able to satisfy the \$1 billion threshold.⁶² Should we include a provision in Forms S-3 and F-3 that would allow these companies to continue to register offerings of such contracts on Form S-3 or Form F-3 even if they do not satisfy the \$1 billion threshold? Should such a provision be limited to companies that are subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of a state or territory of the United States or the District of Columbia? Should we also limit eligibility to an issuer that files an annual statement of its financial condition with, and is supervised and its financial condition examined periodically by, the insurance commissioner, bank commissioner, or any agency or officer performing like functions of the issuer's domiciliary jurisdiction? Should we condition eligibility for such a provision on the issuer's capital adequacy as assessed with reference to risk-based capital standards under the insurance laws of the issuer's state of domicile or other relevant jurisdiction? If so, what level of risk-based capital should be required? Should we condition eligibility for such a provision on the issuer's parent being eligible to register a primary offering on Form S-3 or F-3? Should

⁶² As discussed in note 58 above, we estimate that five of these issuers that used Form S-3 during the relevant period would be ineligible to use Form S-3 if the proposal is adopted.

we also require that the securities offered not constitute an equity interest in the issuer and be subject to regulation under the insurance laws of the domiciliary jurisdiction of the issuer? Should we also provide that the value of the securities to be offered does not vary according to the investment experience of a separate account? Are there other conditions we should consider?

6. Would a provision like that described in the preceding question result in issuers of insurance contracts who are not currently eligible to use Form S-3 or F-3 becoming eligible? If so, would this result be appropriate? If such a provision would result in issuers who are not currently eligible to use Form S-3 or F-3 becoming eligible, what would be the impact on the substance of information available to investors and its accessibility? How could the provision be tailored so that it would be limited to issuers of insurance contracts that are currently eligible to file on Form S-3 or F-3? Should a provision for Form S-3 eligibility have different conditions than a provision for Form F-3 eligibility?
7. We understand based on comments received on the 2008 Proposing Release and our staff's review of offerings of non-convertible securities that wholly-owned operating partnerships of exchange-listed REITS currently are eligible to register offerings in reliance on Instruction I.B.2. of Form S-3 and would no longer be eligible to use Form S-3 if the proposals are adopted because they would not be able to satisfy the \$1

billion threshold.⁶³ Should we include a provision in Forms S-3 and F-3 that would allow these companies to continue to register offerings of non-convertible securities on Form S-3 or F-3 even if they do not satisfy the \$1 billion threshold? Should we condition such eligibility on the issuer's parent also being eligible to register a primary offering on Form S-3 or F-3? Are there other conditions we should consider? Are there reasons these companies should not be able to file on Form S-3 or F-3? Would such a provision result in issuers who are not currently eligible to use Form S-3 or F-3 to become eligible? If so, would this result be appropriate? If such a provision would result in issuers who are not currently eligible to use Form S-3 or F-3 becoming eligible, what would be the impact on the substance of information available to investors and its accessibility? If it should be limited, how could the provision be tailored so that it would be limited to issuers currently eligible to file on Form S-3 or F-3? Should a provision for Form S-3 eligibility have different conditions than a provision for Form F-3 eligibility?

8. Assuming there are issuers currently eligible to use Form S-3 or Form F-3 that would not be eligible to use those forms if the proposals are adopted, should such issuers be eligible under the new rules? If so, should we provide for their continued eligibility through "grandfathering?" If we were to adopt rules that have the effect of "grandfathering" currently eligible issuers, how should such a provision be crafted? Should issuers'

⁶³ We estimate that approximately six operating partnership subsidiaries of REITs that used Form S-3 or Form F-3 during the relevant period would be ineligible to register offerings on Form S-3 or F-3 if the proposals are adopted.

eligibility be measured from the date of the enactment of the Dodd-Frank Act, the date of this proposal, or some other date? Why? How would we determine the population of issuers eligible for any “grandfathering?” Would these issuers have an investment grade “issuer rating,” or would ratings typically used to meet the current Form S-3 and Form F-3 eligibility requirements be issued for each security on an offering by offering basis? If the ratings are issued in connection with each offering of a security, then how could we determine whether such an issuer is eligible under a “grandfathering provision?” Should we provide that issuers that have relied on the investment grade eligibility criterion in the past may continue to use Form S-3 or Form F-3 for offerings of non-convertible securities if the issuers are otherwise eligible to use the forms? Would that approach be consistent with Section 939A of the Dodd-Frank Act? If so, should there be a timing requirement, such as requiring that an issuer have conducted an offering under current Instruction I.B.2. within the past three years? Should there be other conditions? Should there be a time limit going forward, such as allowing these “grandfathered” issuers to use Form S-3 and Form F-3 for three years from the effective date of the proposed amendments? Are there other ways these issuers could remain eligible to use Form S-3 or Form F-3? Are there specific characteristics that should be required to be met that would enable these issuers to retain Form S-3 or Form F-3 eligibility? Assuming there are issuers currently ineligible to use Form S-3 and Form F-3 that would

become eligible if the proposals are adopted, should we condition their eligibility on any specific characteristics?

9. Is there a reason that this Form S-3 and Form F-3 eligibility requirement should not mirror the registered offering amount requirement for the debt-only WKSI definition?
10. Should the measurement time period for a dollar-volume issuance threshold (whether set at \$1 billion, as proposed, or at some other level) be longer or shorter than three years (e.g., four or five years or one or two years)? If so, why? Would it be more appropriate for the threshold to include non-convertible securities, other than common equity, outstanding rather than issued in registered transactions over the prior three years?
11. In determining compliance with the dollar-volume threshold, should issuers be permitted to include only securities issued in registered primary offerings for cash, as proposed? Should issuers be permitted to include registered exchange offers or private offerings?
12. Is there a better alternative for Form S-3 and Form F-3 eligibility for non-convertible securities? By what metrics could one measure the market following for debt issuers? Is there an alternative definition of “investment grade debt securities” that does not rely on NRSRO ratings and adequately meets the objective of relating short-form registration to the existence of widespread following in the marketplace?

13. Does the proposed eligibility based on the amount of prior registered non-convertible securities issued serve as an adequate replacement of the investment grade eligibility condition?
14. Is having a wide following in the market an appropriate basis for determining Form S-3 and Form F-3 eligibility criteria? Are there other criteria on which such eligibility should be based? What characteristics should an issuer eligible to use Form S-3 and Form F-3 have? What standard could we use in Form S-3 and Form F-3 to ensure those characteristics are present? If having a wide following in the market is an appropriate standard, would the alternatives on which we have requested comment (e.g., “grandfathering” certain issuers) result in issuers with a wide following in the market being eligible to use Form S-3 and Form F-3?
15. Should there be an eligibility requirement based on a minimum number of holders of non-convertible securities issued pursuant to registered offerings? If so, should this threshold be limited to securities issued for cash, or should securities issued pursuant to registered exchange offerings also be included? Should the number of holders be 300 or 500, by analogy to our registration and deregistration rules relating to equity securities or some other number?⁶⁴ Would linking the eligibility requirement to the number of holders help to assure market following? If the number of holders would be an appropriate alternative, how should

⁶⁴ See Exchange Act Rule 12g-4 [17 CFR 240.12g-4].

that number be determined? For example, if debt securities are registered in the name of the record holder, is there a reliable and workable method for determining the number of beneficial holders?

16. Transactions in most non-asset backed debt securities are currently required to be reported by broker/dealers who are members of the Financial Industry Regulatory Authority (FINRA). Such transactions are reported through the Trade Reporting and Compliance Engine (TRACE) which is administered by FINRA. Instead of, or in addition to, the proposed \$1 billion threshold we have proposed, should we base Form S-3 and Form F-3 eligibility on the average daily volume of trading as reported in TRACE over a specified period of time (e.g., six months or 12 months)? Would issuers be able to manipulate such a standard? Would allowing Form S-3 and F-3 eligibility for companies with an average daily volume of trading as reported in TRACE of all of the securities of a non-ABS issuer that were offered and sold pursuant to a registration statement for the six or 12 months prior to the filing of the registration statement be appropriate? Would using such a standard result in companies' Form S-3 and Form F-3 eligibility changing too frequently? Is this volatility problematic, and are there ways we could mitigate it? How would the number and types of issuers eligible to use Form S-3 and Form F-3 under a TRACE volume standard compare to the number and issuers eligible to use Form S-3 and Form F-3 currently? Would using volume of transactions reported in TRACE instead of the \$1 billion standard result in

a different set of companies being Form S-3 or Form F-3 eligible or would it result in roughly the same companies being Form S-3 or Form F-3 eligible? Are there particular companies who would be eligible to use Form S-3 or Form F-3 under the \$1 billion standard but not under a TRACE volume standard? Are there particular companies that would be eligible to use Form S-3 or Form F-3 under the TRACE volume standard but not under the \$1 billion standard?

17. Should there be a different standard for eligibility of foreign private issuers to use Form F-3? If so, explain why and what a more appropriate criteria would be.
18. Does the \$1 billion threshold of registered offerings in the prior three years present any issues that are unique to foreign private issuers, especially those that may undertake U.S. registered public offerings as only a portion of their overall plan of financing, and how might these problems be addressed? Would it be appropriate to provide a longer time period for measurement, or to include unregistered, public offerings of securities for cash outside the United States?
19. Should we include a Form S-3 eligibility category for any issuer that is subject to substantive state or federal regulation such as broker/dealers that must satisfy net capital requirements? What types of issuers would be able to use Form S-3 under such a provision? Would it result in a significant number of new issuers being eligible to use Form S-3? Is state or federal regulation, or a particular kind of state or federal regulation

(e.g., approval of capital transactions), an appropriate measure for determining Form S-3 eligibility? Why or why not? Should such an approach be even broader and allow for Form S-3 eligibility of issuers that control entities subject to substantive state or federal regulation such as bank holding companies that control banks subject to federal or state regulation? Is there a comparable approach that would be appropriate for foreign private issuers?

20. Should we base Form S-3 and Form F-3 eligibility on the metrics used by NRSROs in determining a rating? Are there certain key metrics such as debt, revenue, profit margin, cash flow to debt ratios, interest coverage ratios and return on assets that we should include? How could we account for differences in industry to make the metrics appropriate for all companies without undue complexity? Would these metrics (or other appropriate metrics) be easy for companies to calculate for purposes of determining Form S-3 and Form F-3 eligibility?
21. Should we base Form S-3 and Form F-3 eligibility on the presence of certain covenants in the indenture? Are there covenants or other provisions that would indicate that an offering was appropriate for Form S-3 and Form F-3 eligibility?⁶⁵ What would those covenants be, and how would they serve as an indicator that Form S-3 and Form F-3 eligibility was appropriate?

⁶⁵ In this regard, we note that the Credit Roundtable has published a white paper setting forth model covenants for investment grade bond deals. The white paper includes model provisions for change of control, step-up coupons, limitation on liens and priority debt, reporting obligations and voting by series. The paper is available at their website www.creditroundtable.org.

22. Are there elements from the proposed rules and the alternatives on which we have requested comment that could be combined into an appropriate standard for determining Form S-3 and Form F-3 eligibility? If so, what would such a standard include?

B. Form F-9

Form F-9 allows certain Canadian issuers⁶⁶ to register investment grade debt or investment grade preferred securities that are offered for cash or in connection with an exchange offer, and which are either non-convertible or not convertible for a period of at least one year from the date of issuance.⁶⁷ Under the form's requirements, a security is rated "investment grade" if it has been rated investment grade by at least one NRSRO, or at least one Approved Rating Organization, as defined in National Policy Statement No. 45 of the Canadian Securities Administrators ("CSA").⁶⁸ This eligibility requirement was adopted as part of a 1993 revision to the MJDS originally adopted by the Commission in 1991 in coordination with the CSA.⁶⁹

In the 2008 Proposing Release, we proposed to eliminate the requirement in Form F-9 that allows Canadian issuers to register certain debt securities if they were rated investment grade by an NRSRO. We did not propose to change the eligibility requirement in Form F-9 that allows Canadian issuers to register certain debt securities if

⁶⁶ Form F-9 is the Multijurisdictional Disclosure System ("MJDS") form used to register investment grade debt or preferred securities under the Securities Act by eligible Canadian issuers.

⁶⁷ Securities convertible after a period of at least one year may only be convertible into a security of another class of the issuer.

⁶⁸ See General Instruction I.A. to Form F-9.

⁶⁹ See Amendments to the Multijurisdictional Disclosure System for Canadian Issuers, Release No. 33-7025 (Nov. 3, 1993) [58 FR 62028]. See also Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Securities Act Release No. 33-6902 (Jun. 21, 1991) [56 FR 30036].

they are rated investment grade by an Approved Rating Organization (as defined under Canadian regulations). We did not receive significant comment on this proposal.

We have considered modifying this 2008 proposal to further revise Form F-9 in order to comply with Section 939A of the Dodd-Frank Act. However, after further analysis, rather than further revising the form, we are instead proposing to rescind Form F-9. Due to Canadian regulatory developments since the publishing of the 2008 Proposing Release, we no longer believe that keeping Form F-9 as a distinct form would serve a useful purpose. Under Form F-9, an eligible issuer has been able to register investment grade securities using audited financial statements prepared pursuant to Canadian generally accepted accounting principles (Canadian GAAP) without having to include a U.S. GAAP reconciliation. In contrast, a MJDS filer must reconcile its home jurisdiction financial statements to U.S. GAAP when registering securities on a Form F-10.⁷⁰ However, the CSA has recently adopted rules that will require Canadian reporting companies to prepare their financial statements pursuant to International Financial Reporting Standards as issued by the International Accounting Standards Board (“IFRS”) beginning in 2011.⁷¹ Foreign private issuers that prepare their financial statements in accordance with IFRS are not required to prepare a U.S. GAAP reconciliation.⁷² Since a Canadian issuer will not have to perform a U.S. GAAP reconciliation under IFRS, the

⁷⁰ See Item 2 under Part I of Form F-10 (17 CFR 239.40). Form F-10 is the general MJDS registration statement that may be used to register securities for a variety of offerings, including primary offerings of equity and debt securities, secondary offerings, and exchange offers pursuant to mergers, statutory amalgamations, and business combinations.

⁷¹ See, for example, CSA IFRS-Related Amendments to Securities Rules and Policies (2010), which are available at: http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20101001_52-107_ifrs-amd-3339-sup3.pdf. Canadian reporting companies that are U.S. registrants may elect to prepare their financial statements in accordance with U.S. GAAP. See Part 3.7 of National Instrument 52-107.

⁷² See Item 17(c) of Form 20-F.

primary difference between Form F-9 and Form F-10 will be eliminated. Once the Canadian IFRS-related amendments become effective,⁷³ the disclosure requirements for an investment grade securities offering registered on Form F-10 will be the same as the disclosure requirements for one registered on Form F-9, resulting in Form F-9 becoming dispensable.

In addition, MJDS filers have infrequently used Form F-9. Since January 1, 2007, only 21 issuers have filed Form F-9 for fewer than 40 registration statements. In light of its infrequent use and dispensability, we propose to eliminate Form F-9 in its entirety.⁷⁴

Request for Comment

23. The Commission requests comment on whether we should rescind Form F-9, as proposed. Is there a reason that we should retain that form despite the pending effectiveness of the CSA IFRS-related amendments and the infrequency of Form F-9's use?
24. Instead of rescinding the form, should we amend Form F-9 to eliminate references to credit ratings by an NRSRO in order to comply with Section 939A of the Dodd-Frank Act by replacing those references with a requirement that an issuer has issued (as of a date within 60 days prior to the filing of the registration statement) for cash at least \$1 billion in non-

⁷³ Canadian reporting issuers and registrants with financial years beginning on or after January 1, 2011, will be required to comply with the new IFRS requirements. For companies with a year-end of December 31, 2011, the initial reporting period under IFRS will be the first quarter ending March 31, 2011. See the “Transition to International Financial Reporting Standards” of the Ontario Securities Commission (“OSC”), which is available at: http://www.osc.gov.on.ca/en/ifrs_index.htm?wloc=141RHEN&id=21789EN.

⁷⁴ We further propose to eliminate all references to Form F-9 in our rules and forms, including the reference to Form F-9 in Form 40-F. As a result, a Form F-9-eligible Canadian company which currently has an Exchange Act reporting obligation solely with respect to investment grade securities would be required to file its annual report on Form 20-F.

convertible securities, other than equity securities, through registered primary offerings over the prior three years?

25. As noted above, in 2008 the Commission's proposal did not change a Canadian issuer's ability to use Form F-9 to register debt or preferred securities meeting the requirements of current General Instruction I.A. if the securities are rated "investment grade" by at least one Approved Rating Organization (as defined in National Policy Statement No. 45 of the Canadian Securities Administrators). If we retain Form F-9, should we, in addition to eliminating the criterion related to securities rated investment grade by an NRSRO, also eliminate the criterion related to securities rated investment grade by an Approved Rating Organization? In light of Section 939A of the Dodd-Frank Act, would it be appropriate to eliminate the reference to an Approved Rating Organization even though it ultimately refers to Canadian law?

C. Ratings Reliance in Other Forms and Rules

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

Proposals relating to Form S-4, F-4 and Schedule 14A were also included in the 2008 Proposing Release. We did not receive significant separate comment on these proposals and are re-proposing them as they were proposed in the 2008 Proposing Release. Forms S-4 and F-4 essentially include the Form S-3 and Form F-3 eligibility criteria by allowing registrants that meet the registrant eligibility requirements of Form S-3 or F-3 and are offering investment grade securities to incorporate by reference certain

information.⁷⁵ Similarly, Schedule 14A permits a registrant to incorporate by reference if the Form S-3 registrant requirements in Instruction I.A. are met and action is to be taken as described in Items 11, 12 and 14⁷⁶ of Schedule 14A, which concerns non-convertible debt or preferred securities that are "investment grade securities" as defined in General Instruction I.B.2. of Form S-3.⁷⁷ In addition, Item 13 of Schedule 14A allows financial information to be incorporated into a proxy statement if the requirements of Form S-3 (as described in Note E to Schedule 14A) are met. Because the Commission proposes to change the eligibility requirements in Forms S-3 and F-3 to remove references to ratings by an NRSRO, the Commission believes the same standard should apply to the disclosure options in Forms S-4 and F-4 based on Form S-3 or F-3 eligibility. That is, a registrant will be eligible to use incorporation by reference in order to satisfy certain disclosure requirements of Forms S-4 and F-4 to register non-convertible debt or preferred securities if the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) for cash at least \$1 billion in non-convertible securities, other than common equity, through registered primary offerings over the prior three years. Similarly, we propose to amend Schedule 14A to refer simply to the requirements of General Instruction I.B.2. of Form S-3, rather than to "investment grade securities." As a result, an issuer would be permitted to incorporate by reference into a proxy statement if the issuer satisfied the requirements of Instruction I.A. of Form S-3, the matter to be acted upon related to non-convertible securities and was described in Item 11, 12 or 14 of

⁷⁵ See General Instruction B.1 of Forms S-4 and Form F-4.

⁷⁶ Item 11 of Schedule of 14A provides for solicitations related to the authorization or issuance of securities other than an exchange of securities. Item 12 provides for solicitations related to the modification or exchange of securities. Item 14 provides for solicitations related to mergers, consolidations and acquisitions.

⁷⁷ See Note E of Schedule 14A.

Schedule 14A and the issuer had issued (as of a date within 60 days of the date the definitive proxy is first sent to security holders) for cash at least \$1 billion in non-convertible securities, other than common equity, through registered primary offerings over the prior three years.

Request for Comment

26. Are the amendments we have proposed for Forms S-4 and F-4 appropriate?
27. Are the proposed amendments to Schedule 14A appropriate? Would there be a significant impact on the way proxy filings are made as a result of the new criteria?

2. Securities Act Rules 138, 139 and 168

Other Securities Act rules also rely on credit ratings. Rules 138, 139, and 168 under the Securities Act provide that certain communications are deemed not to be an offer for sale or offer to sell a security within the meaning of Sections 2(a)(10)⁷⁸ and 5(c)⁷⁹ of the Securities Act when the communications relate to an offering of non-convertible investment grade securities. These communications include the following:

- under Securities Act Rule 138, a broker's or dealer's publication about securities of a foreign private issuer that meets F-3 eligibility requirements (other than the reporting history requirements) and is issuing non-convertible investment grade securities;
- under Securities Act Rule 139, a broker's or dealer's publication or distribution of a research report about an issuer or its securities where the

⁷⁸ 15 U.S.C. 77b(a)10.

⁷⁹ 15 U.S.C. 77e(c).

issuer meets Form S-3 or F-3 registrant requirements and is or will be offering investment grade securities pursuant to General Instruction I.B.2. of Form S-3 or F-3, or where the issuer meets Form F-3 eligibility requirements (other than the reporting history requirements) and is issuing non-convertible investment grade securities; and

- under Securities Act Rule 168, the regular release and dissemination by or on behalf of an issuer of communications containing factual business information or forward-looking information where the issuer meets Form F-3 eligibility requirements (other than the reporting history requirements) and is issuing non-convertible investment grade securities.

The Commission proposes to revise Rules 138, 139, and 168 to be consistent with the proposed revisions to the eligibility requirements in Forms S-3 and F-3 since in order to rely on these rules the issuer must either satisfy the public float threshold of Form S-3 or F-3, or issue non-convertible investment grade securities as defined in the instructions to Form S-3 or F-3 as proposed to be revised. We included the same proposal in the 2008 Proposing Release and did not receive significant comment separate from the comment on the revised eligibility in Forms S-3 and F-3.

Request for Comment

28. Should the Commission revise Rules 138, 139, and 168 as proposed?

3. Rule 134(a)(17)

Securities Act Rule 134(a)(17)⁸⁰ 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. In the 2008 Proposing Release, we proposed to revise the rule to allow for disclosure of ratings assigned by any credit rating agency, not just NRSROs. We received little comment on this proposal. One commentator was opposed to the proposal because it would allow unregulated credit rating agencies to publicly disclose ratings “without having published its track record, rating procedures and methodologies” and other information required to be disclosed by NRSROs.⁸¹ We are proposing today to remove Rule 134(a)(17) in order to remove the safe harbor for disclosure of credit ratings assigned by NRSROs, since we believe providing a safe harbor that explicitly permits the presence of a credit rating assigned by an NRSRO is not consistent with the purposes of Section 939A. Although we considered continuing the safe harbor for any disclosure regarding credit ratings, similar to what we proposed in 2008, at this point, we preliminarily believe that such an approach without any limiting principle would not be consistent with the otherwise limited disclosures covered by Rule 134. We note that removing the safe harbor for this type of information would not necessarily result in a communication that included this information being deemed to be a prospectus or a free writing prospectus. The proposal would simply result in there no longer being a safe harbor for a communication that included this information. Instead,

⁸⁰ 17 CFR 230.134(a)(17). These disclosures generally appear in “tombstone” ads or press releases announcing offerings. A communication is eligible for the safe harbor if the information included is limited to such matters as, among others, factual information about the identity and business address of the issuer, title of the security and amount being offered, the price or a bona fide estimate of the price or price range, the names of the underwriters participating in the offering and the name of the exchange where such securities are to be listed and the proposed ticker symbols.

⁸¹ See letter from Realpoint.

the determination as to whether such information constitutes a prospectus would be made in light of all of the circumstances of the communication.

Request for Comment

29. Should we continue to provide a safe harbor for communications that include disclosure of ratings information? Would it be appropriate to allow such communication regarding a security rating assigned by any credit rating agency and not limit the safe harbor to NRSRO ratings? If the credit rating agency is not an NRSRO, is it appropriate to require additional disclosure to that effect? Do issuers include credit ratings in Rule 134 communications?

III. General Request for Comments

We request and encourage any interested person to submit comments regarding:

- the proposed amendments that are the subject of this release;
- additional or different changes; or
- other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of companies, investors, and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

In addition, we request comment on the following:

30. Should the Commission include a phase-in for issuers beyond the effective date to accommodate pending offerings or effective shelf registration

statements on Form S-3 or Form F-3? If so, should a phase-in apply only to particular rules, such as Form S-3 and Form F-3 eligibility? As proposed, compliance with the new standards would begin on the effective date of the new rules. Will a significant number of issuers have their offerings limited by the proposed rules without a phase-in? If a phase-in is appropriate, should it be for a certain period of time (e.g., six months or 12 months) or only for the term of an effective registration statement?

31. What impact on competition should the Commission expect were it to adopt the proposed non-convertible debt eligibility requirements? Would any issuers that currently take advantage, or are eligible to take advantage of the investment grade condition and are planning to do so, be adversely affected? Is the ability to offer debt off the shelf a significant competitive advantage that the Commission should be concerned about limiting only to large debt issuers?
32. How can we balance any competitive issues with limiting shelf eligibility to widely followed issuers?

IV. Paperwork Reduction Act

A. Background

Certain provisions of the proposed rule amendments contain a “collection of information” within the meaning of the Paperwork Reduction Act of 1995 (PRA).⁸² The Commission is submitting these proposed amendments and proposed rules to the Office

⁸² 44 U.S.C. 3501 et seq.; 5 CFR 1320.11.

of Management and Budget (OMB) for review in accordance with the PRA.⁸³ An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:

“Form S-1” (OMB Control No. 3235-0065) ;

“Form S-3” (OMB Control No. 3235-0073);

“Form F-1” (OMB Control No. 3235-0258);

“Form F-3” (OMB Control No. 3235-0256);

“Form F-9” (OMB Control No. 3235-0377); and

“Form F-10” (OMB Control No. 3235-0380).

We adopted all of the existing regulations and forms pursuant to the Securities Act or the Exchange Act. These regulations and forms set forth the disclosure requirements for registration statements and proxy statements that are prepared by issuers to provide investors with information. Our proposed amendments to existing forms and regulations are intended to replace rule and form requirements of the Securities Act and the Exchange Act that rely on security ratings with alternative requirements.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collection of information. There is no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on the EDGAR filing system.

⁸³ Although we are proposing amendments to Form S-4, Form F-4 and Schedule 14A, we do not anticipate any changes to the reporting burden or cost burdens associated with these forms, or the number of respondents as a result of the proposed amendments.

B. Summary of Collection of Information Requirements

The threshold we are proposing for issuers of non-convertible securities who are otherwise ineligible to use Form S-3 or Form F-3 to conduct primary offerings because they do not meet the aggregate market value requirement is designed to capture those issuers with a wide market following. The Commission expects that under the proposed threshold, the number of companies in a 12-month period eligible to register on Form S-3 or Form F-3 for primary offerings of non-convertible securities for cash will decrease by approximately 14 issuers for Form S-3 and one issuer for Form F-3.⁸⁴ We expect that the issuers filing on Form S-1 and F-1 will increase by the same amounts.

In addition, because these proposed amendments relate to eligibility requirements, rather than disclosure requirements, the Commission does not expect that the proposed revisions will impose any new material recordkeeping or information collection requirements. Issuers may be required to ascertain the aggregate principal amount of non-convertible securities issued in registered primary offerings for cash, but the Commission believes that this information should be readily available and easily calculable.

We are also proposing to rescind Form F-9, which is the form used by qualified Canadian issuers to register investment grade securities. Because of recent Canadian regulatory developments, we no longer believe that keeping Form F-9 as a distinct form

⁸⁴ In note 58 and the related text, we estimate that for offerings that occurred between January 1, 2006 and August 15, 2008 (approximately 31 months) that a net of 37 issuers would have become ineligible to use Form S-3 if the proposals had been adopted (45 issuers who would become ineligible minus eight issuers who would become newly eligible). Applying that number to a 12-month period would result in approximately 14 companies becoming ineligible to use Form S-3 (thus requiring them to use Form S-1). We have further estimated that a proportional number of Form F-3 filers would be required to file on Form F-1 if the proposals are adopted. These estimates are made solely for purposes of the PRA and are intended to reflect our estimate of the average number of respondents in any given year that may be affected by the proposed rules. The number of actual filers may be higher or lower than our estimates.

would serve a useful purpose. In addition, Canadian issuers have infrequently used Form F-9. As a result of the proposal to eliminate Form F-9, we believe there would be an additional five filers on Form F-10.⁸⁵ We do not believe that the burden of preparing Form F-10 will change because the information required by Form F-10 is the same as that required by Form F-9.

C. Paperwork Reduction Act Burden Estimates

For purposes of the Paperwork Reduction Act, we estimate that there will be no annual incremental increase in the paperwork burden for issuers to comply with our proposed collection of information requirements. We do estimate, however, that the number of respondents on Forms S-1, F-1 and F-10 will increase as a result of the proposals. As a result, the aggregate burden hour and professional cost numbers will increase for those forms due to the additional number of respondents. We also expect that the number of respondents will decrease for Forms S-3 and F-3, which will reduce the aggregate burden hour and professional costs for those forms.⁸⁶ These estimates represent the average burden for all companies, both large and small. For each estimate, we calculate that a portion of the burden will be carried by the company internally, and the other portion will be carried by outside professionals retained by the company. The portion of the burden carried by the company internally is reflected in hours, while the portion of the burden carried by outside professionals retained by the company is

⁸⁵ Based on a review of Commission filings, since January 1, 2007, only 21 issuers have filed on Form F-9. As a result, we estimate that over a 12-month period, approximately five additional Form F-10s will be filed.

⁸⁶ We propose to rescind Form F-9, which will eliminate the PRA burden for that form, but we expect that the number of respondents on Form F-10 will increase as a result.

reflected as a cost. We estimate these costs to be \$400 per hour. A summary of the proposed changes is included in the table below.

Table 1: Calculation of Incremental PRA Burden Estimates

	Current Annual Responses (A)	Proposed Annual Responses (B)	Current Burden Hours (C)	Increase/(Decrease) in Burden Hours (D)	Proposed Burden Hours (E) =C+D	Current Professional Costs (F)	Increase/(Decrease) in Professional Costs (G)	Proposed Professional Costs =F+G
Form S-1	768	782	186,414	3,398	189,812	\$223,697,200	\$4,077,814	\$227,775,014
Form S-3	2,065	2,051	236,959	(1,607)	235,352	\$284,350,500	(\$1,927,800)	\$282,422,700
Form F-1	42	43	18,975	452	19,427	\$22,757,400	\$541,843	\$23,299,243
Form F-3	106	105	4,426	(42)	4,384	\$5,310,600	(\$50,100)	\$5,260,500
Form F-10	75	80	469	31	500	\$562,500	\$37,500	\$600,000
Total				2,232			\$2,679,257	

D. Solicitation of Comments

We request comments in order to evaluate: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed collection of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.⁸⁷

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens.

⁸⁷ We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-18-08. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-18-08, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE, Washington, DC 20549-0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. Cost-Benefit Analysis

A. Proposed Amendments

As discussed above, we are proposing rule amendments pursuant to Section 939A of the Dodd-Frank Act to eliminate references to credit ratings in our rules in order to reduce reliance on credit ratings.⁸⁸ Today's proposals seek to replace rule and form requirements of the Securities Act and the Exchange Act that rely on security ratings by NRSROs with alternative requirements that do not rely on ratings.

The Commission is proposing to revise the transaction eligibility requirements of Forms S-3 and F-3 and other rules and forms that refer to these eligibility requirements.

⁸⁸ See note 20 above and related text.

Currently, these forms allow issuers who do not meet the forms' other transaction eligibility requirements to register primary offerings of non-convertible securities for cash if such securities are rated investment grade by an NRSRO. The proposed rules would replace this transaction eligibility requirement with a requirement that, for primary offerings of non-convertible securities for cash, an issuer must have issued in the previous three years (as of a date within 60 days prior to the filing of the registration statement) at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in registered primary offerings for cash. We are also proposing to remove Rule 134(a)(17) so that disclosure of credit ratings information is no longer covered by the safe harbor that deems certain communications not to be a prospectus or a free writing prospectus. Finally, we are proposing to rescind Form F-9.

We are sensitive to the costs and benefits imposed by our rules. The discussion below focuses on the costs and benefits of the proposals we are making to implement the Dodd-Frank Act within our discretion under that Act, rather than the costs and benefits of the Dodd-Frank Act itself. The two types of costs and benefits may not be entirely separable to the extent that our discretion is exercised to realize the benefits intended by the Dodd-Frank Act.

B. Benefits

The proposed amendments would prescribe a different standard for determining which issuers are eligible to register offerings on Form S-3 or Form F-3. To the extent that some of these issuers were previously unable to avail themselves of the shelf offering process and forward incorporation by reference, they will now have faster access to

capital markets and incur lower transaction costs.⁸⁹ In addition, the new Form S-3 and Form F-3 eligibility requirement of at least \$1 billion of debt issued in registered offerings over the last three years is easily calculable, which will benefit issuers by facilitating their compliance with the requirement.

We believe the benefits of rescinding Form F-9 would be to reduce redundancy by having multiple forms with the same requirements which would streamline the registration process for Canadian issuers.

C. Costs

To the extent that the \$1 billion eligibility threshold results in issuers who were previously eligible to use Forms S-3 and F-3 to register primary offerings of non-convertible securities to register on Form S-1,⁹⁰ this would result in increased costs of preparing and filing registration statements.⁹¹ This would result in additional time spent in the offering process, and issuers would incur costs associated with preparing and filing post-effective amendments to the registration statement. In addition, the resulting loss of the ability to conduct a delayed offering “off the shelf” pursuant to Rule 415 under the

⁸⁹ We estimate that there are approximately eight issuers who will become eligible to use Form S-3 who were not previously eligible. See note 58 and related text.

⁹⁰ We estimate that approximately 45 issuers who were previously eligible to file on Form S-3 will no longer be eligible if the proposals are adopted. See note 58 and related text.

⁹¹ The ability to conduct primary offerings on short form registration statements confers significant advantages on eligible companies in terms of cost savings and capital formation. The time required to prepare and update Form S-3 or F-3 is significantly lower than that required for Forms S-1 and F-1 primarily because registration statements on Forms S-3 and F-3 can be automatically updated. Forms S-3 and F-3 permit registrants to forward incorporate required information by reference to disclosure in their Exchange Act filings. In addition, companies that are eligible to register primary offerings on Form S-3 and Form F-3 generally are able to conduct offerings on a delayed basis “off the shelf” without further staff review and clearance, which results in significant flexibility and efficiency for companies. See Section IV, above, for a discussion of the estimates of the paperwork costs of preparing and filing on Form S-1 associated with the proposed amendments that we have prepared for purposes of the PRA.

Securities Act would result in costs due to the uncertainty an issuer might face regarding the ability to conduct offerings quickly at advantageous times.

We believe that the proposed amendments could result in some issuers who are currently required to file on Form S-1 or Form F-1 becoming eligible to use Form S-3 or Form F-3. This could result in a cost to investors as there would be less information present in the prospectuses for these companies than there was previously. As a result, investors would have to seek out the Exchange Act reports (for example, by accessing the SEC website) of these issuers for company information which would no longer appear in the prospectus. However, we believe these costs would be mitigated to the extent that the proposed \$1 billion eligibility threshold captures issuers with a wide market following for whom incorporation by reference of Exchange Act reports is more appropriate.

We do not expect the elimination of Form F-9 to result in any costs because issuers that would register debt on Form F-9 will be able to register debt on Form F-10. Form F-10's disclosure requirements will be the same as those under Form F-9 once the CSA IFRS-related amendments become effective in 2011.

If the proposed amendment to remove Rule 134(a)(17) is adopted, there could be a cost to investors if ratings information is less available to them, to the extent such ratings information is useful to investors. In addition, to the extent that issuers decide to continue to include ratings information in communications that previously were made in reliance on the Rule 134 safe harbor, they may incur costs in order to ascertain whether including such information would require compliance with prospectus filing requirements.

D. Request for Comments

We request comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed herein. We seek comment and data on the value of the benefits identified. We also welcome comments on the accuracy of the cost estimates in each section of this analysis, and request that commentators provide data that may be relevant to these cost estimates. In addition, we seek estimates and views regarding these costs and benefits for particular covered institutions, including small institutions, as well as any other costs or benefits that may result from the adoption of these proposed amendments.

Specifically, we ask the following:

- Would there be any significant transition costs imposed on issuers as a result of the proposals, if adopted? Please be detailed and provide quantitative data or support, as practicable.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a) of the Exchange Act⁹² requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act⁹³ and Section 3(f) of the Exchange Act⁹⁴ require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public

⁹² 15 U.S.C. 78w(a).

⁹³ 15 U.S.C. 77b(b).

⁹⁴ 15 U.S.C. 78c(f).

interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.

Our preliminary analysis indicates that the proposed amendments will have two distinct effects. First, some issuers currently eligible to register primary offerings of non-convertible securities on Forms S-3 and F-3 and to use the shelf offering process would lose their eligibility. Second, some issuers will become newly eligible to use Forms S-3 and F-3 and the shelf offering process. We believe that the proposed rules will likely result in a net decrease in eligible issuers, which is why the proposed rules may reduce efficiency and hamper capital formation. Issuers who are no longer eligible to register offerings on Form S-3 and Form F-3 (e.g., investment grade debt issuers who do not meet the proposed \$1 billion eligibility threshold) and avail themselves of the shelf offering process may now face relatively higher issuance costs, which would negatively affect efficiency and capital formation of those issuers. As noted throughout this release, we anticipate that the number of such issuers would be small, and we have requested comment on whether other provisions should be adopted that would further reduce the number of affected issuers.

The Commission believes that the proposal to rescind Form F-9 could reduce confusion regarding the appropriate form to use for the registration of securities by Canadian issuers, which could result in increased market efficiency.

The Commission solicits comment on whether the proposed amendments changing the Forms S-3 and F-3 eligibility requirements for registering primary offerings of non-convertible securities, and rescinding Form F-9 and Rule 134(a)(17), if adopted, would promote or burden efficiency, competition, and capital formation. The

Commission also requests comment on whether the proposed amendments would have harmful effects on investors or on issuers who could use Form S-3 and Form F-3 for primary offerings of non-convertible securities, or on issuers of investment grade securities that would otherwise use Form F-9 and what options would best minimize those effects. Finally, the Commission requests comment on the anticipated effect of disclosure requirements on competition in the market for credit rating agencies. The Commission requests commentators to provide empirical data and other factual support for their views, if possible.

VII. Regulatory Flexibility Act Certification

The Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the amendments contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed amendments would:

- Amend the Securities Act Form S-3 and Form F-3 eligibility requirements for primary offerings of non-convertible securities if the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) for cash at least \$1 billion in non-convertible securities, other than common stock, through registered primary offerings, within the prior three years;
- Amend Forms S-4 and F-4 and Schedule 14A to conform with the proposed Form S-3/F-3 eligibility requirements;
- Amend Securities Act Rules 138, 139, and Rules 168 to be consistent with the proposed Form S-3/F-3 eligibility requirements;
- Remove Rule 134(a)(17); and
- Remove Form F-9 and all references to that form in our forms and rules.

We are not aware of any issuers that currently rely on the rules that we propose to change or any issuers that would be eligible to register under the affected rules that is a small entity. In this regard, we note that credit rating agencies rarely, if ever, rate the securities of small entities. We further note most security ratings are obtained and used by the issuer. Issuers are generally required to pay for these security ratings and the cost of these ratings relative to the size of a debt or preferred securities offering by a small entity would generally be prohibitive. Finally, based on an analysis of the language and legislative history of the Regulatory Flexibility Act, we note that Congress did not intend that the Regulatory Flexibility Act apply to foreign issuers. Accordingly, some of the entities directly affected by the proposed rule and form amendments will fall outside the scope of the Regulatory Flexibility Act.

For these reasons, the proposed amendments would not have a significant economic impact on a substantial number of small entities.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,⁹⁵ a rule is “major” if it has resulted, or is likely to result in:

- an annual effect on the U.S. economy of \$100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a “major rule” for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

⁹⁵ Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

- the potential effect on the U.S. economy on an annual basis;
- any potential increase in costs or prices for consumers or individual industries;
- and
- any potential effect on competition, investment, or innovation.

IX. Statutory Authority and Text of Proposed Rule and Form Amendments

We are proposing the amendments contained in this document under the authority set forth in Sections 6, 7, 10, 19(a) of the Securities Act and Sections 14 and 23(a) of the Exchange Act.

List of Subjects

17 CFR Parts 200, 229, 230, 232, 239, 240, and 249.

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 200 -- ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

* * * * *

SubPart N -- Commission Information Collection Requirements Under the Paperwork Reduction Act: OMB Control Numbers

1. The authority citation for Part 200, Subpart N, continues to read as follows:

Authority: 44 U.S.C. 3506; 44 U.S.C. 3507.

* * * * *

2. Amend §200.800 by removing from paragraph (b):
 - a. “Form F-9” under the column entitled “Information collection requirement”;

b. “239.39” under the column entitled “17 CFR part or section where identified and described”; and

c. “3235-0377” under the column entitled “Current OMB control No.”

PART 229 -- STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 -- REGULATION S-K

3. The general authority citation for Part 229 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq., and 18 U.S.C. 1350 unless otherwise noted.

* * * * *

4. Amend §229.10 by removing the penultimate sentence from paragraph (c) and the last sentence from paragraph (c)(1)(i).

PART 230 -- GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

5. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, 80a-37, and Pub. L. No. 111-203, §939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

6. Amend §230.134 by revising paragraph (a) introductory text, revising paragraph (a)(6), and removing and reserving paragraph (a)(17). The revisions read as follows:

§ 230.134 Communications not deemed a prospectus.

* * * * *

(a) Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph, provided that, except as to paragraphs (a)(4), (a)(5), and (a)(6) of this section, the prospectus included in the filed registration statement does not have to include a price range otherwise required by rule:

* * * * *

(6) In the case of a fixed income security with a fixed (non-contingent) interest rate provision, the yield or, if the yield is not known, the probable yield range, as specified by the issuer or the managing underwriter or underwriters and the yield of fixed income securities with comparable maturity and security rating;

* * * * *

(17) Removed and reserved.

* * * * *

7. Amend §230.138 by revising paragraph (a)(2)(ii)(B)(2) to read as follows:

§ 230.138 Publications or distributions of research reports by brokers or dealers about securities other than those they are distributing.

(a) * * *

(2) * * *

(ii) * * *

(B) * * *

(2) Is issuing non-convertible securities and the registrant meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in § 239.33 of this chapter); and

* * * * *

8. Amend §230.139 by revising paragraphs (a)(1)(i)(A)(1)(ii) and

(a)(1)(i)(B)(2)(ii) to read as follows:

§ 230.139 Publications or distributions of research reports by brokers or dealers distributing securities.

(a) * * *

(1) * * *

(i) * * *

(A)(1) * * *

(ii) At the date of reliance on this section, is, or if a registration statement has not been filed, will be, offering non-convertible securities and meets the requirements for the General Instruction I.B.2. of Form S-3 or Form F-3 (referenced in §239.13 and 239.33 of this chapter); or

* * * * *

(B) * * *

(2) * * *

(ii) Is issuing non-convertible securities and meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in §239.33 of this chapter); and

* * * * *

9. Amend §230.168 by revising paragraph (a)(2)(ii)(B) to read as follows:

§ 230.168 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information and forward-looking information.

* * * * *

(a) * * *

(2) * * *

(ii) * * *

(B) Is issuing non-convertible securities and meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in §239.33 of this chapter); and

* * * * *

10. Amend §230.467 by removing:

a. “F-9,” from the heading;

b. “Form F-9 or” and “239.39 or” from the second sentence of paragraph (a);

and

c. “Form F-9 or” from the first sentence of paragraph (b).

11. Amend §230.473 by removing “F-9 or” and “239.39 or” from paragraph

(d).

PART 232 -- REGULATION S-T -- GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

12. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

13. Amend §232.405 by removing:
 - a. “both Form F-9 (referenced in §239.39 of this chapter) and” from the second sentence of Preliminary Note 1;
 - b. “either Form F-9 or” from paragraphs (a)(2), (a)(3) and (a)(4); and
 - c. “both Form F-9 and” and “Form F-9 and” in the second sentence of Note to §232.405, and “both Form F-9 and” in the penultimate sentence of Note to §232.405.

PART 239 --FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

14. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, 80a-37, and Pub. L. No. 111-203, §939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

15. Amend Form S-3 (referenced in §239.13) by:
 - a. Revising General Instruction I.B.2.; and
 - b. Removing Instruction 3 to the signature block.

The revision reads as follows:

Note -The text of Form S-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form S-3

* * * * *

B. Transaction Requirements. * * *

2. Primary Offerings of Non-convertible Securities. Non-convertible securities to be offered for cash by or on behalf of a registrant, provided the registrant, as of a date within 60 days prior to the filing of the registration statement on this Form, has issued in the last three years at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Act.

* * * * *

16. Amend Form S-4 (referenced in §239.25) by revising General Instruction B.1.a.(ii)(B) to read as follows:

Note – The text of Form S-4 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

B. Information with Respect to the Registrant.

1. * * *

a. * * *

(ii) * * *

(B) Non-convertible debt or preferred securities are to be offered pursuant to this registration statement and the requirements of General Instruction I.B.2. of Form S-3 have been met; or

* * * * *

17. Amend Form F-3 (referenced in §239.33) by:
 - a. Revising General Instruction I.B.2.; and
 - b. Deleting Instruction 3 to the signature block.

The revision reads as follows:

Note – The text of Form F-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM F-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form F-3

* * * * *

B. Transaction Requirements * * *

2. Primary Offerings of Non-convertible Securities. Non-convertible securities to be offered for cash provided the issuer, as of a date within 60 days prior to the filing of the registration statement on this Form, has issued in the last three years at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Act.

* * * * *

18. Amend Form F-4 (referenced in §239.34) by revising General Instruction B.1(a)(ii)(B).

The revision reads as follows:

Note – The text of Form F-4 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM F-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

B. Information with Respect to the Registrant

1. * * *

a. * * *

(ii) * * *

(B) Non-convertible debt or preferred securities are to be offered pursuant to this registration statement and the requirements of General Instruction I.B.2. of Form F-3 have been met; or

* * * * *

19. Amend Form F-8 (referenced in §239.38) by removing “Form F-9,” from each of paragraph A.(3) of General Instruction III and paragraph B. of General Instruction V.

Note – The text of Form F-8 does not, and this amendment will not, appear in the Code of Federal Regulations.

20. Remove and reserve §239.39 (referencing Form F-9).

21. Amend Form F-10 (referenced in §239.40) by removing “Form F-9,” from each of paragraph C.(4) of General Instruction I and paragraph B. of General Instruction III.

Note – The text of Form F-10 does not, and this amendment will not, appear in the Code of Federal Regulations.

22. Amend Form F-80 (referenced in §239.41) by removing “Form F-9,” from each of paragraph A.(3) of General Instruction III and paragraph B. of General Instruction V.

Note – The text of Form F-80 does not, and this amendment will not, appear in the Code of Federal Regulations.

23. Amend §239.42 by removing “F-9,” from the heading and from each of paragraphs (a) and (e).

24. Amend Form F-X (referenced in §239.42) by removing “F-9,” from each of paragraphs (a) and (e) of General Instruction I, and each of paragraphs (a) and (c) of General Instruction II.F.

Note – The text of Form F-X does not, and this amendment will not, appear in the Code of Federal Regulations.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

25. The general authority citation for part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3,

80b-4, 80b-11, and 7201 et seq.; 18 U.S.C. 1350, 12 U.S.C. 5221(e)(3), and Pub. L. No. 111-203, §939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

26. Amend § 240.14a-101 by revising Note E(2)(ii) to read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

* * * * *

Notes

* * * * *

E. * * *

(2) * * *

(ii) Action is to be taken as described in Items 11, 12, and 14 of this schedule which concerns non-convertible debt or preferred securities issued by a registrant meeting the requirements of General Instruction I.B.2. of Form S-3 (referenced in §239.13 of this chapter); or

* * * * *

PART 249 -- FORMS, SECURITIES EXCHANGE ACT OF 1934

27. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

28. Amend §249.240f by:

a. Removing “F-9,” in paragraph (a); and

b. Removing in paragraph (b)(4) the phrase “; provided, however, no market value threshold need be satisfied in connection with non-convertible securities eligible for registration on Form F-9 (§239.39 of this chapter)”.

29. Amend Form 40-F (referenced in §249.240f) by:

a. Removing “F-9,” from paragraph (1) of General Instruction A;

b. Removing from paragraph (2)(iv) of General Instruction A the phrase “; provided, however, that no market value threshold need be satisfied in connection with non-convertible securities eligible for registration on Form F-9”; and

c. Revising paragraph (2) of General Instruction C to read as follows:

(2) Any financial statements, other than interim financial statements, included in this Form by registrants registering securities pursuant to Section 12 of the Exchange Act or reporting pursuant to the provisions of Section 13(a) or 15(d) of the Exchange Act must be reconciled to U.S. GAAP as required by Item 17 of Form 20-F under the Exchange Act, unless this Form is filed with respect to a reporting obligation under Section 15(d) that arose solely as a result of a filing made on Form F-7, F-8, or F-80, in which case no such reconciliation is required.

Note – The text of Form 40-F does not, and this amendment will not, appear in the Code of Federal Regulations.

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: February 9, 2011