

## **SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 229, 230, 239, and 240**

**[Release No. 33-8940; 34-58071; File No. S7-18-08]**

**RIN 3235-AK18**

### **SECURITY RATINGS**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This is one of three releases that the Commission is publishing simultaneously relating to the use of security ratings by nationally recognized statistical rating organizations in its rules and forms. In this release, the Commission proposes to replace rule and form requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934 that rely on security ratings (for example, Forms S-3 and F-3 eligibility criteria) with alternative requirements. In addition, the Commission requests comment on its rules relating to the disclosure of security ratings.

**DATES:** Comments should be received on or before September 5, 2008.

**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](mailto: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 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 Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for public inspection and copying 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:** Steven Hearne, Eduardo Aleman, or Katherine Hsu, Special Counsels in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, 100 F Street, NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The Commission is proposing amendments to Regulation S-K,<sup>1</sup> and rules and forms under the Securities Act of 1933 (Securities Act),<sup>2</sup> and the Securities Exchange Act of 1934 (Exchange Act).<sup>3</sup> In Regulation S-K, the Commission is proposing to amend Items 10,<sup>4</sup> 1100,<sup>5</sup> 1112,<sup>6</sup>

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<sup>1</sup> 17 CFR 229.10 through 1123.

<sup>2</sup> 15 U.S.C. 77a *et seq.*

<sup>3</sup> 15 U.S.C. 78a *et seq.*

<sup>4</sup> 17 CFR 229.10.

<sup>5</sup> 17 CFR 229.1100.

<sup>6</sup> 17 CFR 229.1112.

and 1114.<sup>7</sup> Under the Securities Act, the Commission is proposing to amend Rules 134,<sup>8</sup> 138,<sup>9</sup> 139,<sup>10</sup> 168,<sup>11</sup> 415,<sup>12</sup> 436,<sup>13</sup> Form S-3,<sup>14</sup> Form S-4,<sup>15</sup> Form F-1,<sup>16</sup> Form F-3,<sup>17</sup> Form F-4,<sup>18</sup> and Form F-9.<sup>19</sup> The Commission is also proposing to amend Schedule 14A<sup>20</sup> under the Exchange Act.

## **I. Background**

On June 16, 2008, in furtherance of the Credit Rating Agency Reform Act of 2006,<sup>21</sup> the Commission published for notice and public comment two rulemaking initiatives.<sup>22</sup> The first proposes additional requirements for nationally recognized statistical rating organizations (NRSROs) that were directed at reducing conflicts of interests in the credit rating process, fostering competition and comparability among credit rating agencies, and increasing transparency of the credit rating process.<sup>23</sup> The

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<sup>7</sup> 17 CFR 229.1114.

<sup>8</sup> 17 CFR 230.134.

<sup>9</sup> 17 CFR 230.138.

<sup>10</sup> 17 CFR 230.139.

<sup>11</sup> 17 CFR 230.168.

<sup>12</sup> 17 CFR 230.415.

<sup>13</sup> 17 CFR 230.436.

<sup>14</sup> 17 CFR 239.13.

<sup>15</sup> 17 CFR 239.25.

<sup>16</sup> 17 CFR 239.31.

<sup>17</sup> 17 CFR 239.33.

<sup>18</sup> 17 CFR 239.34.

<sup>19</sup> 17 CFR 239.39.

<sup>20</sup> 17 CFR 240.14a-101.

<sup>21</sup> Pub. L. No. 109-291, 120 Stat. 1327 (2006).

<sup>22</sup> Proposed Rules for Nationally Recognized Statistical Rating Organizations, Release No. 34-57967 (Jun. 16, 2008).

<sup>23</sup> See Press Release No. 2008-110 (Jun. 11, 2008). As described in more detail below, an NRSRO is an organization that issues ratings that assess the creditworthiness of an obligor itself or with regard to specific securities or money market instruments, has been in existence as a credit rating

second is designed to improve investor understanding of the risk characteristics of structured finance products. These proposals address concerns about the integrity of the credit rating procedures and methodologies of NRSROs in light of the role they played in determining the security ratings for securities that were the subject of the recent turmoil in the credit markets.

Today's proposals comprise the third of these three rulemaking initiatives relating to security ratings by an NRSRO that the Commission is proposing. This release, together with two companion releases, sets forth the results of the Commission's review of the requirements in its rules and forms that rely on security ratings by an NRSRO. The proposals also address recent recommendations issued by the President's Working Group on Financial Markets, the Financial Stability Forum on Enhancing Market and Institutional Resilience, and the Technical Committee of the International Organization of Securities Commissions.<sup>24</sup> Consistent with these recommendations, the Commission is considering whether the inclusion of requirements related to security ratings in its rules and forms has, in effect, placed an "official seal of approval" on ratings that could adversely affect the quality of due diligence and investment analysis. The Commission believes that today's proposals could reduce undue reliance on ratings and result in improvements in the analysis that underlies investment decisions.

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agency for at least three years, and meets certain other criteria. The term is defined in section 3(a)(62) of the Exchange Act (15 U.S.C. 78c(a)(62)). A credit rating agency must apply with the Commission to register as an NRSRO, and currently there are nine registered NRSROs.

<sup>24</sup> See President's Working Group on Financial Markets, Policy Statement on Financial Market Developments (March 2008), available at [www.ustreas.gov](http://www.ustreas.gov); The Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience (April 2008), available at [www.fsforum.org](http://www.fsforum.org); Technical Committee of the International Organization of Securities Commissions, Consultation Report: The Role of Credit Rating Agencies in Structured Finance Markets (March 2008), page 9, available at [www.iosco.org](http://www.iosco.org).

In 1981, the Commission issued a statement of policy regarding its view of disclosure of security ratings in registration statements under the Securities Act.<sup>25</sup> This statement marked a clear delineation between the Commission’s historic practice of precluding the disclosure of security ratings in these filings and the Commission’s then-developing acknowledgement of the growing importance of ratings in the securities markets and in the regulation of those markets. Soon thereafter, the Commission adopted rules that not only set forth its new policy of permitting the voluntary disclosure of security ratings in registration statements but that also encouraged such disclosure by the issuer.<sup>26</sup> The rules permitted the voluntary disclosure of security ratings in a communication deemed not to be a prospectus and provided that a security rating by an NRSRO is generally not part of a registration statement or report prepared or certified by a person within the meaning of Sections 7<sup>27</sup> and 11<sup>28</sup> of the Securities Act.

Concurrent with the adoption of these rules regarding security ratings, the Commission adopted Securities Act Form S-3, the short-form Securities Act registration statement for eligible domestic issuers.<sup>29</sup> The Commission adopted a provision in Form S-3 that a primary offering of non-convertible debt securities may be eligible for

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<sup>25</sup> See Disclosure of Ratings in Registration Statements, Release No. 33-6336 (Aug. 6, 1981) [46 FR 42024]. The Commission first began using ratings by an NRSRO in 1975 for purposes of determining capital charges on different grades of debt securities under Rule 15c3-1 under the Exchange Act (Net Capital Rule). See 17 CFR 240.15c-31(c)(2)(vi)(E) and Adoption of Amendments to Rule 15c3-1 and Adoption of Alternative Net Capital Requirement for Certain Brokers and Dealers, Release No. 34-11497 (Jun. 26, 1975) [40 FR 29795].

<sup>26</sup> See Adoption of Integrated Disclosure System, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380] (“Integrated Disclosure Release”).

<sup>27</sup> 15 U.S.C. 77g.

<sup>28</sup> 15 U.S.C. 77k.

<sup>29</sup> 17 CFR 239.13 and the Integrated Disclosure Release.

registration on the form if rated investment grade.<sup>30</sup> This provision provided debt securities issuers 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.<sup>31</sup> In adopting this requirement, the Commission specifically noted that commenters believed that the component relating to investment grade ratings was appropriate because nonconvertible debt securities are generally purchased on the basis of interest rates and security ratings.<sup>32</sup> 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.<sup>33</sup>

Since the adoption of those rules relating to security ratings and Form S-3 and Form F-3, other Commission forms and rules have included requirements that likewise

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<sup>30</sup> See General Instruction I.B.2 of Form S-3. A non-convertible security is an “investment grade security” for purposes of form eligibility if at the time of sale, at least one NRSRO has rated the security in one of its generic rating categories which signifies investment grade, typically one of the four highest rating categories. See *id.*

<sup>31</sup> Pursuant to the recently adopted revisions to Form S-3 and Form F-3, 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].

<sup>32</sup> See Section III.A.1 of the Integrated Disclosure Release. 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].

<sup>33</sup> 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].

rely on the ratings issued to a security.<sup>34</sup> Among them include Form F-9,<sup>35</sup> Forms S-4 and F-4,<sup>36</sup> and Exchange Act Schedule 14A.<sup>37</sup> Shelf registration requirements for asset-backed securities also depend on a security ratings component.<sup>38</sup> In 1983, the Commission adopted Securities Act Rule 415 which permits certain mortgage related securities, among others, to be offered on a delayed basis.<sup>39</sup> A mortgage related security is defined in Section 3(a)(41) of the Exchange Act,<sup>40</sup> as, among other things, “a security that is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization.”<sup>41</sup> In 1992, the Commission expanded the Form S-3 eligibility provisions to provide for the registration of investment grade asset-backed securities offerings, regardless of the issuer’s reporting history or public float.<sup>42</sup> In addition, if they are related to investment grade rated securities, certain registration statements and other requirements afford foreign private issuers with an option to comply with less extensive U.S. GAAP reconciliation requirements.<sup>43</sup>

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<sup>34</sup> This release addresses rules and forms filed by issuers under the Securities Act and Exchange Act. In separate releases, the Commission is proposing to address other rules and forms that rely on an investment grade ratings component.

<sup>35</sup> See General Instruction I. of Form F-9.

<sup>36</sup> See General Instruction B.1 of Form S-4 and General Instruction B.1(a) of Form F-4.

<sup>37</sup> See Note E and Item 13 of Schedule 14A.

<sup>38</sup> General Instruction I.B.5 of Form S-3.

<sup>39</sup> 17 CFR 230.415(a)(1)(vii). See Shelf Registration, Release No. 33-6499 (Nov. 17, 1983) [48 FR 5289].

<sup>40</sup> 15 U.S.C. 78c(a)(41).

<sup>41</sup> See discussion of mortgage related securities in Section II.A.2. below.

<sup>42</sup> See Simplification of Registration Procedures for Primary Securities Offerings, Release No. 33-6964 (Oct. 22, 1992) [57 FR 32461].

<sup>43</sup> See Exchange Act Forms 20-F (17 CFR 249.220f) and 40-F (17 CFR 249.240f), Securities Act Forms F-1 (17 CFR 239.31), F-3 (17 CFR 239.33), and F-4 (17 CFR 239.34), and Form F-9 (17 CFR 239.39) and Rule 502(b)(2)(i)(C) of Regulation D (17 CFR 230.502(b)(2)(i)(C)).

At various times since the adoption of these form requirements and rules, however, the Commission has reviewed and reconsidered its permissive views toward the disclosure of ratings in filings and the reliance on ratings in the Commission's form requirements. For example, in 1994, the Commission published a proposing release that would have mandated disclosure in Securities Act prospectuses of a rating given by an NRSRO whenever a rating with respect to the securities being offered is "obtained by or on behalf of an issuer."<sup>44</sup> The proposals would have required disclosure of specified information with respect to security ratings, whether or not disclosed voluntarily or mandated by the proposed new rules. In addition, the 1994 Ratings Release sought comment on various areas relating to the disclosure of security ratings.

The 1994 Ratings Release also proposed to require the disclosure on a Form 8-K current report of any material change in the security rating assigned to the registrant's securities by an NRSRO.<sup>45</sup> Later, in 2002, the Commission again proposed to require an issuer to file a Form 8-K current report when it received a notice or other communication from any rating agency regarding, for example, a change or withdrawal of a particular rating.<sup>46</sup> The Commission did not adopt this proposal, noting that it would continue to consider the appropriate regulatory approach for rating agencies.<sup>47</sup>

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<sup>44</sup> See Disclosure of Security Ratings, Release No. 33-7086 (Aug. 31, 1994) [59 FR 46304] (the "1994 Ratings Release"). A concept release on this subject was published in Disclosure of Security Ratings, Release No. 33-5882 (Nov. 3, 1977) [42 FR 58414].

<sup>45</sup> See the 1994 Ratings Release.

<sup>46</sup> See Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release No. 33-8106 (Jun. 17, 2002) [67 FR 42914].

<sup>47</sup> See Additional Form 8-K Filing Requirements and Acceleration of Filing Date, Release No. 33-8400 (Mar. 16, 2004) [69 FR 15594], amended by Release No. 33-8400A (Aug. 4, 2004) [69 FR 48370].



In 2003, the Commission issued a concept release requesting comment on whether it should cease using the NRSRO designation and, as an alternative to the ratings criteria, provide for Form S-3 eligibility where investor sophistication or large size denomination criteria are met.<sup>48</sup> The Commission also requested comment on alternatives to Form S-3 ratings reliance with regard to offerings of asset-backed securities. In the 2004 adopting release for Regulation AB,<sup>49</sup> while retaining the eligibility provision for investment grade rated asset-backed securities, the Commission noted that it was engaged in a broad review of the role of credit rating agencies in the securities markets, including whether security ratings should continue to be used for regulatory purposes under the securities laws.<sup>50</sup> The release made note of the 2003 concept release and the comments received on possible alternatives to using the investment grade requirement for determining Form S-3 eligibility for asset-backed securities.

In 2005, the Commission adopted rules and form amendments to modify the framework for the registration, communications, and offerings processes, relaxing restrictions and requirements on the largest issuers.<sup>51</sup> These large issuers, defined as well-known seasoned issuers, include issuers that have issued for cash more than an aggregate of \$1 billion in non-convertible securities, other than common equity, through

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<sup>48</sup> See Rating Agencies and the Use of Credit Ratings under the Federal Securities Laws, Release No. 33-8236 (Jun. 4, 2003) [68 FR 35258]. Comments on the concept release are available at: <http://www.sec.gov/rules/concept/s71203.shtml>. As discussed above, recent events have highlighted the need to revisit our reliance on NRSRO ratings in the context of these developments. See also the extensive discussion of market developments in Release No. 34-57967.

<sup>49</sup> 17 CFR 229.1100 through 1123.

<sup>50</sup> See Section III.A.3.c of Asset-Backed Securities, Release No. 33-8518 (Dec. 22, 2004) [70 FR 1506, 1524].

<sup>51</sup> See Securities Offering Reform, Release No. 33-8591 (July 19, 2005) [70 FR 44722].

registered primary offerings over the prior three years.<sup>52</sup> In adopting this definition, the Commission did not rely on investment grade ratings, noting in the adopting release that the securities included in the calculation for determining whether the \$1 billion threshold has been met need not be investment grade securities.<sup>53</sup>

## **II. Proposed Amendments**

### **A. Shelf Registration for Issuers of Asset-Backed Securities**

#### **1. Form S-3 Eligibility for Offerings of Asset-Backed Securities**

Under the existing requirements, an offering of asset-backed securities, or ABS, as defined in Item 1101 of Regulation AB,<sup>54</sup> may be eligible for registration on Form S-3 and may therefore be offered on a delayed or continuous basis<sup>55</sup> if they are rated investment grade by an NRSRO and meet certain other conditions.<sup>56</sup> The Commission now proposes to amend this requirement in Form S-3 for ABS to replace the component that relies on investment grade ratings with an alternate provision.

In the 2004 proposing release for Regulation AB, the Commission requested comment on whether the investment grade reliance component of the Form S-3 eligibility requirements for ABS offerings was appropriate and whether alternative criteria such as

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<sup>52</sup> See definition of well-known seasoned issuer in Rule 405. 17 CFR 230.405.

<sup>53</sup> See Section II.A.1.b of Release No. 33-8591.

<sup>54</sup> 17 CF 229.1101.

<sup>55</sup> General Instruction I.B.5 of Form S-3. The Commission expanded the use of Form S-3 to all types of asset-backed securities in 1992. See Simplification of Registration Procedures for Primary Securities Offerings, Release No. 33-6964 (Oct. 22, 1992) [57 FR 48970].

<sup>56</sup> As discussed below, two additional conditions also apply in order for ABS offered for cash to be Form S-3 eligible: (1) delinquent assets do not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date; and (2) with respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date. General Instruction I.B.5(a) of Form S-3.

investor sophistication, minimum denomination, or experience criteria were more appropriate.<sup>57</sup> The Commission received four comment letters in response that provided suggestions on possible alternatives to the investment grade requirement for Form S-3 eligibility purposes for ABS offerings.<sup>58</sup> One commenter recommended that the Commission replace the investment grade ratings requirement with a sponsor<sup>59</sup> experience requirement (e.g., Exchange Act reporting).<sup>60</sup> Another commenter suggested that the Commission either (1) eliminate the use of the ratings as a bright line test for the Form S-3 eligibility criteria, thereby eliminating the incentive to shop for ratings simply to satisfy a regulatory requirement; or (2) reflective of developing market practice, require an investment grade rating which is the lower of two ratings.<sup>61</sup>

Two commenters recommended that the Commission adopt a minimum denomination requirement (e.g., \$100,000 or \$250,000) that would determine form eligibility, limiting investment in the offering to investors who had such capital.<sup>62</sup> One of these commenters recommended that the Commission make short-form registration

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<sup>57</sup> See Section III.A.3.c of Asset-Backed Securities, Release No. 33-8419 (May 3, 2004) [69 FR 16650]. In the 2003 concept release where the Commission requested comment on alternatives to the ratings reliance requirement in Form S-3 for corporate debt, the Commission requested comment on alternatives to ratings reliance with respect to ABS offerings. No comment letters submitted in response to the concept release provided specific suggestions on alternatives for ABS offerings. See Release No. 33-8236.

<sup>58</sup> See letters commenting on Release No. 33-8419 from the American Bar Association (ABA), Kutak Rock, LLP (Kutak), State Street Global Advisors (State Street), and Moody's Investor Service (Moody's). The public comments received are available for inspection in our Public Reference Room at 100 F Street, NE, Washington, DC 20549 in File No. S7-21-04, or may be viewed at <http://www.sec.gov/rules/proposed/s72104.shtml>.

<sup>59</sup> While "sponsor" is a commonly used term for the entity that initiates the asset-backed securities transaction, the terms "seller" or "originator" also are often used in the market. In some instances the sponsor is not the originator of the financial assets but has purchased them in the secondary market. See footnote 46 of Release No. 33-8518.

<sup>60</sup> See letter from State Street.

<sup>61</sup> See letter from Moody's.

<sup>62</sup> See letters from ABA and Kutak.

available to otherwise eligible non-investment grade rated or unrated classes of asset-backed securities provided that sales are made in minimum denominations and initial sales of classes of securities are made only to qualified institutional buyers (as defined in Securities Act Rule 144A(a)(1))<sup>63</sup> and institutional accredited investors (as defined in Rule 501<sup>64</sup> of Regulation D).<sup>65</sup> The commenter reasoned that such restrictions should ensure that securities are sold and subsequently resold only to investors who are capable of undertaking their own analysis of the merits and risks of their investment.<sup>66</sup>

In light of our effort to reduce regulatory reliance on security ratings, the Commission has revisited the comments in 2004 and now proposes to replace the investment grade component in the Form S-3 eligibility requirement for ABS offerings with a minimum denomination requirement for initial and subsequent sales and a requirement that initial sales of classes of securities be made only to qualified institutional buyers. The eligibility requirement, as proposed to be revised, would retain the other provisions relating to delinquency concentration and residual value percentages for offerings of securities backed by leases other than motor vehicle leases.<sup>67</sup> Thus, as proposed, asset-backed securities offered for cash may be Form S-3 eligible provided:

- Initial and subsequent resales are made in minimum denominations of \$250,000;
- Initial sales are made only to qualified institutional buyers (as defined in Rule 144A(a)(1));

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<sup>63</sup> 17 CFR 230.144A(a)(1).

<sup>64</sup> 17 CFR 230.501.

<sup>65</sup> See letter from ABA.

<sup>66</sup> Id.

- Delinquent assets do not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date; and
- With respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.<sup>68</sup>

This proposed amendment would limit use of a short-form shelf registration statement for asset-backed securities to offerings to large sophisticated and experienced investors without, we believe, causing undue detriment to the liquidity of the asset-backed securities market.<sup>69</sup> In keeping with that purpose and given the unique nature and structure of asset-backed securities, we are proposing at this time only to include qualified institutional buyers rather than also including institutional accredited investors as suggested by the commenter in 2004.

## **2. Mortgage Related Securities and Securities Act Rule 415**

In addition to being shelf eligible by meeting the requirements of Form S-3, a particular subset of ABS may also be shelf eligible by meeting the requirements in Securities Act Rule 415,<sup>70</sup> which enumerates the securities which are permitted to be offered on a continuous or delayed basis. Among those securities are “mortgage related

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<sup>67</sup> See proposed General Instruction I.B.5(a)(iii) and (iv) of Form S-3.

<sup>68</sup> See proposed General Instruction I.B.5(a) of Form S-3.

<sup>69</sup> We are aware of two types of asset-backed offerings that may not meet these new criteria, unit repackaging and securitization of insurance funding agreements but believe that they can be effectively registered using Form S-1 instead of Form S-3.

securities, including such securities as mortgage-backed debt and mortgage participation or pass through certificates.”<sup>71</sup> By specifically referring to mortgage related securities, Rule 415 has permitted such securities to be offered on a delayed basis, even if the offering cannot be registered on the Form S-3 short form registration statement because it does not meet the eligibility requirements of Form S-3.

Currently, the term “mortgage related securities” is defined by Section 3(a)(41) of the Exchange Act<sup>72</sup> as, among other things, “a security that is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization.” Given that the term mortgage related securities also depends on a ratings component, it would be a logical extension of our amendments here to amend the Rule 415 reference to a mortgage related security to add that the sale of such security must be in compliance with the additional requirements that initial sales are made to qualified institutional buyers and initial and subsequent sales are made in certain minimum denominations. Given that reliance on security ratings could just as easily impact an investor’s investment decision in mortgage-backed securities as it could for other asset-backed securities,<sup>73</sup> we believe it is appropriate that mortgage-backed securities be treated the same as all asset-backed securities.<sup>74</sup>

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<sup>70</sup> 17 CFR 230.415.

<sup>71</sup> 17 CFR 230.415(a)(vii).

<sup>72</sup> 15 U.S.C. 78c(a)(41). Section 3(a)(41) was added by the Secondary Mortgage Market Enhancement Act of 1984 (SMMEA) (Pub. L. No. 98-440-98 Stat. 1690). In 1984, contemporaneous with the enactment of SMMEA, the Commission amended Rule 415, which is known as the shelf rule, to allow SMMEA-eligible mortgage related securities to use the shelf offering process. See Shelf Registration, Release No. 33-6499 (Nov. 17, 1983) [48 FR 5289].

<sup>73</sup> The President’s Working Group has noted that one of the principal underlying causes of the current global market turmoil relating to the mortgage-backed securities industry was the credit rating agencies’ assessments of subprime residential mortgage-backed securities and other complex structured credit products that held residential mortgage-backed and other asset-backed

Therefore, under the proposed revision to Rule 415, mortgage-backed securities, having the same characteristics as mortgage related securities under the Section 3(a)(41) definition, regardless of the security rating, could be offered on a delayed basis provided that:

- initial sales and any resales of the securities are made in minimum denominations of \$250,000;<sup>75</sup> and
- initial sales of the securities are made only to qualified institutional buyers (as defined in Rule 144A(a)(1)).

#### Request for Comment

- Is the proposed amendment to the Form S-3 eligibility requirement for asset-backed securities appropriate? Is there a better alternative to the investment grade ratings component? If so, what is that alternative and why is it better?
- Is the proposed amendment requiring that initial and subsequent sales be made in a minimum denomination appropriate? Should the denomination level be higher or lower (e.g., \$400,000 or \$100,000)?
- We understand that non-convertible securities may typically be held in book entry form with a depository. Are there any system issues or processes at the depository that may affect the ability to limit transferability based on a minimum denomination? If yes, what are those issues or processes and how

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securities. See Section I of the Policy Statement on Financial Market Developments. See n. 24 above.

<sup>74</sup> Indeed, mortgage-backed securities are merely a type of, or subset of, asset-backed securities. We believe that there have not been any recent offerings that have relied on Rule 415(a)(vii) for shelf eligibility rather than through meeting the requirements of Form S-3.

<sup>75</sup> Denominations of any amounts above \$250,000 would meet this requirement.

should the rule provisions be revised to prohibit subsequent transfers below the minimum denominations?

- Should there be any restriction on permitting purchasers from allocating securities in denominations lower than \$250,000 if the purchasers are acquiring the nonconvertible securities for more than one account? For example, if an investment advisor acquires the securities for more than one qualified institutional buyer, should it be allowed to allocate securities to the accounts of the qualified institutional buyers in denominations lower than \$250,000?
- Should Form S-3 limit initial sales of eligible asset-backed securities to qualified institutional buyers? Should the requirement include sales to an additional group of investors (e.g., institutional accredited investors)? If so, why? Should subsequent sales be limited as well? Would it be appropriate to eliminate the minimum denomination requirements after some period of time, such as after six months or one year from the date of issuance? Are there particular kinds of ABS offerings that are sold to investors other than qualified institutional buyers?
- What would be the impact on liquidity in the ABS secondary market if Form S-3 registration required that initial sales be limited to qualified institutional buyers, institutional accredited investors, or other groups of sophisticated investors? What would be the impact on liquidity in the secondary market if resales of securities that were originally offered and sold off of the Form S-3 were so limited? What would be the impact on the cost of capital for ABS



sponsors if Form S-3 registration required that initial sales or resales were limited to qualified institutional buyers or other groups of sophisticated investors?

- Would a better standard than qualified institutional buyer be any purchaser that owns and invests on a discretionary basis not less than \$25,000,000? Would a threshold like this that does not limit the purchasers to institutions be appropriate, particularly in light of recent market events? Should there be other thresholds for particular investors, such as owning and investing on a discretionary basis not less than \$50,000,000 for government or political subdivisions, agencies or instrumentalities of a government? Should we use Qualified Investor as defined in Exchange Act Section 3(a)(54)<sup>76</sup> rather than qualified institutional buyer?
- We note that there are two types of ABS offerings that may not meet this new criteria, unit repackagings, and securitizations of insurance funding agreements. Can the offer and sale of these securities be effectively registered on Form S-1? We note that these securities are typically listed on a national securities exchange. Should we instead add an alternative eligibility requirement that would provide eligibility to use Form S-3 for securities listed on a national securities exchange?
- Should we instead assess Form S-3 and shelf eligibility in a manner similar to what we are proposing for corporate debt that is discussed in the next section? If so, what would be the appropriate amount of required issuance? Should the

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<sup>76</sup> 15 U.S.C. 78c(a)(54).

issuance amount be measured only for the same sponsor, same asset class, and same structure? Should it matter if the assets are purchased by the sponsor rather than originated by the sponsor or an affiliate?

- Is the proposed revision to Securities Act Rule 415 appropriate? Is there any reason why mortgage related securities should be treated differently from other asset-backed securities for purposes of delayed offerings?
- Are there SMMEA eligible loans that could not be securitized in circumstances meeting the proposed threshold for S-3 eligibility?
- Should Rule 415 be amended as proposed? In the alternative, should the reference to mortgage related securities in Rule 415 be deleted (i.e., so that mortgage-backed securities could only be offered on a delayed basis if eligible for registration on Form S-3)? Are there securities that are currently offered pursuant to Rule 415(a)(1)(vii) that do not meet the current requirements of Form S-3 and would not meet the requirements of the proposal?

## **B. Primary Offerings of Non-convertible Securities**

### **1. 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 eligibility for primary offerings also enables form eligible issuers to conduct primary offerings “off the shelf” under Securities Act Rule 415. 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,<sup>77</sup> and at least one of the form’s transaction requirements.<sup>78</sup> One such transaction requirement permits registrants to register primary offerings of non-convertible securities if they are rated investment grade by at least one NRSRO.<sup>79</sup> 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 by the Commission in a 1982 release.<sup>80</sup> Prior to adopting Form S-3, the Commission had previously provided a short form registration statement on Form S-9, which permitted the registration of issuances of certain high quality debt securities.<sup>81</sup> The criteria for use of Form S-9 related primarily to the quality of the issuer.<sup>82</sup> While these eligibility criteria

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<sup>77</sup> See General Instruction I.A to Forms S-3 and F-3.

<sup>78</sup> See General Instruction I.B to Forms S-3 and F-3.

<sup>79</sup> See General Instruction I.B.2 to Forms S-3 and F-3.

<sup>80</sup> 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”).

<sup>81</sup> 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].

<sup>82</sup> The criteria included 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.

delineated 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.<sup>83</sup> The Commission believed that security ratings were a more appropriate standard on which to base Form S-3 eligibility than specified quality of the issuer criteria, citing letters from commenters indicating that short form prospectuses are appropriate for investment grade debt because such securities are generally purchased on the basis of interest rates and security ratings.<sup>84</sup>

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. As proposed, the instructions to these forms 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 more than \$1 billion in non-convertible securities, other than common equity, through registered primary offerings over the prior three years.<sup>85</sup>

We are proposing to revise the form 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

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<sup>83</sup> See the S-3 Proposing Release.

<sup>84</sup> See the Integrated Disclosure Release.

<sup>85</sup> 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.

issuer.”<sup>86</sup> Similar to our approach with well-known seasoned issuers, we believe that having issued \$1 billion of registered non-convertible securities over the prior three years would lead to a wide following in the marketplace. These issuers generally have their Exchange Act filings broadly followed and scrutinized by investors and the markets.<sup>87</sup> The Commission intends for the number of issuers eligible under the proposed criteria to register primary offerings of non-convertible securities on Forms S-3 and F-3 to not be significantly reduced, or to differ significantly from, the number of those eligible under the current form requirements.<sup>88</sup> Using the \$1 billion threshold, we preliminarily believe that for issuances that have occurred thus far this year, the proposed change would result in approximately six issuers filing on Form S-1 instead of on a short-form registration statement. This approach is designed to provide assurance that eligible issuers are followed by the markets such that it is appropriate to allow forward incorporation by

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<sup>86</sup> See Securities Offering Reform, Release No. 33-8591 (Jul. 19, 2005) [70 FR 44722]. Rule 405 under the Securities Act defines a “well-known seasoned issuer” as an issuer that meets the registrant requirements of Form S-3 or F-3, and either has a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of \$700 million or more, or has issued in the last three years, in registered offerings, at least \$1 billion aggregate principal amount of non-convertible securities in primary offerings for cash. 17 CFR 230.405

<sup>87</sup> See Securities Offering Reform, Release No. 33-8501 (Nov. 3, 2004) [69 FR 67392].

<sup>88</sup> We preliminarily anticipate that under the proposed threshold some additional high yield debt issuers would be eligible to use the Forms.

reference and delayed offering. We realize that it is now possible that some offerings of non-investment grade securities, such as high-yield bonds (also known as “junk bonds”) may be registered for sale on Form S-3.

These issuers also would have to satisfy the other conditions of the form eligibility requirement. In determining compliance with this threshold:

- issuers may aggregate the amount of non-convertible securities, other than common equity, issued in registered primary offerings during the prior three years;
- issuers may include only such non-convertible securities that were issued in registered primary offerings for cash – they may not include registered exchange offers;<sup>89</sup> and
- parent company issuers only may include in their calculation the principal amount of their full and unconditional guarantees, within the meaning of Rule 3-10 of Regulation S-X,<sup>90</sup> 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.

The aggregate principal amount of non-convertible securities that may be counted toward the \$1 billion issuance threshold may have been issued in any registered primary offering

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<sup>89</sup> Issuers may not 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 investors in the private offering, relying upon, for example, the exemptions of Securities Act Section 4(2) and Rule 144A, 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.

<sup>90</sup> 17 CFR 210.3-10.

for cash, on any form (other than Form S-4 or Form F-4). Non-convertible securities need not be investment grade securities to be included in the calculation. In calculating the \$1 billion amount, issuers generally may 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.<sup>91</sup>

#### Request for Comment

- The recent turmoil in the credit markets, particularly in the structured finance market, strongly suggests that there has been undue reliance on security ratings and that the ratings for many issuers did not reflect the risks of the investment. We are proposing thresholds on the amount of issuance in order to move away from reliance on security ratings in the Commission's rules. Does the proposed eligibility based on the amount of prior registered non-convertible securities issued serve as an adequate replacement for the investment grade eligibility condition? Would the cumulative offering amount for the most recent three-year period reflect market following? Since most of the problems in the market have occurred with respect to asset-backed securities, should we retain the current eligibility requirement for investment grade non-convertible securities?
- Would the specific issuers eligible under the investment grade condition be different from the issuers eligible under the proposal? Would certain

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<sup>91</sup> In determining the dollar amount of securities that have been registered during the preceding three years, issuers should 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.

investors, such as pension funds, be impacted if investment grade securities could not be offered on Form S-3?

- If the Commission adopts a Form S-3 eligibility requirement designed to reflect the market following of a debt issuer, should the condition be sensitive to the number of debt holders? Is it reasonable to expect that analysts would be more likely to follow issuers with a larger number of debt holders insofar as such holders are potential customers of the analysts' products? If so, how should we determine the number of holders?
- Should there be an eligibility requirement based on a minimum number of holders of record of non-convertible securities offered for cash? If so, should this number be 300 or 500, by analogy to our registration and deregistration rules relating to equity securities? Would linking the eligibility requirement to the number of holders of record help to assure market following?
- Is the cumulative offering amount for the most recent three-year period the appropriate threshold at which to differentiate issuers? Should the threshold be higher (e.g., \$1.25 billion) or lower (e.g., \$800 million), and, if so, at what level should it be set? 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 such offerings are made.



- Would the proposed threshold increase or decrease the number of issuers eligible to use Forms S-3 and F-3 under the current investment grade criteria? Is there a reason that this Form S-3 eligibility requirement should not mirror the debt only well-known seasoned issuer definition?
- Should the measurement time period for \$1 billion of issuance be longer than three years (e.g., four or five 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 over the prior three years?
- Is there a better alternative by which Form S-3 eligibility for non-convertible securities could be required? 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?
- Should there be a different standard for foreign private issuers eligible to use Form F-3? If so, explain why and what would be a more appropriate criteria.
- Does the \$1 billion threshold of offering 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 public offerings of securities for cash outside the United States?

## **2. U.S. GAAP Reconciliation Requirements**

The Commission's rules relating to U.S. GAAP reconciliation requirements for foreign filers also rely on ratings. Forms F-1, F-3, and F-4 under the Securities Act permit foreign private issuers registering offerings of investment grade securities to provide financial information in accordance with Item 17 of Exchange Act Form 20-F. Item 17 requires foreign private issuers to reconcile their financial statements and schedules to U.S. GAAP if they are prepared in accordance with a basis of accounting other than U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board. This reconciliation need only include a narrative discussion of reconciling differences, a reconciliation of net income for each year and any interim periods presented, a reconciliation of major balance sheet captions for each year and any interim periods, and a reconciliation of cash flows for each year and any interim periods. Item 18 of Form 20-F, by contrast, requires that a foreign private issuer provide all of the information required by U.S. GAAP and Regulation S-X, in addition to the reconciling information for the line items specified in Item 17.<sup>92</sup> Foreign private issuers of investment grade rated securities are permitted to provide the less-extensive U.S. GAAP reconciliation disclosure pursuant to Item 17 in registration statements and annual reports.

The definition of "investment grade" is the same as in the Form S-3 eligibility requirements. A security is "investment grade" if, at the time of sale, at least one NRSRO has rated it in one of its generic rating categories that signifies investment grade. Also, a foreign private issuer conducting a private placement of investment grade

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<sup>92</sup> See also Foreign Issuer Reporting Enhancements, Release No. 33-8900 (Feb. 29, 2008) [73 FR 13404] at Section III.A.

securities under Regulation D can provide Item 17 information to the extent the issuer is able to do so in a registration statement.<sup>93</sup>

The Commission recently proposed to require foreign private issuers offering investment grade securities, among others, to file financial statements that comply with the more complete Item 18 level of reconciliation, thus eliminating the option of providing Item 17 financial disclosure.<sup>94</sup> The Commission reasoned that “a reconciliation that includes footnote disclosures required by U.S. GAAP and Regulation S-X<sup>95</sup> can provide important additional information.”<sup>96</sup> The Commission specifically requested comment, however, on whether foreign private issuers should continue to be permitted to provide Item 17 financial disclosure for offerings of, and periodic reporting relating to, investment grade securities.<sup>97</sup> We now also propose to remove from these requirements the components relying on investment grade ratings and instead permit foreign private issuers to comply with the less extensive U.S. GAAP reconciliation requirements under Item 17 in a registration statement or private offering document if the issuer would meet the proposed Form F-3 eligibility requirements (i.e., if the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) for cash more than \$1 billion in non-convertible securities, other than common equity, through registered primary offerings over the prior three years).

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<sup>93</sup> Rule 502 requires a foreign private issuer to provide the same kind of information the issuer would be required to include in a registration statement on a form the issuer would be eligible to use if any sales are made to investors who are not accredited investors. See 17 CFR 230.502(b)(2)(i)(C).

<sup>94</sup> See Release No. 33-8900.

<sup>95</sup> 17 CFR 210.1-01 et seq.

<sup>96</sup> Release No. 33-8900 at Section III.A.

<sup>97</sup> See Request for Comment No. 23 of Release No. 33-8900.

### Request for Comment

- If the Commission does not adopt the proposal in Release No. 33-8900 that would eliminate the ability of a foreign private issuer to comply with the less extensive U.S. GAAP reconciliation requirements under Item 17 for filings with respect to investment grade securities, should the Commission revise the requirements as proposed to permit a foreign private issuer to comply with the less extensive U.S. GAAP reconciliation requirements under Item 17 if the issuer has met the proposed Form F-3 eligibility criteria for debt issuers? Are there different criteria that should be used?

### **3. Form F-9**

Form F-9 allows certain Canadian issuers 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.<sup>98</sup> 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 Administrator).<sup>99</sup> This eligibility requirement was adopted as part of a 1993 revision to the multijurisdictional disclosure system originally adopted by the Commission in 1991 in coordination with the Canadian Securities Administrators.<sup>100</sup> Consistent with the Commission's proposal to reduce reliance on

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<sup>98</sup> Securities convertible after a period of at least one year may only be convertible into a security of another class of the issuer.

<sup>99</sup> See General Instruction I.A to Form F-9.

<sup>100</sup> 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

security ratings in its rules and regulations the Commission is proposing to eliminate the eligibility requirement of Form F-9 that allows Canadian issuers to register certain debt and preferred securities if they are rated investment grade by at least one NRSRO. As with our proposals regarding Forms S-3 and F-3, this requirement would be replaced by a requirement that the issuer has issued in the three years immediately preceding the filing of the Form F-9 registration statement at least \$1 billion of aggregate principal amount of debt or preferred securities for cash in primary offerings registered under the Securities Act.

The proposed revision would 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). While the proposal would still permit Canadian issuers to register certain securities rated investment grade by an Approved Rating Organization, the Commission believes this approach is appropriate and consistent with the Commission's intent in adopting the multijurisdictional disclosure system to look to form eligibility requirements under Canadian rules.<sup>101</sup> To the extent that the Canadian securities regulators revise similar requirements to remove references to investment grade ratings, we may revise Form F-9 to mirror those revisions.

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to the Current Registration and Reporting System for Canadian Issuers, Securities Act Release No. 33-6902 (Jun. 21, 1991) [56 FR 30036].

<sup>101</sup> See Release No. 33-6902, section II.

## Request for Comment

- The Commission requests comment on whether the proposed threshold for issuances of debt or preferred securities in the three years immediately preceding the filing of the registration statement is appropriate. Should the Form F-9 eligibility requirements continue to permit the use of ratings by Approved Rating Organizations? Is a different threshold or measurement period more appropriate for Form F-9?

#### **4. NRSRO Ratings Reliance in Other Forms and Rules**

##### **a. Forms S-4 and F-4 and Schedule 14A**

Issuing investment grade securities confers benefits that extend to other forms and rules as well. Forms S-4 and F-4 allow 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.<sup>102</sup> Similarly, Schedule 14A permits a registrant to incorporate by reference if the Form S-3 registrant requirements are met and the registrant is offering investment grade securities.<sup>103</sup> 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 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 more than \$1 billion in non-convertible

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<sup>102</sup> See General Instruction B.1 of Forms S-4 and Form F-4.

<sup>103</sup> See Note E and Item 13 of Schedule 14A.

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.”

**b. Securities Act Rules 138, 139 and 168**

The reliance on security ratings is also evident in other Securities Act rules. 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)<sup>104</sup> and 5(c)<sup>105</sup> 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 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

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<sup>104</sup> 15 U.S.C. 77b(a)10.

<sup>105</sup> 15 U.S.C. 77e(c).

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.

#### Request for Comment

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

#### **c. Item 1100 of Regulation AB**

Under the existing Item 1100(c) of Regulation AB,<sup>106</sup> if a significant obligor<sup>107</sup> meets the registrant requirements for Form S-3 or Form F-3 and the pool assets relating to the obligor are non-convertible investment grade rated securities, then an ABS issuer's filings may include a reference to the financial information of the obligor rather than presenting the full financial information of the obligor. The Commission now proposes to amend this provision of Item 1100(c) to remove the ratings reference and permit

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<sup>106</sup> 17 CFR 229.1100(c).

<sup>107</sup> The term "significant obligor" is defined in Item 1101(k) of Regulation AB [17 CFR 229.1101(k)].



incorporation by reference of third party financial statements if the third party meets the registrant requirements of Form S-3 and the pool assets relating to such third party are non-convertible securities, other than common equity, that were issued in a primary offering for cash that was registered under the Securities Act. The Commission believes that, for the most part, non-convertible securities that were issued in a registered offering constitute higher quality securities than securities issued under an exemption under, for example, Securities Act Rule 144A, and then subsequently exchanged for registered securities because such securities are subject to the Securities Act.

Request for Comment

- Should the Commission revise Item 1100 of Regulation AB as proposed? If not, explain why?

**d. Items 1112 and 1114 of Regulation AB**

Items 1112 and 1114 of Regulation AB require the disclosure of certain financial information regarding significant obligors of an asset pool and significant credit enhancement providers relating to a class of asset-backed securities. An instruction to Item 1112(b)<sup>108</sup> provides that no financial information on a significant obligor, however, is required if the obligations of the significant obligor as they relate to the pool assets are backed by the full faith and credit of a foreign government and the pool assets are investment grade securities. Item 1114 of Regulation AB contains a similar instruction that relieves an issuer from providing financial information when the obligations of the credit enhancement provider are backed by a foreign government and the enhancement provider has an investment grade rating. Under both Items 1112 and 1114, to the extent

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<sup>108</sup> Instruction 2 to 17 CFR 229.1112(b).

that pool assets are not investment grade securities, information required by paragraph (5) of Schedule B of the Securities Act may be provided in lieu of the required financial information.<sup>109</sup>

We are now proposing to revise these instructions so that these exceptions based on investment grade ratings to the requirements of Items 1112 and 1114 of Regulation AB would no longer apply and information required by paragraph (5) of Schedule B would be required in all situations when the obligations of a significant obligor are backed by the full faith and credit of a foreign government. We are not aware of any benchmark comparable to an investment grade rating here and the requirement would not impose substantial costs or burdens to an ABS issuer, as such information should be readily available.

#### Request for Comment

- Should the Commission revise the instructions that rely on investment grade ratings in Items 1112 and 1114, as proposed? In the alternative, should the Commission instead permit issuers to omit all information relating to the obligors and credit enhancement providers when the obligations are backed by the full faith and credit of the foreign government? Are there any risks in doing so? Should the Commission allow incorporation by reference of the information required by paragraph (5) of Schedule B of the Securities Act in lieu of providing the information to the extent such information is contained in a filing with the Commission?

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<sup>109</sup> Paragraph 5 of Schedule B requires disclosure of three years of the issuer's receipts and expenditures classified by purpose in such detail and form as the Commission prescribes.

- Are there any other provisions in Regulation AB or other rules applicable to asset-backed securities that should be revised?

### **C. The Commission’s Policy on Security Ratings**

As noted above, in 1981 the Commission issued its policy on disclosure of security ratings, articulated in Item 10(c) of Regulation S-K,<sup>110</sup> that permits, but does not require, issuers to disclose in Commission filings security ratings assigned by credit rating agencies to classes of debt securities, convertible debt securities, and preferred stock.<sup>111</sup> In 1994, the Commission proposed to change from permissible to mandated disclosure of security ratings.<sup>112</sup> While the Commission did not adopt mandatory disclosure at that time, it signaled concerns relating to adequate disclosure to the markets regarding new financial products and security ratings. In the proposal we noted the dramatic proliferation in the types of securities offered in the marketplace with the development of the market for mortgage- and asset-backed securities and other highly structured or derivative financial obligations. In response to the growth of this market, we adopted new and amended rules and forms to address comprehensively the registration, disclosure, and reporting requirements for asset-backed securities.<sup>113</sup> The adoption of Regulation AB in 2004 codified disclosure requirements and assisted in providing more disclosure with greater comparability for investors in the asset-backed securities markets. While the adoption of Regulation AB has enhanced the disclosure

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<sup>110</sup> 17 CFR 229.10(c).

<sup>111</sup> See the Integrated Disclosure Release. See also Release No. 33-6336. The release indicated that a debt rating was simply “an evaluation of the likelihood that an issuer will be able to make timely interest payments and will be able to repay principal.”

<sup>112</sup> See the 1994 Ratings Release.

<sup>113</sup> Release No. 33-8518.

about asset-backed securities, it did not significantly address securities ratings disclosure.

Because mandating disclosure of, and about, securities ratings might unduly emphasize or over rely on ratings, the Commission is at this time retaining the current Item 10(c) policy on security ratings, with minor changes to accommodate our proposed changes to Rule 436(g),<sup>114</sup> which asks registrants to consider, but does not require, certain additional disclosure if a registration statement includes disclosure of a rating. While the Commission has not determined to propose mandatory disclosure, we are again requesting comment as to whether we should require disclosure by issuers regarding ratings in their Securities Act registration statements and their Exchange Act periodic reports. The goal of such disclosure requirements would be to enhance security rating disclosure so that investors are better able to understand the terms of a security rating and the limitations on the rating.

We are proposing to amend Rule 436(g) so that applicability would no longer be limited to just NRSROs. Securities Act Rule 436(g)<sup>115</sup> provides that a security rating assigned to a class of debt securities, a class of convertible debt securities, or a class of preferred stock is not a part of a registration statement prepared or certified by a person or a report or valuation prepared or certified by a person within the meaning of sections 7 and 11 of the Securities Act. We propose to amend the reference to “nationally recognized statistical rating organization” in Rule 436(g) to expand the relief to any “credit rating agency” as defined in 15 U.S.C. 78c(a)(61). By proposing to permit issuers to disclose security ratings provided by any credit rating agency without requiring

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<sup>114</sup> 17 CFR 230.436(g).

<sup>115</sup> 17 CFR 230.436(g).

consents, the Commission believes this relief may foster competition between credit rating agencies.<sup>116</sup>

#### Request for Comment

- Prior to 1981 the Commission precluded disclosure regarding security ratings in registration statements under the Securities Act. Should we revise our disclosure policy to prohibit disclosure of security ratings in an issuer’s Securities Act registration statements or Exchange Act periodic reports? Should we simply delete Item 10(c) and provide no established disclosure policy regarding credit ratings?
- In 1994, the Commission noted “the extensive use of, and reliance on, ratings, and the wide disparity in the meaning and significance of the rating” as important factors in its decision to propose mandated disclosure.<sup>117</sup> In light of the recent turmoil in the credit markets, some of the factors for the proposed disclosure may be no less of concern today than they were in 1994. Should the Commission require disclosure like the disclosure we currently recommend in Item 10(c) of Regulation S-K in order to enhance issuers’ security rating disclosure so that investors are better able to understand the terms of a security rating and the limitations on that rating? Would requiring disclosure of a security rating place the Commission’s “official seal of approval” on security ratings such that it could adversely affect the quality of due diligence and investment analysis?

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<sup>116</sup> See also Section II.B.1 of the 1994 Ratings Release where the Commission requested comment on eliminating the consent requirement for credit rating agencies that are not NRSROs.

<sup>117</sup> See Section II.A of the 1994 Proposing Release.

- Item 10(c) of Regulation S-K currently refers to “security ratings” while the 2006 Credit Rating Agency Reform Act added the definition of “credit rating” to the Exchange Act, which means an assessment of the creditworthiness of an obligor as an entity or with respect to specific securities or money market instruments. Should we revise the reference to “security rating” in Item 10(c) to refer to “credit rating” instead? Would such a revision increase or decrease the scope of ratings covered by 10(c)? Would such a change limit the types of ratings that could be disclosed in a registration statement? In particular, are there any types of ratings that are issued that would not be covered by the term “credit rating,” particularly for ABS or structured products that should be covered by Item 10(c)? Are there any other changes we should make to Item 10(c) to align it with the Credit Rating Agency Reform Act or otherwise modernize it? For instance, should we specifically delineate structured products and asset-backed securities in the list of securities covered by the item since it currently only lists debt securities, convertible debt securities and preferred stock?
- While Item 10(c) currently only recommends disclosure, commenters on the 1994 Ratings Release expressed that most issuers provide this disclosure in their Securities Act filings. Do issuers generally provide this disclosure today? Is disclosure about an issuer’s securities rating appropriate disclosure for their Securities Act filings? Is it appropriate disclosure for their periodic Exchange Act filings? Is there any reason that this disclosure should only be recommended rather than required?

- In addition to the information Item 10(c) currently recommends disclosure regarding security ratings would it be valuable for investors to have additional disclosure of all material scope limitations of the rating and any related designation (or other published evaluation) of non-credit payment risks assigned by the rating agency with respect to the security assist investors in better understanding the credit rating and assessing the risks of an investment in the securities? What additional disclosure would be helpful to investors in making these assessments?
- If we were to mandate security rating disclosure, should disclosure be required for any published designation that reflects the results of any evaluation, other than a credit risk evaluation, done by a credit rating agency? Should disclosure be required for any evaluation by a credit rating agency that is communicated to the issuer, regardless of whether it is published?
- If the Commission were to require security rating disclosure, when should an issuer be required to provide that disclosure? In 1994, we proposed to require disclosure: if a registrant has obtained a security rating from an NRSRO with respect to a class of securities being registered under the Securities Act; if the rating is used in the offer or sale of the securities by any participant in an offering; or if the registrant voluntarily discloses a security rating. Should disclosure about the security rating be required under those circumstances? If not, under what circumstances, if any, should disclosure be required?
- Should we require disclosure of unsolicited ratings? It has been suggested that such ratings may not reflect the level of information on the security that is

reflected in a solicited rating, at least in part because of a lack of access to the issuer by the unsolicited credit rating agency.<sup>118</sup> Is there a difference between solicited and unsolicited ratings such that they should be treated disparately? Should it matter if the issuer uses the unsolicited rating in the offer and sale of the securities being rated? If we were to require disclosure of unsolicited ratings, should there be limitations on how many ratings or which credit rating agencies ratings should be required to be disclosed? At what point would this create too great a burden on the issuer?

- In Release 34-57967, we expressed our concerns about ratings shopping by issuers and the potential for credit rating agencies to use less conservative rating methodologies in order to gain business, presumably lessening the value of the ratings. If an issuer would be required to provide ratings disclosure where the issuer has obtained either a preliminary security rating or a final security rating from a rating agency, would such disclosure enhance investors' understanding of, and therefore the value of, the ratings? Would it help to address our concerns with ratings shopping? If you do not believe such disclosure would be helpful, how would you suggest that we address these concerns? Should we include a disclosure requirement for indications of a rating prior to a preliminary rating? Would disclosure of indication from a credit rating agency of a likely or possible rating be appropriate?

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<sup>118</sup> However, in the corollary release amending rules for NRSROs, the Commission proposed various changes to Exchange Act Rule 17g-5 [17 CFR 240.17g-5] that would provide the opportunity for other credit rating agencies to use the information to develop "unsolicited ratings" for certain rated asset-backed securities. See proposed amendments to Rule 17g-5 in Release No. 34-57967 (Jun. 16, 2008).



- If we were to interpret that a security rating is “obtained” if: it is solicited by or on behalf of an issuer from a credit rating agency; or the issuer pays a credit rating agency for services related to a rating issued by that credit rating agency, would the standard capture sufficient disclosure about an issuer’s security ratings and the credit rating agencies that have issued them? Could that lead to non-substantive or procedural modifications to the practice of assigning ratings so that issuers could avoid the disclosure requirement? Would that lead to disclosure of security ratings that would not be useful to investors? What standard would provide the most useful information for investors? Could this threshold lead to ratings being obtained in connection with an offering but not being disclosed?
- In the 1994 Ratings Release, we proposed to require issuers to disclose any material differences between the terms of the security as assumed in rating the security and (1) the terms of the security as specified in the governing instruments, and (2) the terms of the security as marketed to investors. The terms of the securities are required to be disclosed in the prospectus, a prospectus supplement, or a post-effective amendment, as applicable. Would this disclosure assist investors? Would requiring this disclosure in periodic filings assist investors in the secondary market in making their investment decisions?
- Having previously proposed requiring material changes in security ratings be reported on Form 8-K under the Exchange Act,<sup>119</sup> we recognize that such security rating changes can be important information to an investor in making investment and voting decisions. We note, however, that issuer-paid rating agencies make

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<sup>119</sup> See the 1994 Ratings Release and Release No. 33-8106.

their rating designations public. The current failures of security ratings, particularly in the asset-backed securities markets, have led us to re-evaluate the required level of disclosure regarding security ratings. Would requiring detailed current and/or periodic reporting of an issuer's security ratings provide investors and the markets sufficient, timely information about an issuer's security ratings to assist them in making their investment decisions? Would a Form 8-K provide investors with material and timely information about an issuer's security ratings and changes in those ratings? Would periodic reports on Form 10-K, Form 20-F, Form 10-Q and Form 10-D provide investors with material and timely information about an issuer's security ratings and changes in those ratings? Is the information that would be provided regarding a material change in a rating in a Form 8-K already provided by the credit rating agency? Would a Form 8-K be unduly burdensome? Should a Form 8-K requirement be limited to solicited ratings? If a credit rating agency does not publicly disclose the security rating of an issuer's securities, should we require disclosure of the rating in a Form 8-K or in the issuer's periodic reports? How would the existence of subscriber paid credit rating agencies affect your response?

- We are only proposing to amend Item 10(c) to remove references to consents in conjunction with our proposed amendments to Rule 436(g) to no longer requiring consents from any credit rating agencies for inclusion of their ratings in an issuer's registration statement. Should there be a written consent requirement? Would a written consent requirement create any issues if the Commission were to

- require disclosure regarding those ratings? Would issuers find it problematic or costly to obtain consents?
- Should we require the consent of a credit rating agency for the use of its security rating by an issuer? What would be the additional costs of such a requirement? Would a consent requirement result in fewer ratings being obtained?
  - Should we continue to limit the consent requirement to non-NRSROs as our rules currently do? Does our proposed regulatory oversight and additional disclosure regarding the ratings process and results of ratings justify allowing the use of NRSROs ratings without requiring consents? Would such a provision provide a “seal of approval” for NRSROs? Would there be any competitive effect on non-NRSRO credit rating agencies?
  - Are there any issues with periodic disclosure regarding security ratings that are particular to ABS issuers? For instance, how would the responsibility to monitor changes or development in security ratings impact ABS offerings?

#### **D. Other Rules Referencing Security Ratings**

Other rules under the Securities Act also reference security ratings assigned by NRSROs. Rule 134(a)(17)<sup>120</sup> permits the disclosure of security ratings in certain communications deemed not to be a prospectus or free writing prospectus. We are not proposing to eliminate this reference to security ratings in our rules. However, we are proposing to revise the rule to allow for disclosure of ratings assigned by any credit rating agency, not just NRSROs. In addition, disclosure must also note that the credit rating agency is not an NRSRO, if that is the case.

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<sup>120</sup> 17 CFR 230.134(a)(17).

Under Rule 100(b)(2) of Regulation FD, disclosures to an entity whose primary business is the issuance of security ratings are excluded from coverage provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available. We believe this exception for disclosures to credit rating agencies is appropriate given the purpose of Regulation FD and are therefore not proposing to revise that provision.

#### Request for Comment

- Should we continue to allow disclosure of security ratings in “tombstones” to be deemed not to be a prospectus or free writing prospectus? Is it appropriate to allow such disclosure of a security rating by any credit rating agency and not limit the allowance to NRSROs? If the credit rating agency is not an NRSRO, is it appropriate to require additional disclosure to that effect?
- Should we revise Rule 100(b)(2) of Regulation FD to eliminate the requirement that the entity's ratings be publicly available or to require public disclosure of information submitted to credit rating agencies by issuers? If so, please explain the basis for recommending the change and discuss how to implement such changes.
- How would requiring disclosure under Regulation FD affect security ratings?

### **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:

- Should the Commission include a phase-in for issuers beyond the effective date to accommodate pending offerings? If so, should a phase-in apply only to particular rules, such as Form S-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? If a phase-in is appropriate, should it be for a certain period of time or only for the term of a pending registration statement?
- 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 to only large debt 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).<sup>121</sup> The Commission is submitting these proposed amendments and proposed rules to the Office of Management and Budget (OMB) for review in accordance with the PRA. 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:<sup>122</sup>

“Regulation S-K” (OMB Control No. 3235-0071);

“Regulation C” (OMB Control No. 3235-0074);

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

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

“Form S-4” (OMB Control No. 3235-0324);

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

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

“Form F-4” (OMB Control No. 3235-0325).

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 periodic reports and registration statements that are prepared by issuers

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<sup>121</sup> 44 U.S.C. 3501 *et seq.*; 5 CFR 1320.11.

<sup>122</sup> The paperwork burden from Regulation S-K and S-B is imposed through the forms that are subject to the requirements in those regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulation S-K.

to provide investors with information to make investment decisions in registered offerings and in secondary market transactions. 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.

#### **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 an active market following. The Commission expects that under the proposed threshold, approximately the same number of issuers who are currently eligible will be eligible to register on Form S-3 or Form F-3 for primary offerings of non-convertible securities for cash. In addition, because these proposed amendments relate to those forms' eligibility requirements, rather than the 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.

Our proposed amendments to Form S-3 and Rule 415 for ABS offerings is intended to limit the investors purchasing asset-backed securities in a delayed offering and off a short-form registration statement to sophisticated and experienced investors without creating an undue detriment to the liquidity of the asset-backed securities market. The Commission expects preliminarily that the proposed amendments for ABS offerings would not substantially change the number of ABS issuers registering their offerings on Form S-3.<sup>123</sup>

**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.

**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.<sup>124</sup>

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<sup>123</sup> As noted above, we have identified two areas of exception: unit repackagings and securitizations of insurance funding agreements. We do not believe that changes in these areas would substantially change the number of issuers that would be eligible under the proposed Form S-3 eligibility requirement for ABS offerings.

<sup>124</sup> We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).



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. 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 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, Records Management, Office of Filings and Information Services, 100 F Street, NE, Washington, DC 20549. 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**

The Commission is sensitive to the costs and benefits imposed by its rules. We have identified certain costs and benefits of the proposed amendments and request comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in this analysis. 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

commenters 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.

As discussed above, the proposed rule amendments are designed to address the risk that the reference to and use of NRSRO ratings in our rules is interpreted by investors as an endorsement of the quality of the credit ratings issued by NRSROs, and may encourage investors to place undue reliance on the NRSRO ratings. 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, F-3, and F-9. 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.<sup>125</sup> The proposed rules would replace the current eligibility requirement with a requirement that for primary offerings of non-convertible securities for cash, an issuer must have issued in the 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. In addition, the Commission proposes to replace the Form S-3 eligibility requirement for

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<sup>125</sup> The proposed revisions to Form F-9 would eliminate a Canadian issuer's ability to rely on security ratings by NRSROs, but would continue to rely on ratings issued by Approved Rating Organizations, as defined in National Policy Statement No. 45 of the Canadian Securities Administrator.

ABS offerings to require that initial sales of eligible offerings be made only to qualified institutional buyers and that initial and subsequent resales of the securities in the eligible offerings be made only in denominations of at least \$250,000. In conjunction with this proposal, the Commission proposes to amend Rule 415 to provide for delayed offerings of mortgage related securities, regardless of the security ratings, only if they meet the same criteria as proposed for ABS offerings on Form S-3.

Currently, issuers are required to obtain consent from a rating agency that is not an NRSRO for disclosure of a security rating issued by that rating agency in a registration statement or report. The Commission is also proposing to amend Securities Act Rule 436(g) and related rules to expand the relief from the consent requirements for security ratings currently provided to NRSROs to other credit rating agencies that are not NRSROs. In addition, the proposed revision to Rule 134 of the Securities Act would permit an issuer to disclose the security rating of any credit rating agency, but would require an issuer to provide, if it elects to include a security rating in a communication under Rule 134, a statement as to whether the entity issuing the rating is an NRSRO.

## **B. Benefits**

The Commission anticipates that one of the primary benefits of the proposed amendments, if adopted, would be the benefit to investors of reducing their possible undue reliance on NRSRO ratings that could be caused by references to NRSROs in our rules. An over-reliance on ratings can inhibit independent analysis and could possibly lead to investment decisions that are based on incomplete information. The purpose of the proposed rule amendments is to encourage investors to examine more than a single source of information in making an investment decision. Eliminating reliance on ratings

in the Commission's rules could also result in greater investor due diligence and investment analysis. In addition, the Commission believes that eliminating the reliance on ratings in its rules would remove any appearance that the Commission has placed its imprimatur on certain ratings.

The Commission believes that the proposed amendments to the Form S-3 eligibility requirements for ABS offerings and eligibility to rely on Rule 415(a)(vii) for mortgage-backed securities are designed to make shelf eligibility and short-form registration available to sophisticated and experienced investors. The proposed requirement to permit initial sales only to qualified institutional buyers is intended to limit the market to investors who understand the risks involved with an ABS offering. The proposed requirement that initial sales and subsequent resales of the securities are in minimum denominations of \$250,000 is designed to limit offerings to investors with such capital, increasing the probability that these investors have the resources to analyze and comprehend the risks involved with an investment decision in the ABS offering. As with the other amendments to our rules and form requirements relying on investment grade ratings, the Commission believes that these proposals would reduce or eliminate undue reliance on ratings.

The proposed revision to Rule 134 of the Securities Act would require an issuer to provide, if it elects to include a security rating in a communication under Rule 134, a statement as to whether the entity issuing the rating is an NRSRO. The Commission believes that disclosure of this information would be beneficial to investors in evaluating the value of the rating.

Under our proposed amendment to Rule 436(g), an issuer would not be required to obtain consent from the rating agency even with respect to a rating disclosed in a registration statement or report that is issued by a credit rating agency that is not an NRSRO. We believe that our proposed change would foster competition between credit rating agencies.<sup>126</sup>

### **C. Costs**

We are proposing to revise the transaction eligibility criteria for registering primary offerings of non-convertible securities on short-form registration statements. Forms S-3 and F-3 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 more than \$1 billion in non-convertible securities, other than common equity, through registered primary offerings over the prior three years. The proposed eligibility thresholds may be more difficult to ascertain for some issuers than an NRSRO rating and impose some burden on issuers to ascertain the information. In addition, while we do not anticipate that fewer issuers will be eligible, to the extent that the proposal results in fewer issuers eligible to use Forms S-3 and F-3 to register primary offerings of non-convertible securities, this could result in increased costs of preparing and filing registration statements.<sup>127</sup> Issuers who do not meet the proposed threshold and are not otherwise eligible to use Forms S-3 and F-3, would have to register offerings on

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<sup>126</sup> This would be consistent with our proposed amendments to the rules governing NRSROs in Release No. 34-57967. As discussed in that release, such competition could promote ease of comparability between ratings.

<sup>127</sup> 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 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.

Forms S-1 or F-1. This could result in additional time spent in the offering process, and issuers may incur costs associated with preparing and filing post-effective amendments to the registration statement.

The Commission does not expect the proposed changes to Forms F-1, F-3 and F-4 to impact substantially the number of registrants able to provide information required by Item 17 of Form 20-F in lieu of Item 18 information. However, because the Commission is proposing changes to the provisions of the forms that provide the eligibility requirements for registrants to provide Item 17 information instead of Item 18, registrants who do not meet the proposed criteria could incur more costs as a result of being required to provide Item 18 information instead.

For the most part, the Commission believes that there would be minimal costs involved with the adoption of the proposed ABS offering Form S-3 eligibility requirements and eligibility to rely on Rule 415(a)(vii) for mortgage-backed securities.<sup>128</sup> Some costs may be incurred on the part of issuers to ensure that sales of the securities in an offering on Form S-3 are made only to qualified institutional buyers and in the prescribed denominations; however, the Commission believes these costs are not significant. To the extent that some issuers would no longer be able to use Form S-3 to register their offerings, those issuers may face some additional costs, such as those arising from no longer being able to utilize certain rules permitting the use of offering materials.

The proposed revision to Rule 134 could impose a disclosure burden of ascertaining whether the entity is an NRSRO, but the Commission believes this burden is

slight given the limited number of NRSROs, the availability of this information from public filings, and the issuer's relationship with the credit rating agency.

#### **D. Request for Comments**

We seek comments and empirical data on all aspects of this Cost-Benefit Analysis. Specifically, we ask the following:

- Are there any costs involved with tracking whether the initial purchaser is a qualified institutional buyer? Are most ABS offerings on Form S-3 sold to such purchasers? What kind of asset-backed securities are sold to retail investors?
- Are there any costs entailed with tracking the denominations of the sale for the purposes of meeting the proposed ABS offering Form S-3 eligibility requirements?
- 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 Act<sup>129</sup> 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

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<sup>128</sup> ABS issuers generally provide the same disclosure in Form S-1 and Form S-3 registration statements. As such, there may not be the same cost concerns for ABS issuers that no longer qualify for registration on Form S-3 as for other issuers.

<sup>129</sup> 15 U.S.C. 78w(a).

of the purposes of the Exchange Act. Section 2(b) of the Securities Act<sup>130</sup> and Section 3(f) of the Exchange Act<sup>131</sup> require the Commission, when engaging in rulemaking, to consider whether an action is necessary or appropriate in the public interest, and in addition, to consider the protection of investors and whether the action would promote efficiency, competition, and capital formation.

The proposed amendments would eliminate reliance on ratings by an NRSRO in various rules and forms under the Securities Act and the Exchange Act. If adopted, the Commission believes that these amendments would reduce the potential for over-reliance on ratings, and thereby promote investor protection. The Commission anticipates that these proposed amendments would improve investors' ability to make informed investment decisions, which will therefore lead to increased efficiency and competitiveness of the U.S. capital markets. The Commission expects that this increased market efficiency and investor confidence also may encourage more efficient capital formation. Specifically, the proposed amendments would:

- Seek to limit the investors purchasing asset-backed securities off a short-form registration statement to sophisticated and experienced investors without creating an undue detriment to the liquidity of the asset-backed securities market; and
- Seek to limit the issuers eligible to register primary offerings of non-convertible securities on Forms S-3 and F-3 and incorporate by reference to issuers that are actively followed by the markets; and
- Enhance the ability of credit rating agencies to offer security ratings to issuers.

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<sup>130</sup> 15 U.S.C. 77b(b).



The Commission solicits comment on whether the proposed amendments would change the Forms S-3 and F-3 eligibility requirements for registering primary offerings of non-convertible securities, 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, and what options would best minimize those effects. The Commission requests comment on whether the proposed changes to the eligibility requirement on Form S-3 for offerings of asset-backed securities would promote or burden efficiency, competition, and capital formation. The Commission requests comment on whether the proposed eligibility criterion is less efficient than using the current NRSRO criterion? Additionally, the Commission solicits comment on whether the proposed expansion of the ability of credit rating agencies to proffer their security ratings without being required to provide a consent for an issuer to disclose those ratings would promote or burden efficiency, competition, and capital formation. Finally, the Commission requests comment on the anticipated effect of disclosure requirements on competition in the market for credit rating agencies. The Commission requests commenters 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:

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<sup>131</sup> 15 U.S.C. 78c(f).

- Amend the Securities Act Form S-3 eligibility requirements for offerings of asset-backed securities by replacing the investment grade component with a minimum denomination requirement for initial and subsequent sales and require that initial sales of classes of securities only be made to qualified institutional buyers;
- Amend Rule 415 of the Securities Act that references mortgaged related securities by adding the requirement that an initial and subsequent sale of such a security must meet certain minimum denominations, and initial sales must be made to qualified institutional buyers;
- 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 more than \$1 billion in non-convertible securities, other than common stock, through registered primary offerings, within the prior three years;
- Amend Form F-9 which requires securities to be rated investment grade to instead require that the issuer have issued in the prior three years at least \$1 billion of aggregate principle amount of debt or preferred securities for cash in registered primary offerings;
- 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;
- Amend Item 10(c) to conform to our proposed Rule 436(g) changes;

- Amend Rule 134(a)(17) to allow for disclosure of ratings assigned by any Credit Rating Agency—not just NRSROs; and
- Amend Rule 436(g) to replace the current reference to “nationally recognized statistical rating organization” with a reference to “credit rating agency.”

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 that will be disclosed are expected to be ratings obtained and used by the issuer. Issuers are 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 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 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,<sup>132</sup> 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

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<sup>132</sup> Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

- 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:

- 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 12, 13, 14, 15(d) and 23(a) of the Exchange Act.

### **List of Subjects**

17 CFR Parts 229, 230, 239, and 240

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 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**

1. The authority citation for part 229 continues to read in part 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.; 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

2. Amend § 229.10, paragraph (c)(1)(i) by:
  - a. Removing the second sentence;
  - b. Revising “NRSRO” in the third sentence to read, “credit rating agency (as defined in 15 U.S.C. 78c(a)(61))”; and
  - c. Revising the phrase “Instruction to paragraph (a)(2)” in the fourth sentence to read, “paragraph A.2.(B)”.
3. Amend § 229.1100 by revising paragraph (c)(2)(ii)(B) to read as follows:

**§ 229.1100 (Item 1100) General.**

\* \* \* \* \*

- (c) \* \* \*
- (2) \* \* \*
- (ii) \* \* \*

(B) The third party meets the requirements of General Instruction I.A. of Form S-3 or General Instructions 1.A.1, 2, 3, 4, and 6 of Form F-3 and the pool assets relating to such third party are non-convertible securities, other than common equity, that were issued in a primary offering for cash that was registered under the Securities Act.

\* \* \* \* \*

4. Amend § 229.1112 by:
  - a. Removing Instruction 2 to Item 1112(b);

- b. Redesignating Instructions 3 and 4 to Items 1112(b) as Instructions 2 and 3 to Item 1112(b).
- 5. Amend § 229.1114 by:
  - a. Revising the heading for “Instructions to Item 1114:” to read “Instructions to Item 1114(b):”.
  - b. Removing Instruction 3 to Item 1114.
  - c. Redesignating Instructions 4 and 5 to Item 1114 as Instructions 3 and 4 to Item 1114.

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

- 6. 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, and 80a-37, unless otherwise noted.

\* \* \* \* \*

- 7. Amend §230.134 by:
  - a. Revising paragraph (a)(17)(i);
  - b. Redesignating paragraph (a)(17)(ii) as paragraph (a)(17)(iii); and
  - c. Adding new paragraph (a)(17)(ii).

The revision and addition read as follows:

**§ 230.134 Communications not deemed a prospectus.**

\* \* \* \* \*

(a) \* \* \*

(17) \* \* \*

(i) Any security rating assigned, or reasonably expected to be assigned, by a credit rating agency, as that term is defined in 15 U.S.C. 78c(a)(61), and the name or names of the credit rating agencies that assigned or is or are reasonably expected to assign the rating(s);

(ii) If the credit rating agency or agencies that assigned or is or are reasonably expected to assign the rating(s) is not a nationally recognized security rating organization, as that term is defined in 15 U.S.C. 78c(a)(62), include a statement to that effect; and

\* \* \* \* \*

8. 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; and

\* \* \* \* \*

9. 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; or

\* \* \* \* \*

(B) \* \* \*

(2) \* \* \*

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

\* \* \* \* \*

10. 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; and

\* \* \* \* \*

11. Amend §230.415 by revising paragraph (a)(1)(vii) to read as follows:

**§ 230.415 Delayed or continuous offering and sale of securities.**



(a) \* \* \*

(1) \* \* \*

(vii) Mortgage backed securities, including such securities as mortgage backed debt and mortgage participation or pass through certificates, provided that:

(A) Initial sale and any resales of the securities are made in minimum denominations of \$250,000; and

(B) Initial sales of the securities are made only to qualified institutional buyers (as defined in §230.144A(a)(1)); and

(C) Either of the following is true:

(1) Represents ownership of one or more promissory notes or certificates of interest or participation in such notes (including any rights designed to assure servicing of, or the receipt or timeliness of receipt by the holders of such notes, certificates, or participations of amounts payable under, such notes, certificates, or participations), which notes:

(i) Are directly secured by a first lien on a single parcel of real estate, including stock allocated to a dwelling unit in a residential cooperative housing corporation, upon which is located a dwelling or mixed residential and commercial structure, on a residential manufactured home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, whether such manufactured home is considered real or personal property under the laws of the State in which it is to be located, or on one or more parcels of real estate upon which is located one or more commercial structures; and

(ii) Were originated by a savings and loan association, savings bank, commercial bank, credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or by a mortgage approved by the Secretary of Housing and Urban Development pursuant to sections 203 and 211 of the National Housing Act, or, where such notes involve a lien on the manufactured home, by any such institution or by any financial institution approved for insurance by the Secretary of Housing and Urban Development pursuant to section 2 of the National Housing Act; or

(2) Is secured by one or more promissory notes or certificates of interest or participations in such notes (with or without recourse to the issuer thereof) and, by its terms, provides for payments of principal in relation to payments, or reasonable projections of payments, on notes meeting the requirements of paragraphs (a)(1)(vii)(C)(1) (i) and (ii) of this section or certificates of interest or participations in promissory notes meeting such requirements.

Note to paragraph (a)(1)(vii): For purposes of paragraph (a)(1)(vii) of the section, the term “promissory note,” when used in connection with a manufactured home, shall also include a loan, advance, or credit sale as evidence by a retail installment sales contract or other instrument.

\* \* \* \* \*

12. Amend §230.436 by revising paragraph (g) and removing the authority citations following the section to read as follows:

**§ 230.436 Consents required in special cases.**

\* \* \* \* \*

(g) Notwithstanding the provisions of paragraphs (a) and (b) of this section, the security rating assigned to a class of debt securities, a class of convertible debt securities, or a class of preferred stock by a credit rating agency as defined in 15 U.S.C. 78c(a)(61), or with respect to registration statements on Form F-9 (§239.39 of this chapter) by any other rating organization specified in the Instruction to paragraph A of General Instruction I of Form F-9, shall not be considered a part of the registration statement prepared or certified by a person within the meaning of sections 7 and 11 of the Act.

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

13. 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, and 80a-37, unless otherwise noted.

\* \* \* \* \*

14. Amend Form S-3 (referenced in §239.13) by:

- a. Revising General Instructions I.B.2 and I.B.5; and
- b. Removing Instruction 3 to the signature block.

The revisions read 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.

\* \* \* \* \*

5. Offerings of Asset-backed Securities.

(a) Asset-backed securities (as defined in 17 CFR 229.1101) to be offered for cash, provided:

- (i) Initial sales and any resales of the securities are made in minimum denominations of \$250,000;
- (ii) Initial sales of the securities are made only to qualified institutional buyers (as defined in 17 CFR 230.144A(a)(1));
- (iii) Delinquent assets do not constitute 20% or more, as measured by dollar volume, of the asset pool as of the measurement date; and
- (iv) With respect to securities that are backed by leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases, as determined in accordance with the

transaction agreements for the securities, does not constitute 20% or more, as measured by dollar volume, of the securitized pool balance as of the measurement date.

Instruction. For purposes of making the determinations required by paragraphs (a)(iii) and (a)(iv) of this General Instruction I.B.5, refer to the Instructions to Item 1101(c) of Regulation AB (17 CFR 229.1101(c)).

\* \* \* \* \*

15. 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

\* \* \* \* \*

16. Amend Form F-1 (referenced in § 239.31) by revising Item 4.c, including

the Instructions to read as follows:

**Note – The text of Form F-1 does not, and this amendment will not, appear in the Code of Federal Regulations.**

**FORM F-1**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

**Item 4. Information with Respect to the Registrant and the Offering.**

\* \* \* \* \*

c. Information required by Item 17 of Form 20-F may be furnished in lieu of the information specified by Item 18 thereof if:

1. The only securities being registered are non-convertible securities offered for cash and 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 registered under the Act; or

2. The only securities to be registered are to be offered:

i. Upon the exercise of outstanding rights granted by the issuer of the securities to be offered, if such rights are granted on a pro rata basis to all existing security holders of the class of securities to which the rights attach and there is no standby underwriting in the United States or similar arrangement; or

ii. Pursuant to a dividend or interest reinvestment plan; or

iii. Upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer of the securities to be offered, or by an affiliate of such issuer.

Instruction: Attention is directed to section 10(a)(3) of the Securities Act.

\* \* \* \* \*

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 to General Instruction I.B.2 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. In the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement may comply with Item 17 or 18 of Form 20-F.

\* \* \* \* \*

18. Amend Form F-4 (referenced in §239.34) by:

- a. revising General Instruction B.1(a)(ii)(B); and
- b. revising the following in Part I.B: Instruction 1 to Item 11 following paragraph (a)(3); the first sentence in paragraph (b)(2) to Item 12; Instruction 1 to Item 13 following paragraph (b); and paragraph (h) to Item 14.

The revisions read 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

\* \* \* \* \*

**PART I -- INFORMATION REQUIRED IN THE PROSPECTUS**

\* \* \* \* \*

**B. INFORMATION ABOUT THE REGISTRANT**



\* \* \* \* \*

**Item 11. Incorporation of Certain Information by Reference.**

\* \* \* \* \*

- (a) \* \* \*
- (3) \* \* \*

Instructions

1. All annual reports or registration statements incorporated by reference pursuant to Item 11 of this Form shall contain financial statements that comply with Item 18 of Form 20-F except that financial statements of the registrants may comply with Item 17 of Form 20-F if the only securities being registered are non-convertible securities offered for cash and the requirements of General Instruction I.B.2 of Form F-3 have been satisfied.

\* \* \* \* \*

**Item 12. Information With Respect to F-3 Registrants.**

\* \* \* \* \*

- (b) \* \* \*
- (2) Include financial statements and information as required by Item 18 of Form 20-F, except that financial statements of the registrant may comply with Item 17 of Form 20-F if the requirements of General Instruction I.B.2 of Form F-3 have been satisfied. \* \* \*

\* \* \* \* \*

**Item 13. Incorporation of Certain Information by Reference.**

\* \* \* \* \*

(b) \* \* \*

Instructions

1. All annual reports incorporated by reference pursuant to Item 13 of this Form shall contain financial statements that comply with Item 18 of Form 20-F, except that financial statements of the registrants may comply with Item 17 of Form 20-F if the only securities being registered are non-convertible securities offered for cash and the requirements of General Instruction I.B.2 of Form F-3 have been satisfied.

\* \* \* \* \*

**Item 14. Information With Respect to Foreign Registrants Other Than F-3 Registrants.**

\* \* \* \* \*

(h) Financial statements required by Item 18 of Form 20-F, except that financial statements of the registrants may comply with Item 17 of Form 20-F if the only securities being registered are non-convertible securities offered for cash and the requirements of General Instruction I.B.2 of Form F-3 have been satisfied, as well as financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued (Schedules required by Regulation S-X shall be filed as “Financial Statement Schedules” pursuant to Item 21 of this Form); and

\* \* \* \* \*

19. Amend Form F-9 (referenced in §239.39) by:
- a. Revising General Instruction I.A;
  - b. Removing Instruction D to the signature block.

The revision reads as follows:

**Note – The text of Form F-9 does not, and this amendment will not, appear in the Code of Federal Regulations.**

## **FORM F-9**

### **REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

#### **GENERAL INSTRUCTIONS**

##### **I. Eligibility Requirements for Use of Form F-9**

###### **A. Form F-9 may be used for the registration under the Securities Act of 1933**

(the “Securities Act”) for an offering of debt or preferred securities if:

(1) The debt or preferred securities to be offered are:

(A) Offered for cash or in connection with an exchange offer; and

(B) Either non-convertible or not convertible for a period of at least one year from the date of issuance and, except as noted in E. below, are thereafter only convertible into a security of another class of the issuer; and

(2) Either of the following are true:

(A) 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 of aggregate principal amount of debt or preferred securities for cash in primary offerings registered under the Act; or

(B) The securities are investment grade debt or investment grade preferred securities. Securities shall be “investment grade” for purposes of this requirement if, at the time of sale, at least one Approved Rating Organization (as defined in National Policy Statement No. 45 of the Canadian Securities Administrator, as the same may be amended

from time to time) has rated the security in one of its generic rating categories that signifies investment grade; typically the four highest rating categories (within which there may be subcategories or gradations indicating relative standing) signify investment grade.

\* \* \* \* \*

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

20. The authority citations for part 240 continues to read in part 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, 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.; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

21. 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; or

\* \* \* \* \*

By the Commission.

Florence E. Harmon  
Acting Secretary

Dated: July 1, 2008