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SEC Eliminates Form F-9 and Adopts New Rules for Short-Form Eligibility

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On July 26, 2011, the U.S. Securities and Exchange Commission adopted new rules under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* that will (i) eliminate Form F-9, one of the registration statements used by companies under the Multijurisdictional Disclosure System (MJDS) to offer securities in the United States; and (ii) replace investment-grade credit ratings as a basis for issuers being eligible to offer securities using the short-form registration statements Form S-3 and Form F-3.

Elimination of Form F-9

Currently, Form F-9 may be used by eligible Canadian issuers to register non-convertible investment-grade debt or preferred securities under MJDS. With the elimination of Form F-9, MJDS issuers will use Form F-10 to register all types of securities. Form F-10 is the same as Form F-9 except that it requires the issuer to have a minimum public float of US$75 million. (Historically, Form F-10 also required the issuer's financial statements to be reconciled to U.S. GAAP, but this is no longer required for issuers whose financial statements are prepared in accordance with International Financial Reporting Standards (IFRS).) The SEC expects the elimination of Form F-9 to affect very few Canadian companies upon their transition to IFRS. Moreover, the SEC has adopted a temporary grandfathering provision that will permit Canadian issuers to use Form F-10 for the next three years if certain conditions are met, even if they fail to meet the minimum public float requirement.

Changes to Short-Form Registration Statements on Form S-3 and Form F-3

The new SEC rules remove the ability of issuers to rely on an investment-grade credit rating as the basis for eligibility to use short-form registration statements. Instead of the current credit-rating criteria, the new rules will permit the use of Form S-3 or F-3 if an issuer satisfies one of the following tests (in addition to meeting other eligibility requirements):

- the issuer has issued at least US$1 billion of non-convertible securities, other than common equity, in primary registered offerings for cash in the last three years;
- the issuer has outstanding at least US$750 million of non-convertible securities, other than common equity, issued in primary registered offerings for cash;
- the issuer is a wholly owned subsidiary of a well-known seasoned issuer; or

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- the issuer is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer.

To facilitate the transition, for three years after the effectiveness of the new rules, an issuer may still use Form S-3 or F-3 if it reasonably believes that it would have been eligible to use such form under the old rules.

In addition to eliminating credit ratings as a basis for short-form eligibility, the new rules will require issuers making a public offering to take greater care in disclosing information about their securities' credit ratings and will need to assess whether such disclosure can be made in a news release announcing the filing of a registration statement without the news release becoming subject to heightened liability standards. SEC rules limit the information that can be included in a news release regarding an offering, and news releases that go beyond the scope of permitted information may be deemed to be a prospectus and subject to issuer liability if there are material misstatements or omissions.