July 22, 2010

SEC Division of Corporation Finance
Compliance and Disclosure Interpretations ("C&DIs")
Changes made in response to the abrogation of Securities Act Rule 436(g)

New C&DIs added

Question 198.08

Question: An issuer not subject to Regulation AB disclosure requirements has a registration statement on Form S-3 or Form F-3 that was declared effective before July 22, 2010 and includes or incorporates by reference ratings information that is not limited to issuer disclosure-related ratings information. Can the issuer continue to use its registration statement without filing a consent by the credit rating agency?

Answer: Yes. In this fact pattern, the staff would not object to reliance upon Rule 401(a) under the Securities Act to allow continued use of the registration statement for the limited period permitted under Rule 401(a). This would be applicable only until the next post-effective amendment to such registration statement and only if no subsequently incorporated periodic or current report contains ratings information that is not limited to issuer disclosure-related ratings information. Note that the filing of the issuer's next annual report on Forms 10-K, 20-F or 40-F is deemed to be the post-effective amendment of such registration statement for purposes of Securities Act Section 10(a)(3), so that in accordance with Rule 401(a), the registration statement could no longer be used after the annual report is filed without the filing of the consent. [July 22, 2010]

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Question 233.04

Question: For a company not subject to Regulation AB disclosure requirements, when would a consent by a credit rating agency be required if information about a company's credit ratings is included in, or incorporated by reference into, a Securities Act registration statement or a Section 10(a) prospectus?
Answer: A consent would be required if the company includes the credit rating in its registration statement or Section 10(a) prospectus (directly or through incorporation by reference), unless the rating information is included only for the purpose of satisfying disclosure requirements as described below.
If the disclosure of a credit rating in a filing with the Commission is related only to changes to a credit rating, the liquidity of the registrant, the cost of funds for a registrant or the terms of agreements that refer to credit ratings ("issuer disclosure-related ratings information"), then a consent by the credit rating agency would not be required. For example, some companies note their ratings in the context of a risk factor discussion regarding the risk of failure to maintain a certain rating and the potential impact a change in credit rating would have on the registrant. A company also may refer to, or describe, its ratings in the context of its liquidity discussion in Management's Discussion and Analysis of Financial Condition and Results of Operations. Companies may also need to discuss ratings when they describe debt covenants, interest or dividends that are tied to credit ratings or potential support to variable interest entities. See Release No. 33-9070 (Oct. 7, 2009) [74 FR 53086]. [July 22, 2010]

Question 233.05

Question: For a company not subject to Regulation AB disclosure requirements, would a consent by a credit rating agency be required if ratings information, other than issuer disclosure-related ratings information, is included in, or incorporated by reference into, a prospectus or prospectus supplement first filed on or after July 22, 2010?
Answer: Yes. [July 22, 2010]

Question 233.06

Question: For a company not subject to Regulation AB disclosure requirements, if ratings information is included in a free writing prospectus that complies with Securities Act Rule 433 or in a term sheet or press release that complies with Securities Act Rule 134, is a consent from a credit rating agency required?
Answer: No. Securities Act Rule 436, which requires the filing of written consents by experts, applies only to "registration statements" and to "prospectuses." A Rule 433 free writing prospectus is not part of a registration statement, nor, as a Section 10(b) prospectus, is it included in the definition of "prospectus" in Securities Act Rule 405. Communications that are in compliance with Rule 134 are not prospectuses. If any of these documents are also filed as prospectuses under Rule 424, a consent would be required. [July 22, 2010]

Question 233.07

Question: An issuer not subject to Regulation AB disclosure requirements has a registration statement on Form S-3 or Form F-3 that was declared effective before July 22, 2010 and includes or incorporates by reference ratings information that is not limited to issuer disclosure-related ratings information. Can the issuer continue to use its registration statement without filing a consent by the credit rating agency?
Answer: Yes. In this fact pattern, the staff would not object to reliance upon Rule 401(a) under the Securities Act to allow continued use of the registration statement for the limited period permitted under Rule 401(a). This would be applicable only until the next post-effective amendment to such registration statement and only if no subsequently incorporated periodic or current report contains ratings information that is not limited to issuer disclosure-related ratings information. Note that the filing of the issuer's next annual report on Forms 10-K, 20-F or 40-F is deemed to be the post-effective amendment of such registration statement for purposes of Securities Act Section 10(a)(3), so that in accordance with Rule 401(a), the registration statement could no longer be used after the annual report is filed without the filing of the consent. [July 22, 2010]

Question 233.08

Question: For a company not subject to Regulation AB disclosure requirements, if a registration statement or post-effective amendment becomes effective on or after July 22, 2010 and includes or incorporates by reference ratings information that is not limited to issuer disclosure-related ratings information, is a consent by a credit rating agency required to be filed with the registration statement or post-effective amendment?
Answer: Yes. [July 22, 2010]