is accepted by the CPSC on or before October 3, 2011;

• With regard to tests conducted under F 963–08, the product was tested to the applicable section(s) on or after May 13, 2009; with regard to tests conducted under section 4.27 of F 963–07ε1, the product was tested on or after August 14, 2008;

• The accreditation scope in effect for the third party conformity assessment body at the time of testing expressly included testing to the toy standard section(s) under which the test(s) was conducted;

• The test results show compliance with the applicable current toy standards; and

• The third party conformity assessment body's accreditation, including inclusion in its scope of the toy standard section(s) under which the test(s) was conducted, remains in effect through the effective date for mandatory third party testing and manufacturer certification for conformity with ASTM F 963–08 and/or section 4.27 of ASTM F 963–07ε1.

Dated: July 22, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–18962 Filed 8–2–11; 8:45 am]

BILLING CODE 6355–01–P

SECURITIES AND EXCHANGE COMMISSION

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

[Release No. 33–9245; 34–64975; File No. S7–18–08]

RIN 3235–AK18

Security Ratings

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: In light of the provisions of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, we are adopting amendments to replace rule and form requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934 for securities offering or issuer disclosure rules that rely on, or make special accommodations for, security ratings (for example, Forms S–3 and F–3 eligibility criteria) with alternative requirements.

DATES: *Effective Date:* This rule is effective September 2, 2011 except for the following amendments, which are effective December 31, 2012:

• Amendatory instruction 2 amending 17 CFR 200.800;

• Amendatory instruction 4 amending 17 CFR 229.10;

• Amendatory instruction 10 amending 17 CFR 230.467;

• Amendatory instruction 11 amending 17 CFR 230.473;

• Amendatory instruction 13 amending 17 CFR 232.405;

• Amendatory instruction 21 amending 17 CFR 239.38;

• Amendatory instruction 22 amending Form F–8 [referenced in 17 CFR 239.38];

• Amendatory instruction 23 removing Form F–9 [referenced in § 239.39];

• Amendatory instruction 24 amending 17 CFR 239.40;

• Amendatory instruction 25 amending Form F–10 [referenced in 17 CFR 239.40];

• Amendatory instruction 26 amending 17 CFR 239.41;

• Amendatory instruction 27 amending Form F–80 [referenced in 17 CFR 239.41];

• Amendatory instruction 28 amending 17 CFR 239.42;

• Amendatory instruction 29 amending Form F–X [referenced in 17 CFR 239.42];

• Amendatory instruction 33 amending 17 CFR 249.240f; and

• Amendatory instruction 34 amending Form 40–F [referenced in 17 CFR 249.240f].

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

SUPPLEMENTARY INFORMATION: We are adopting amendments to rules and forms under the Securities Act of 1933 (''Securities Act''),[1] and the Securities Exchange Act of 1934 (''Exchange Act'').[2] Under the Securities Act, we are adopting amendments to Rules 134,[3] 138,[4] 139,[5] 168,[6] Form S–3,[7] Form S–4,[8] Form F–3,[9] and Form F–4.[10] We are rescinding Form F–9 [11] and adopting amendments to the Securities Act and Exchange Act forms and rules that refer to Form F–9 to eliminate those references.[12] We are also amending Schedule 14A [13] under the Exchange Act.

I. Introduction

We are adopting amendments today to remove references to credit ratings in rules and forms promulgated under the Securities Act and the Exchange Act. On February 9, 2011, we proposed amendments in light of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank'') [14] to remove references to credit ratings in rules and forms under the Securities Act and the Exchange Act.[15] We proposed similar changes in 2008, prior to the enactment of the Dodd-Frank Act, but did not act on those proposals.[16]

We have considered the role of credit ratings in our rules under the Securities Act on several previous occasions and even proposed removal of some references to credit ratings prior to the enactment of the Dodd-Frank Act.[17]

[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 230.134.

[4] 17 CFR 230.138.

[5] 17 CFR 230.139.

[6] 17 CFR 230.168.

[7] 17 CFR 239.13.

[8] 17 CFR 239.25.

[9] 17 CFR 239.33.

[10] 17 CFR 239.34.

[11] 17 CFR 239.39.

[12] We are removing references to Form F–9 in Securities Act Forms F–8 [17 CFR 239.38], F–10 [17 CFR 239.40], F–80 [17 CFR 239.41], and Form F–X [17 CFR 239.42]; in Exchange Act Form 40–F [17 CFR 249.240f], and in the following rules: 17 CFR 200.800, 17 CFR 229.10, 17 CFR 230.134, 17 CFR 230.467, 17 CFR 230.473, and 17 CFR 232.405.

[13] 17 CFR 240.14a–101.

[14] Pub. L. No. 111–203, 124 Stat. 1376 (2010). Section 939A of the Dodd-Frank Act requires that we ''review any regulation issued by [us] that requires the use of an assessment of the credit-worthiness of a security or money market instrument and any references to or requirements in such regulations regarding credit ratings.'' Once we have completed that review, the statute provides that we modify any regulations identified in our review to ''remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness'' as we determine to be appropriate.

[15] *See Security Ratings,* Release No. 33–9186 (Feb. 9, 2011) [76 FR 8946] (''2011 Proposing Release'').

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

[17] See the 2008 Proposing Release for a discussion of the history and background of references to credit ratings in rules and regulations under the Securities Act. See also *Credit Ratings Disclosure,* Release No.

Continued

While we recognize that credit ratings play a significant role in the investment decisions of many investors, we want to avoid using credit ratings in a manner that suggests in any way a ''seal of approval'' on the quality of any particular credit rating or rating agency, including any nationally recognized statistical rating organization (''NRSRO''). Similarly, the legislative history indicates that Congress, in adopting Section 939A, intended to ''reduce reliance on credit ratings.'' [18] The rules we are adopting today seek to reduce our reliance on credit ratings for regulatory purposes while also preserving the use of Form S–3 (and similar forms) for issuers that we believe are widely followed in the market.

As discussed in more detail below, we are adopting the amendments with certain changes from the proposals. We received 48 comment letters on the 2011 Proposing Release and have modified the final amendments in certain respects in response to the comments we received.

We are adopting amendments today to revise General Instruction I.B.2. of Form S–3 and Form F–3 to provide that an offering of non-convertible securities, other than common equity, is eligible to be registered on Form S–3 and Form F–3 if:

(i) The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) The issuer is a wholly-owned subsidiary of a well-known seasoned issuer (''WKSI'') as defined in Rule 405 under the Securities Act; [19] or

(iv) The issuer is a majority-owned operating partnership of a real estate investment trust (''REIT'') that qualifies as a WKSI; or

(v) The issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S–3 or Form F–3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments. As before today's amendments, issuers using Form S–3 or Form F–3 would also need to satisfy the other relevant requirements of Form S–3 and Form F–3, including the requirements in General Instruction I.A. of those forms.[20]

We are also rescinding Form F–9 under the Securities Act because we believe that regulatory changes have rendered the form unnecessary. Further, we are adopting amendments to Rules 138, 139 and 168 under the Securities Act and Schedule 14A under the Exchange Act so that they refer to the new eligibility criteria in Form S–3 and Form F–3. Finally, we are removing Rule 134(a)(17) under the Securities Act.

II. Discussion of the Amendments

A. Primary Offerings of Non-Convertible Securities Other Than Common Equity

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

Form S–3 and Form F–3 are the ''short forms'' used by eligible issuers to register securities offerings under the Securities Act. These forms allow eligible issuers to rely on reports they have filed under the Exchange Act to satisfy many of the disclosure requirements under the Securities Act. Form S–3 and Form F–3 eligibility for primary offerings also enables eligible issuers to conduct primary offerings ''off the shelf'' under Securities Act Rule 415.[21] Rule 415 provides considerable flexibility in accessing the public securities markets in response to changes in the market and other factors. Issuers that are eligible to register these primary ''shelf'' offerings under Rule 415 are permitted to register securities offerings prior to planning any specific offering and, once the registration statement is effective, offer securities in one or more tranches without waiting for further Commission action. To be eligible to use Form S–3 or Form F–3, an issuer must meet the form's eligibility requirements as to registrants, which generally pertain to reporting history under the Exchange Act,[22] and at least one of the form's transaction requirements.[23] One such transaction requirement permits registrants to register primary offerings of non-convertible securities, if they are rated investment grade by at least one NRSRO.[24] General 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.

General Instruction I.B.2. to Form S–3 provides issuers of non-convertible securities whose public float does not reach the required threshold, or that do not have a public float, with an alternate means of becoming eligible to register offerings on Form S–3. Consistent with Form S–3, the Commission also adopted a provision in Form F–3 providing for the eligibility of a primary offering of investment grade non-convertible securities by eligible foreign private issuers.[25]

Since the adoption of those rules relating to security ratings in Form S–

33–9070 (Oct. 7, 2009) [74 FR 53086], which includes a proposal to require disclosure regarding credit ratings under certain circumstances.

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

[19] 17 CFR 230.405.

[20] We are also adopting a technical amendment to General Instruction I.B.5 of Form S–3.

[21] 17 CFR 230.415.

[22] *See* General Instruction I.A. to Forms S–3 and F–3.

[23] *See* General Instruction I.B to Forms S–3 and F–3. In addition to permitting offerings of investment grade securities, an issuer who meets the eligibility criteria in General Instruction I.A. may use Form S–3 or Form F–3 for primary offerings if the issuer has a public float in excess of $75 million, transactions involving secondary offerings, and rights offerings, dividend reinvestment plans, warrants and options. In addition, certain subsidiaries are eligible to use Form S–3 or Form F–3 for debt offerings if the parent company satisfies the eligibility requirements in General Instruction I.A. and provides a full and unconditional guarantee of the obligations being registered by the subsidiary. Pursuant to the revisions to Form S–3 and Form F–3 adopted in 2007, issuers also may conduct primary securities offerings registered 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].

[24] *See* General Instruction I.B.2. to Forms S–3 and F–3.

[25] 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].

3 and Form F–3, other Commission forms and rules relating to securities offerings or issuer disclosures have included requirements that likewise rely on securities ratings.[26] Among them are Form F–9,[27] Forms S–4 and F–4,[28] and Exchange Act Schedule 14A.[29]

2. The 2011 Proposing Release

In February 2011, we proposed to revise the instructions to Form S–3 and Form F–3 so that they 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, we proposed that these forms would be available to register primary offerings of non-convertible securities if the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) for cash at least $1 billion in non-convertible securities, other than common equity, in offerings registered under the Securities Act, over the prior three years. The proposals in the 2011 Proposing Release were substantially similar to amendments that were proposed in 2008.[30]

3. Comments Received on the 2011 Proposing Release

We received 48 comment letters on the 2011 Proposing Release.[31] We received nine comment letters from law firms, nine comment letters from associations or industry groups, 16 comment letters from utility companies, one comment letter from an institutional investor, two comment letters from banks or bank holding companies and 11 comment letters from other interested parties. The majority of the comments focused on the proposals to amend the eligibility criteria for Form S–3 and Form F–3.

All of the commentators suggested modifications to the proposals to amend Form S–3 and Form F–3. Several commentators believed that Congress did not intend to change the pool of issuers eligible to use Form S–3 and Form F–3.[32] Commentators generally did not believe that the Form S–3 and Form F–3 criteria needed to mirror the standard for issuers to qualify as WKSIs.[33] In particular, commentators noted that the proposed non-convertible securities (other than common equity) offering standard in the 2011 Proposing Release was disproportionately higher than the standard for primary offerings on Form S–3 and Form F–3 by issuers that have an aggregate market value of $75 million or more for their voting and non-voting common equity held by non-affiliates.[34] As a result, commentators raised concerns that the proposals would result in issuers who are currently eligible to use Form S–3 or Form F–3 losing that eligibility.[35]

In the 2011 Proposing Release, we requested comment on whether we should adopt rules that would keep the pool of issuers currently eligible to use Form S–3 and Form F–3 substantially the same. Commentators suggested several alternatives to the proposals in the 2011 Proposing Release that may preserve Form S–3 and Form F–3 eligibility for certain issuers. The commentators generally believed that the alternatives suggested would reserve the use of Form S–3 and Form F–3 for issuers that were widely followed in the marketplace. Some of the alternatives suggested by commentators include:

- Allowing either wholly or majority-owned subsidiaries of WKSIs to use Form S–3 or Form F–3;[36]
- Basing the eligibility standard on having $1 billion of non-convertible securities other than common equity outstanding;[37]
- Lowering the $1 billion threshold (commentators suggested various thresholds with some as low as $250 million);[38]
- Extending the measurement period for the $1 billion threshold to five years from three years;[39]
- Allowing securities issued in unregistered offerings of non-convertible securities other than common equity to be included in the calculation of the $1 billion threshold;[40]
- Allowing non-convertible securities other than common equity issued in registered exchange offerings to be included in the $1 billion calculation;[41]
- Allowing U.S. dollar denominated non-convertible securities other than common equity issued in Regulation S offerings to be included in the $1 billion calculation;[42]
- Adding an exception to allow regulated operating subsidiaries of utility companies to continue to use Form S–3 and Form F–3;[43]
- Adding an exception that would allow insurance company issuers of

[26] This release addresses rules and forms filed by issuers, disclosures made by issuers and relevant offering safe harbors under the Securities Act and Schedule 14A under the Exchange Act. In separate releases to be considered at a later date, the Commission intends to adopt rules to address other rules and forms that rely on an investment grade ratings component.

[27] *See* General Instruction I. of Form F–9.

[28] *See* General Instruction B.1 of Form S–4 and General Instruction B.1(a) of Form F–4.

[29] *See* Note E and Item 13 of Schedule 14A.

[30] *See* note 16 above.

[31] The public comments we received on the 2011 Proposing Release are available on our Web site at *http://www.sec.gov/comments/s7-18-08/s71808.shtml*. In addition, to facilitate public input on the Dodd-Frank Act, we provided a series of e-mail links, organized by topic, on our Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml*. The public comments we received on Section 939A of the Dodd-Frank Act are available on our Web site at *http://www.sec.gov/comments/df-title-ix/credit-rating-agencies/credit-rating-agencies.shtml*.

[32] *See* letters from Securities Industry and Financial Markets Association dated March 18, 1011 (SIFMA), SCANA Corporation dated March 28, 2011 (SCANA), Public Service Enterprise Group dated March 28, 2011 (PSEG), Davis Polk & Wardwell dated March 25, 2011 (Davis Polk), Exelon Corporation dated March 28, 2011 (Exelon), National Association of Real Estate Investment Trusts dated March 28, 2011 (NAREIT), The Financial Services Roundtable dated March 28, 2011 (Roundtable), Pepco Holdings, Inc. dated March 28, 2011 (Pepco), Edison Electric Institute dated March 28, 2011 (EEI) and Society of Corporate Secretaries & Governance Professionals dated April 1, 2011 (SCSGP).

[33] *See* letters from SIFMA, Debevoise & Plimpton LLP dated March 29, 2011 (Debevoise), Davis Polk, Cleary, Exelon, NAREIT, SCSGP, McGuire Woods LLP dated March 28, 2011 (McGuire Woods) and UnionBanCal Corporation dated March 28, 2011 (UnionBanCal).

[34] *See* letters from Davis Polk, Cleary, McGuire Woods, Debevoise, UnionBanCal, NAREIT, SCSGP and Exelon.

[35] *See* letters from Boeing Capital Corporation dated March 25, 2011 (BCC), EEI, Central Hudson Gas & Electric Corporation dated March 16, 2011 (Central Hudson), PSEG, DTE Energy Company dated March 28, 2011 (DTE), Alliant Energy Corporation dated March 28, 2011 (Alliant), PNM Resources, Inc. dated March 28, 2011 (PNM), The Laclede Group, Inc. dated March 29, 2011 (Laclede), Vectren Corporation dated April 5, 2011 (Vectren), Sutherland Asbill & Brennan LLP dated March 28, 2011 (Sutherland), Roundtable, NAREIT, SCSGP and American Council of Life Insurers dated May 11, 2011 (ACLI).

[36] *See* letters from BCC, Exelon, EEI, SCSGP, Southern, McGuire Woods, Dominion, Alliant, Laclede, Debevoise, Madison Gas and Electric Company dated March 29, 2011 (MGE), UnionBanCal and Vectren.

[37] *See* letters from SIFMA, BCC, Cleary, AEP, SCANA, Oglethorpe, PSEG, EEI, DTE, UnionBanCal and ACLI. The letter from Debevoise indicates that they would support a debt outstanding test lower than $1 billion, but they did not specify a threshold. The letter from Sutherland supports using a non-convertible security (other than common equity) outstanding test with a $500 million threshold.

[38] *See* letters from Davis Polk, Cleary Gottlieb Steen & Hamilton LLP dated March 28, 2011 (Cleary), McGuire Woods, Debevoise, UnionBanCal, NAREIT, SCSGP and Sutherland.

[39] *See* letters from Cleary, McGuire Woods, Dominion, PSEG and EEI.

[40] *See* letters from Central Hudson, SIFMA, Davis Polk, Exelon, NAREIT, McGuire Woods, Oglethorpe, PSEG, Debevoise, UnionBanCal and SCSGP.

[41] *See* letters from SIFMA, Exelon, McGuire Woods, Oglethorpe, PSEG, Debevoise and SCSGP.

[42] *See* letter from Davis Polk.

[43] *See* letters from Central Hudson, Entergy Corporation dated March 21, 2011 (Entergy), American Electric Power dated March 28, 2011 (AEP), SCANA, Pepco, Roundtable, The Southern Company dated March 28, 2011 (Southern), Dominion Resources, Inc. dated March 28, 2011 (Dominion), Wisconsin Energy Corporation dated March 28, 2011 (Wisconsin Energy), Alliant, DTE, EEI, Laclede, American Gas Association dated March 28, 2011 (AGA) and Vectren.

certain insurance contracts to continue to use Form S–3 and Form F–3;[44] and

• Adding an exception that would allow operating partnership subsidiaries of REITs to continue to use Form S–3 and Form F–3.[45]

Several commentators did not believe that the new eligibility criteria for Form S–3 and Form F–3 for primary offerings of non-convertible securities, other than common equity, should be based on the WKSI standard because it is disproportional to the criteria in Form S–3 and Form F–3 for primary offerings made in reliance on General Instruction I.B.1 of Form S–3 and Form F–3.[46] Commentators noted that the WKSI standard should be more stringent than the criteria for Form S–3 and Form F–3 eligibility because of the benefits, such as automatic shelf registration, that WKSI status confers.[47] Some commentators suggested that we should provide additional, alternative criteria for Form S–3 and Form F–3 eligibility.[48]

In addition, some commentators believed the three-year look back for the $1 billion threshold in the 2011 Proposing Release was arbitrary and could have significant consequences. One commentator believed that the volume standard could be ''volatile'' particularly in times of financial uncertainty.[49] One commentator did not believe its following in the marketplace would be affected by the timing of its debt issuances and would not be significantly affected if it did not issue $1 billion in three years.[50] One commentator did not believe Form S–3 and Form F–3 eligibility should be based on the frequency of debt issuances and believed issuers would be followed on the basis of their debt outstanding.[51] Several utility company commentators noted that debt issuances within their industry are done on an irregular basis in connection with large capital projects, which would make the three-year test difficult to satisfy on a consistent basis.[52]

Commentators generally believed that if issuers were unable to satisfy the proposed standard, they would seek to raise capital in the private markets instead of registering offerings on Form S–1.[53] Commentators believed that private offerings would be more efficient and take less time than a registered offering on Form S–1.[54] Commentators noted that using the private markets would make it difficult for issuers to ever gain eligibility for Form S–3 because the amount of non-convertible securities (other than common equity) issued in private offerings is not included in calculating the $1 billion threshold under the proposal.[55] Commentators also noted that if issuers were to use the private markets, it would be inconsistent with the Commission's policy preference for registered offerings.[56]

We have reviewed and considered all of the comments we received on the proposed amendments. The adopted amendments reflect changes made in response to many of these comments. These changes are discussed in more detail below.

4. Amendments

(i) Replace Investment Grade Rating Criterion With Alternative Criteria

(a) Overview

Today we are adopting amendments to revise the transaction eligibility criteria for registering primary offerings of non-convertible securities on Forms S–3 and F–3. After considering the comments we received on the 2011 Proposing Release, we believe that the amendments we are adopting today provide an appropriate and workable alternative to credit ratings for determining whether an issuer should be able to use Form S–3 and Form F–3 and have access to the shelf offering process.

The instructions to Forms S–3 and F–3 will 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 will be available to register primary offerings of non-convertible securities other than common equity if:

(i) The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) The issuer is a wholly-owned subsidiary of a WKSI as defined in Rule 405 under the Securities Act; or

(iv) The issuer is a majority-owned operating partnership of a REIT that qualifies as a WKSI; or

(v) The issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S–3 or Form F–3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments.[57]

We are modifying eligibility criteria for use of Form S–3 and Form F–3 from the proposal because we are persuaded by commentators' arguments that the criteria from the 2011 Proposing Release could result in some issuers who should be eligible to use Form S–3 or Form F–3 because of their wide market following and who are currently eligible to no longer be eligible. As we noted in the 2011 Proposing Release, we are not aware of anything in the legislative history to indicate that Congress intended to substantially alter the pool of issuers eligible for short-form

[44] *See* letters from Sutherland, Roundtable, and ACLI. Issuers of certain insurance contracts (*e.g.,* contracts with so-called ''market value adjustment'' features and contracts that provide insurance benefits in connection with assets held in an investor's mutual fund, brokerage, or investment advisory account) are currently eligible to use Form S–3 and Form F–3 under General Instruction I.B.2. if these contracts have investment grade ratings. Market value adjustment (''MVA'') features have historically been associated with annuity and life insurance contracts that provide a specified rate of return to purchasers. In order to protect the insurer against the risk that a purchaser may take withdrawals from the contract at a time when the market value of the insurer's assets that support the contract has declined due to rising interest rates, insurers sometime impose an MVA upon surrender. Under an MVA feature, the insurer adjusts the proceeds a purchaser receives upon early surrender to reflect changes in the market value of its portfolio securities supporting the contract.

[45] *See* letter from NAREIT.

[46] *See* letters from Davis Polk, Cleary, McGuire Woods, Debevoise, UnionBanCal and NAREIT.

[47] *Id.*

[48] *See* letters from SIFMA, BCC and Exelon.

[49] *See* letter from Orchard Street Partners LLC dated February 10, 2011 (Orchard Street).

[50] *See* letter from BCC.

[51] *See* letter from Exelon.

[52] *See* letters from Entergy, Exelon, Dominion, Wisconsin Energy, Alliant, Oglethorpe, DTE and EEI.

[53] *See* letters from NAREIT, Davis Polk, Central Hudson, Entergy, Exelon, Oglethorpe, PSEG, DTE, Laclede and AGA.

[54] *See* letters from Central Hudson, Entergy and Exelon.

[55] *See* letters from Central Hudson, SIFMA, Oglethorpe and DTE.

[56] *See* letters from Davis Polk, NAREIT and EEI.

[57] *See* revised General Instruction I.B.2. of Forms S–3 and F–3. We are also deleting the reference to General Instruction I.B.2 in Instruction 3 to the signature block of Forms S–3 and F–3. Instruction 3 to the signature block of Form S–3 and Form F–3 provides that a registrant may sign the registration statement even if a final credit rating has not been issued so long as the registrant states its reasonable belief that the rating will be issued by the time of sale. *See* Section II.B. below for a discussion of General Instruction I.B.5.

registration and access to the shelf registration process.[58] Accordingly, we believe that any alternative standard for Form S–3 and Form F–3 eligibility that does not refer to credit ratings should preserve the forms and access to the shelf registration process for issuers who have a wide following in the marketplace.[59] These modifications to the proposals should preserve short-form eligibility for widely followed issuers. In addition to adding a non-convertible securities issued criteria, as proposed, we are also adding other criteria intended to allow widely followed issuers access to Form S–3 and Form F–3 and the shelf registration process.[60] These criteria do not distinguish among issuers by the quality of their credit but instead focus on wide following in the marketplace. Those modifications are discussed in more detail below.

In the 2011 Proposing Release, we solicited comment specifically related to how the proposals would affect operating subsidiaries of utility companies, REITs and insurance company issuers of certain insurance contracts. Among other things, we asked whether we should adopt industry-specific provisions that would enable these companies to continue to file registration statements on Form S–3 and Form F–3. The revisions we have made to the proposals, including the addition of several alternative standards, would allow widely followed issuers to use Form S–3 and Form F–3, and we believe that most of the operating subsidiaries of utility companies, REITs and insurance company issuers of certain insurance contracts that may have been excluded under the proposals will be included under the amendments we are adopting today.[61]

(b) $1 Billion of Non-Convertible Securities (Other Than Common Equity) Issued or $750 Million of Non-Convertible Securities (Other Than Common Equity) Outstanding

We are adopting the $1 billion of non-convertible securities, other than common equity, issued over three years criterion as proposed because we believe it would be an appropriate indicator of whether an issuer is widely followed. In addition, we are persuaded by commentators' arguments that focusing solely on issuances over the past three years may inappropriately limit use of Form S–3 or Form F–3. We agree that considering outstanding securities issued in primary registered offerings would result in issuers for whom short form registration is appropriate being eligible to use Form S–3 or Form F–3. As a result, we are amending General Instruction I.B.2. of Form S–3 and Form F–3 to provide that, among other things and in addition to the $1 billion of non-convertible securities, other than common equity, issued over three years criterion, an issuer that has at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act outstanding (as measured from a date within 60 days prior to the filing of the registration statement) will be eligible to register on Form S–3 or Form F–3 if the issuer meets the other requirements (such as those in General Instruction I.A.) of the form. For the non-convertible securities (other than common equity) outstanding criteria, we chose a level of $750 million because we believe this threshold will allow currently eligible issuers to continue to use Form S–3 and Form F–3 while preserving the forms' use for widely followed issuers. As noted above, several commentators supported a lower threshold than $1 billion.[62] While most of those commentators supported a threshold ranging from $250 million to $500 million, we believe setting the threshold to $750 million of non-convertible securities (other than common equity) outstanding will encourage registered offerings and assist in maintaining the availability of Form S–3 and Form F–3 for currently eligible issuers while also preserving Form S–3 and Form F–3 for widely followed issuers. This alternative will allow companies that have irregular issuances of non-convertible securities (other than common equity), but that still have significant amounts of non-convertible securities (other than common equity) issued in primary, registered offerings outstanding, to continue to have access to short-form registration and the shelf offering process. Similarly, by also adopting the $1 billion issued over three years threshold, we believe issuers who may issue a significant amount of non-convertible securities over a three-year period but then retire a portion of those securities based on prevailing market conditions will be able to continue to be eligible to use Form S–3 and Form F–3.

Consistent with the 2011 Proposing Release, the revised thresholds should be calculated consistent with the standards used to determine WKSI status. As a result, in determining compliance with both the $1 billion issued and the $750 million outstanding thresholds:

- Issuers can aggregate the amount of non-convertible securities, other than common equity, issued in registered primary offerings that were issued within the previous three years (measured as of a date within 60 days prior to the filing of the registration statement) or, for the non-convertible securities (other than common equity) outstanding threshold, that are outstanding as of a date within 60 days prior to the filing of the registration statement;
- Issuers can include only such non-convertible securities, other than common equity, that were issued in registered primary offerings for cash and not registered exchange offers;[63] and
- Parent company issuers only can include in their calculation the principal amount of their full and unconditional guarantees, within the meaning of Rule 3–10 of Regulation S–X,[64] of non-convertible securities, other than common equity, of their majority-owned subsidiaries issued in registered primary offerings for cash over the prior three years or, for the non-convertible securities (other than common equity) outstanding threshold, that are outstanding as of a date within 60 days prior to the filing of the registration statement.

In response to public comment, we have added an instruction to Form S–3 and Form F–3 clarifying how insurance company issuers should calculate the $1 billion issued and $750 million outstanding thresholds. Insurance company issuers, when registering offerings of insurance contracts,[65] will be permitted to include in their calculation the amount of insurance contracts, including variable insurance contracts, issued in offerings registered under the Securities Act over the prior

[58] *See* 2011 Proposing Release, *supra,* note 15, at note 20.

[59] *See Securities Offering Reform,* Release No. 33–8591 (Aug. 3, 2005) [70 FR 44722], where we said that we believed issuers with a wide following would produce ''Exchange Act reports that not only are reliable but also are broadly scrutinized by investors and the markets.''

[60] We note that none of these criteria are a standard of credit worthiness.

[61] *See* Section II.A.4.ii below for a discussion of the impact of the amendments.

[62] *See* note 38 above. The commentators included law firms and industry groups.

[63] Issuers will not be permitted to include the principal amount of securities that were offered in registered exchange offers by the issuer when determining compliance with the eligibility thresholds. A substantial portion of these offerings involve registered exchange offers of substantially identical securities for securities that were sold in private offerings.

[64] 17 CFR 210.3–10.

[65] For this purpose, an ''insurance contract'' is a security that is subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia.

three years, or for the non-convertible securities (other than common equity) outstanding threshold, that are outstanding as of a date within 60 days prior to the filing of the registration statement.[66] We believe that insurance company issuers that have a significant amount of registered contracts issued or outstanding receive sufficient scrutiny by the marketplace that short-form registration is appropriate for insurance contracts of those issuers. We also believe that calculating the eligibility thresholds in this manner will enable insurance company issuers that are currently eligible to use Form S–3 and Form F–3 to register insurance contract offerings, and that are unable to rely on the alternative eligibility criteria, to remain eligible to use those forms.

In calculating the $1 billion or the $750 million amount, as applicable, issuers generally will be permitted to include the principal amount of any debt and the greater of liquidation preference or par value of any non-convertible preferred stock that were issued in primary registered offerings for cash.[67] In calculating the $1 billion amount or the $750 million amount, as applicable, an insurance company, when using Form S–3 or Form F–3 to register insurance contracts, may include the purchase payments or premium payments for insurance contracts issued in offerings registered under the Securities Act over the prior three years, or for the non-convertible securities (other than common equity) outstanding threshold, the contract value as of the measurement date, of any outstanding insurance contracts issued in offerings registered under the Securities Act.[68]

Several commentators asserted that we should allow issuers to include securities issued in unregistered transactions to be included in the eligibility threshold.[69] In addition, some commentators wanted us to permit the inclusion of registered exchange offers in the calculations,[70] and one commentator believed that U.S. dollar denominated securities issued in Regulation S offerings should be permitted to be included in the calculations.[71] These commentators generally believed that securities issued in these transactions play a role in whether an issuer is widely followed.[72] After considering the comments, we have decided not to allow securities issued in unregistered offerings, registered exchange offerings or Regulation S offerings to be included in the $1 billion or $750 million calculations. We are concerned that including such securities could result in the inclusion of some securities that are not indicative of wide market following, and thus do not benefit from the attendant scrutiny of the issuer's public filings by a broad section of market participants, such as privately negotiated placements to a small number of investors. We are also concerned that delineating when a private offering would, and would not, be included would be unworkable. Further, as noted above, the Commission has previously indicated a policy preference for registered offerings.[73] We believe that it would be inconsistent with that preference to allow securities issued in transactions not registered under the Securities Act to be included in the calculation of the $1 billion or $750 million thresholds. In addition, the calculation of the $1 billion and the $750 million standards are substantially similar to the calculation for WKSI status in which unregistered and registered exchange offerings are not permitted to be included.

(c) Subsidiaries of WKSIs

Under the amendments as adopted, issuers that are wholly-owned subsidiaries of WKSIs will be eligible to use Form S–3 or Form F–3 for offerings of non-convertible securities other than common equity. Commentators noted that a wholly-owned subsidiary of a WKSI is likely to be followed by analysts who follow the WKSI as a part of the WKSI's operations, which supports allowing these companies access to Form S–3 and Form F–3. We also believe this will allow many utility company operating subsidiaries and insurance company issuers of certain insurance contracts to continue to be able to use Form S–3 and Form F–3, which would reduce the negative impact the proposals in the 2011 Proposing Release potentially could have had on these issuers' ability to raise capital and to offer securities.

Some commentators urged us to permit less than wholly-owned subsidiaries of WKSIs to have access to Form S–3 and Form F–3 under a new eligibility criteria for subsidiaries of WKSIs.[74] Except with respect to certain REIT structures discussed below, we have limited this eligibility to wholly-owned subsidiaries of WKSIs because we believe that a wholly-owned subsidiary is more likely to be followed by analysts in connection with its WKSI parent. Also, we note that the limitation does not appear to significantly impact the eligibility of WKSI subsidiaries currently eligible to use Form S–3 and Form F–3.

Although the new criteria for subsidiaries of WKSIs will generally be limited to wholly-owned subsidiaries, we are adopting a provision that will allow certain operating partnerships of REITs to continue to use Form S–3 and Form F–3. Given the partnership structure, REITs generally do not wholly own the operating partnerships; however, the REIT controls the operating partnership because it is the general partner. Further, the REIT generally conducts all of its business through the operating partnership and holds its properties in the operating partnership. As a result of this structure, one commentator representing the REIT industry explained that followers of the REIT parent analyze the operations of the operating partnerships in conjunction with following the REIT.[75] We are adopting a provision that will allow a majority-owned operating partnership subsidiary of a REIT to register offerings of non-convertible securities, other than common equity, on Form S–3 or Form F–3 so long as the REIT parent is a WKSI. In the limited context of REITs with operating partnerships, we believe permitting the use of Form S–3 and Form F–3 by majority-owned operating partnerships whose REIT parent is a WKSI is consistent with our goal of seeking to assure that entities using those forms are widely followed.

(d) Grandfathering of Other Currently Eligible Issuers

Finally, commentators expressed wide support for a temporary

[66] One commenter asked that we clarify that an insurance company be permitted to include variable insurance contracts in calculating whether the insurance company meets the eligibility threshold. *See* letter from Sutherland.

[67] In determining the dollar amount of securities that have been registered during the preceding three years, issuers will 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].

[68] For variable insurance contracts, the amount of purchase payments or premium payments used in this calculation may not include amounts initially allocated to investment options that are not registered under the Securities Act, and the contract value may not include amounts allocated as of the measurement date to investment options that are not registered under the Securities Act.

[69] *See* letters from Central Hudson, SIFMA, Davis Polk, Exelon, NAREIT, McGuire Woods, Oglethorpe, PSEG, Debevoise, UnionBanCal and SCSGP.

[70] *See* letters from SIFMA, Exelon, McGuire Woods, Oglethorpe, PSEG, Debevoise and SCSGP.

[71] *See* letter from Davis Polk.

[72] *See, e.g.,* letter from SIFMA.

[73] *See* note 56 and related text. *See also Securities Offering Reform* in note 59 above.

[74] *See* note 36 above and related text.

[75] *See* letter from NAREIT.

''grandfather'' provision that would allow issuers that are currently eligible to use Form S–3 and Form F–3 to continue to use those forms for a period of time even if the issuers would not be eligible under the new rules.[76] As noted above, we are not aware of anything in the legislative history to indicate that Congress intended for Section 939A of the Dodd-Frank Act to substantially alter access to our short forms or the shelf registration process. Although we believe that the revisions to the proposal described above would not result in significant numbers of issuers losing access to those forms, we are nevertheless concerned that there could be some issuers that would no longer be eligible to use Form S–3 or Form F–3. In order to ease transition to the new rules and allow companies affected by the amendments time to adjust, we are adopting a temporary ''grandfather'' clause that will allow issuers who reasonably believe they would have been eligible to rely on General Instruction I.B.2. of Form S–3 or Form F–3 based on the criteria in existence prior to the new rules and who disclose that belief and the basis for it in the registration statement, to be able to use Form S–3 and Form F–3 if they file a final prospectus for an offering on Form S–3 or Form F–3 within three years from the effective date of the new rules.[77] We are adopting a ''reasonable belief'' standard because of the way in which some credit ratings work. Because some issuers would likely not obtain a credit rating until a deal is relatively certain (unless the issuer has an issuer rating), those issuers would not have a bright-line way of determining whether they were eligible to use Form S–3 and Form F–3 based on the criteria in effect prior to the new rules. We believe requiring the issuer to disclose its reasonable belief will prompt issuers to consider carefully whether the disclosure is accurate since they will be responsible for the disclosure under the Securities Act. As a result, as long as the issuer has a reasonable belief that it would have been eligible and discloses that belief (and the basis for it) in the registration statement, the issuer will be able use Form S–3 and Form F–3 for a period of three years from the effective date of the new rules. We believe three years will provide issuers with enough time to adjust to the new rules, including modifying how they might choose to offer securities. Factors that indicate a reasonable belief of eligibility would include, but not be limited to:

- An investment grade issuer credit rating;
- A previous investment grade credit rating on a security issued in an offering similar to the type the issuer seeks to register that has not been downgraded or put on a watch-list since its issuance; or
- A previous assignment of a preliminary investment grade rating.

(ii) Impact of Amendments

We noted in the 2011 Proposing Release that we anticipated that under the proposed threshold, which was intended to capture widely followed issuers based on the amount of recently issued non-convertible securities other than common equity, some high yield debt issuers and issuers without credit ratings that are not currently eligible to use Form S–3 would become eligible and some issuers currently eligible to use Form S–3 and Form F–3 would become ineligible. We believe the changes we have made to the proposals, which include also considering the amount of outstanding non-convertible securities other than common equity, will reduce the likelihood of unnecessarily excluding issuers that are currently eligible to use Form S–3 and Form F–3. In the proposing release, based on a review of non-convertible securities, other than common equity, issued in the United States from January 1, 2006 through August 15, 2008, we estimated that approximately 45 issuers who were previously eligible to use Form S–3 (and who had made an offering during the review period) would no longer be able to use Form S–3 for offerings of non-convertible securities other than common equity securities.[78] We further estimated in the 2011 Proposing Release that approximately eight issuers who were previously ineligible to use Form S–3 or Form F–3 would be eligible to use those forms if the proposals were adopted. In connection with the changes to the proposals that we are adopting today, we reviewed the 45 companies we believed would become ineligible to use Form S–3 or Form F–3 under the proposals to determine how many companies would remain eligible to use Form S–3 and Form F–3. Based on our review, we estimate that of the 45 companies we previously estimated would be excluded under the proposal, 39 would remain eligible because they are wholly-owned subsidiaries of WKSIs and two would remain eligible because they have at least $750 million in non-convertible securities (other than common equity) outstanding. Thus, from the sample of 45 companies that would have lost their eligibility based on the standards in the proposing release, four companies would remain ineligible to use Form S–3 or Form F–3 with the changes we are making in this adopting release. Based on the review of offerings described above, we estimate that 16 issuers who have recently used Form S–1 will become newly eligible to use Form S–3 and Form F–3. The number of issuers who may become newly eligible to use Form S–3 or Form F–3 includes insurance company issuers of certain insurance contracts, a number of whom now file on Form S–1 but that will become eligible to use Form S–3 as a result of the changes made to the eligibility requirements being adopted.[79] As a result, we believe that the amendments will result in a net increase of 12 additional issuers becoming eligible to use Form S–3 and Form F–3.

Some commentators believed that our estimates in the proposing release understated the number of companies that would be affected by the proposals.[80] Another commentator reviewed data from March 2008 to March 2011 in the utility industry and believes that at least 60 utility companies would have been affected.[81] We acknowledged in the 2011 Proposing Release that reviewing offerings during a different time period would give different results. We also acknowledged that our data did not capture issuers who were eligible to use Form S–3 and Form F–3 but did not make offerings during the review period. However, we believe that the changes we are making to the proposals will reduce the impact on certain issuers, particularly utility companies, REITs and insurance company issuers of certain insurance contracts. We believe the provision to allow wholly-owned subsidiaries of WKSIs (or, in the case of REITs, majority owned operating partnerships of WKSIs) to continue to have access to Form S–3 and Form F–3 and the other changes we are making will allow these types of issuers continued access to short form registration and the shelf offering process. Because we do not believe

[76] *See* letters from SIFMA, Entergy, Davis Polk, Cleary, AEP, Roundtable, Wisconsin Energy, Oglethorpe, DTE, MGE and Vectren.

[77] Under this eligibility standard, issuers will be able to file new Forms S–3 or F–3, but any offerings would need to have a final prospectus filed within three years of the effective date of the new rules.

[78] *See* the 2011 Proposing Release at note 58 and related text.

[79] *See* note 44 above.

[80] *See* letters from SIFMA, Entergy and EEI.

[81] *See* letter from SIFMA. *See also* letter from Entergy, who argued that the potential number of utility companies affected may have been understated because utility companies did not make offerings due to market conditions.

Congress intended to substantially alter the companies eligible to use Form S–3 and Form F–3, we are adopting a standard that we believe balances the goals of preserving Form S–3 and Form F–3 eligibility for current users while reserving the forms for issuers that are widely followed in the marketplace.

B. Technical Amendment to General Instruction I.B.5. of Form S–3

General Instruction I.B.5. to Form S–3 provides transaction requirements for offerings of investment grade asset-backed securities. That instruction contains a cross-reference to the definition of ''investment grade securities'' that currently is found in General Instruction I.B.2. of Form S–3. As one commentator noted, the amendments we are adopting today would remove the definition of investment grade securities from General Instruction I.B.2.[82] In April 2010, we proposed to remove references to credit ratings as a requirement for shelf eligibility for offerings of asset-backed securities.[83] Among other things, the proposal would have required risk retention by the sponsor as a condition to shelf eligibility. Those proposals are still outstanding. As a result, such issuers still look to General Instruction I.B.5. for their offerings. Therefore, we are adopting an amendment to General Instruction I.B.5. of Form S–3 to move the definition of investment grade securities to that instruction until such time as new shelf eligibility requirements for asset-backed issuers are adopted that do not reference credit ratings.

C. Rescission of Form F–9

Form F–9 allows certain Canadian issuers [84] 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.[85] Under the form's requirements, a security is rated ''investment grade'' if it has been rated investment grade by at least one NRSRO, or at least one Approved Rating Organization, as defined in National Policy Statement No. 45 of the Canadian Securities Administrators (''CSA'').[86] This eligibility requirement was adopted as part of a 1993 revision to the MJDS originally adopted by the Commission in 1991 in coordination with the CSA.[87]

Under Form F–9, an eligible issuer has been able to register investment grade securities using audited financial statements prepared pursuant to Canadian generally accepted accounting principles (''Canadian GAAP'') without having to include a U.S. GAAP reconciliation. In contrast, a MJDS filer must reconcile its home jurisdiction financial statements to U.S. GAAP when registering securities on a Form F–10.[88] However, the CSA has adopted rules that will require Canadian reporting companies to prepare their financial statements pursuant to International Financial Reporting Standards as issued by the International Accounting Standards Board (''IFRS'') beginning in 2011.[89] Foreign private issuers that prepare their financial statements in accordance with IFRS are not required to prepare a U.S. GAAP reconciliation.[90] Since a Canadian issuer will not have to perform a U.S. GAAP reconciliation under IFRS, one of the primary differences between Form F–9 and Form F–10 will be eliminated. Once the Canadian IFRS-related amendments become effective,[91] the disclosure requirements for an investment grade securities offering registered on Form F–10 will be the same as the disclosure requirements for one registered on Form F–9.

In the 2011 Proposing Release, we proposed to rescind Form F–9 due to the Canadian regulatory developments described above. One commentator noted that Canadian issuers who have a later fiscal year end will have a later effective date for required IFRS financial statements.[92] If Form F–9 were to be rescinded before an issuer is required to prepare IFRS financial statements, then that issuer would be required to provide a reconciliation to U.S. GAAP in connection with the filing of a registration statement during the interim period before its IFRS financial statements are available. In order to address this concern and ease transition for these issuers, we are adopting a delayed effective date of December 31, 2012 for the rescission of Form F–9.

Commentators also noted that a gap remains between the eligibility requirements for Form F–9 and Form F–10.[93] Currently, issuers using Form F–9 are not required to have a public float while issuers using Form F–10 must either have a $75 million public float or be debt issuers with a guarantee from a parent meeting the requirements of Form F–10. As a result, to the extent a Form F–9 issuer does not have the requisite public float and does not have a parent guarantee of its debt, it would not be eligible to use Form F–10.

As we noted in the 2011 Proposing Release, MJDS issuers have infrequently used Form F–9. Of the 40 Form F–9s filed by 22 issuers since January 1, 2007, we believe only one of these issuers would not qualify to file on Form F–10 if Form F–9 is rescinded. Consistent with the temporary ''grandfather'' provision we are adopting for Form S–3 and Form F–3 filers, in order to address this concern and ease the transition, we are adopting a temporary ''grandfather'' provision in Form F–10 that would permit any issuer that discloses in the registration statement that it has a reasonable belief that it would have been eligible to file on Form F–9 as of the effective date of the amendments, and discloses the basis for that belief, to file a final prospectus for an offering on Form F–10 for a period of three years from the effective date of the new rules even if it does not satisfy

[82] *See* letter from American Securitization Forum dated March 28, 2011 (ASF).

[83] *See Asset-Backed Securities,* Release No. 33–9117 (Apr. 7, 2010) [75 FR 23328]. In 2010, we proposed amendments that would remove General Instruction I.B.5. of Form S–3 and move shelf offerings of asset-backed securities to a new form.

[84] Form F–9 is the Multijurisdictional Disclosure System (''MJDS'') form used to register investment grade debt or preferred securities under the Securities Act by eligible Canadian issuers.

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

[86] *See* General Instruction I.A. to Form F–9.

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

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

[89] See, for example, CSA IFRS-Related Amendments to Securities Rules and Policies (2010), which are available at: *http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20101001_52–107_ifrs-amd-3339-supp3.pdf.* Canadian reporting companies that are U.S. registrants may elect to prepare their financial statements in accordance with U.S. GAAP. *See* Part 3.7 of National Instrument 52–107.

[90] *See* Item 17(c) of Form 20–F.

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

[92] *See* letter from Bank of Nova Scotia dated March 28, 2011 (Scotiabank).

[93] *See* letters from Davies Ward Phillips & Vineberg LLP dated March 28, 2011 (Davies), Osler, Hoskin & Harcourt LLP dated March 28, 2011 (Osler) and Fraser Milner Casgrain LLP dated March 28, 2011 (FMC).

the parent guarantee or public float requirements of Form F–10.[94]

One commentator also noted that removing the reference to Form F–9 from Form 40–F (as was proposed in the 2011 Proposing Release) would result in former F–9 filers who do not have a public float of $75 million or a parent guarantee of their debt losing eligibility to file annual reports on Form 40–F.[95] Issuers who are not eligible to use Form 40–F use Form 20–F, which requires disclosure in accordance with standards set by the Commission rather than standards set by the Canadian securities regulators. In Form 40–F, Canadian MJDS filers file with the Commission their home jurisdiction periodic disclosure documents under cover of Form 40–F. In Form 20–F, foreign private issuers are subject to the Commission's special disclosure requirements for foreign private issuers, and have to prepare separate disclosure to comply with those requirements. Similar to the Form F–10 ''grandfather'' provision above, we believe this change to Form 40–F would result in a very small number of issuers no longer being able to use Form 40–F. In order to address this concern, we are adopting a permanent ''grandfather'' provision that would allow currently eligible Form 40–F filers to continue to use Form 40–F to satisfy their reporting obligations under Section 13 and Section 15(d) of the Exchange Act as to previously sold securities if they had filed and sold securities under a Form F–9 with the Commission before the effective date of the new rules. We believe a permanent ''grandfather'' provision is appropriate for these issuers because some issuers may have issued securities many years ago and may still be reporting pursuant to the requirements of Form 40–F, and given the design of the MJDS system, we do not believe it would be appropriate to change the requirements that these issuers relied on when the offering was made.

One commentator was opposed to rescinding Form F–9 because Form F–9 filers who are in the oil and gas industry are not required to provide the disclosure required by Accounting Standards Codification 932 ''Extractive Activities—Oil and Gas'' (ASC 932) that would be required for Form F–10 filers.[96] A review of issuers that have filed a Form F–9 since January 1, 2007 indicates that this change would affect very few issuers. As the commentator notes, the Commission has indicated that it will continue to monitor the necessity of providing ASC 932 disclosure as regulatory changes occur.[97] At this time we are not making any changes to the requirement for Form F–10 filers to provide ASC 932 disclosure or otherwise making special accommodations for previous Form F–9 filers. We are also not adopting a grandfather provision for this disclosure requirement because we believe the burden on former F–9 filers will not be significant and will impact a very small number of issuers.

D. Ratings Reliance in Other Forms and Rules

1. Forms S–4 and F–4 and Schedule 14A

Proposals relating to Form S–4, Form F–4 and Schedule 14A were also included in the 2011 Proposing Release. We did not receive significant separate comment on these proposals. Form S–4 and Form F–4 include the Form S–3 and Form F–3 eligibility criteria by allowing registrants that meet the registrant eligibility requirements of Form S–3 or F–3 and that are offering investment grade securities to incorporate by reference certain information.[98] Similarly, Schedule 14A permits a registrant to incorporate by reference if the Form S–3 registrant requirements in General Instruction I.A. are met and action is to be taken as described in Items 11, 12 and 14 [99] of Schedule 14A, which concerns non-convertible debt or preferred securities that are ''investment grade securities'' as defined in General Instruction I.B.2. of Form S–3.[100] In addition, Item 13 of Schedule 14A allows financial information to be incorporated into a proxy statement if the requirements of Form S–3 (as described in Note E to Schedule 14A) are met. Because we are changing the eligibility requirements in Forms S–3 and F–3 to remove references to ratings by an NRSRO, we believe the same standard should apply to the disclosure options in Forms S–4 and F–4 based on Form S–3 or F–3 eligibility. That is, a registrant will be eligible to use incorporation by reference in order to satisfy certain disclosure requirements of Forms S–4 and F–4 to register non-convertible debt or preferred securities on Form S–4 or Form F–4 if:

(i) The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act;

(iii) The issuer is a wholly-owned subsidiary of a WKSI as defined in Rule 405 under the Securities Act;

(iv) The issuer is a majority-owned operating partnership of a REIT that qualifies as a WKSI; or

(v) The issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S–3 or Form F–3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments.

Similarly, we are amending Schedule 14A to refer simply to the requirements of General Instruction I.B.2. of Form S–3, rather than to ''investment grade securities.'' As a result, an issuer will be permitted to incorporate by reference into a proxy statement if the issuer satisfied the requirements of General Instruction I.A. of Form S–3, the matter to be acted upon related to non-convertible securities, other than common equity, and was described in Item 11, 12 or 14 of Schedule 14A and the issuer falls into one of the categories listed above (measured as of a date that is within 60 days of the proxy first being sent to security holders).

2. Securities Act Rules 138, 139 and 168

Other Securities Act rules also reference credit ratings. Rules 138, 139, and 168 under the Securities Act provide that certain communications are deemed not to be an offer for sale or offer to sell a security within the

[94] Similar to the grandfather provision we are adopting for Form S–3 and Form F–3 filers, new Form F–10s may be filed, but issuers relying on this instruction will need to file a final prospectus for any such offering within three years of the effective date of the new rules.

[95] *See* letter from Davies.

[96] *See* letter from Paul, Weiss, Rifkind, Wharton & Garrison LLP dated March 28, 2011 (Paul Weiss).

[97] *See* Release No. 33–8879, *Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP* (Dec. 21, 2007) [73 FR 986].

[98] *See* General Instruction B.1 of Forms S–4 and Form F–4.

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

[100] *See* Note E of Schedule 14A.

meaning of Sections 2(a)(10)[101] and 5(c)[102] of the Securities Act when the communications relate to an offering of non-convertible investment grade securities. Under current rules, 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 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.

In the 2011 Proposing Release, we proposed to revise these rules to refer to the new proposed instructions in General Instruction I.B.2 of Form S–3 or Form F–3, as appropriate. We received little comment on these proposals. One commentator did not believe amendments to these rules were required by the Dodd-Frank Act.[103] The commentator was concerned that the amendments would be burdensome on firms that publish research because they would have to determine the issuer's form eligibility each time they wanted to publish research instead of relying on a published credit rating.[104]

We do not believe that determining an issuer's form eligibility will be unduly burdensome for those seeking to publish research. A review of the issuer's or its parent company's publicly available filings, such as Forms 10–K or prospectuses, should indicate whether the issuer satisfies the eligibility requirements for Form S–3 or Form F–3.[105] We also believe that these revisions are appropriate both because of the Dodd-Frank Act's goal to reduce reliance on credit ratings and to promote regulatory consistency. As a result, we are adopting revisions to Rules 138, 139, and 168 to be consistent with the revisions we are adopting to the eligibility requirements in Forms S–3 and F–3.

3. Rule 134(a)(17)

Securities Act Rule 134(a)(17)[106] permits the disclosure of security ratings issued or expected to be issued by NRSROs in certain communications deemed not to be a prospectus or free writing prospectus. We proposed in the 2011 Proposing Release to remove this rule since we believe providing a safe harbor that explicitly permits the presence of a credit rating assigned by an NRSRO is not consistent with the purposes of Section 939A.

Commentators were opposed to this proposal.[107] Two commentators argued that removing Rule 134(a)(17) is not required by Section 939A of Dodd-Frank.[108] One commentator did not believe that allowing the inclusion of credit rating information encourages reliance on ratings but instead merely reflects the fact that ratings are relevant to investors.[109] Another commentator believed we should expand the rule to cover all credit ratings instead of those issued by NRSROs.[110] That commentator believed removing Rule 134(a)(17) would result in less information being available to investors. One commentator believed the amendment is not required by either the letter or spirit of Section 939A and would chill information available to investors.[111]

Notwithstanding the comments we received, we believe it is appropriate to revise Rule 134 in order to remove the safe harbor for disclosure of credit ratings assigned by NRSROs. We believe providing a safe harbor that explicitly permits the presence of a credit rating assigned by an NRSRO is not consistent with the purposes of Section 939A to reduce reliance on credit ratings. We also do not believe this change will have a material impact on the information available to investors because issuers will (as is common now) be able to disclose a credit rating in a free writing prospectus.[112] In addition, as we noted in the 2011 Proposing Release, removing the safe harbor for this type of information would not necessarily result in a communication that included this information being deemed to be a prospectus or a free writing prospectus. The revision results in there no longer being a safe harbor for a communication that included this information. Instead, the determination as to whether such information constitutes a prospectus would be made in light of all of the circumstances of the communication.

III. Paperwork Reduction Act

A. Background

Certain provisions of the rule amendments contain a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (PRA).[113] The Commission is submitting these amendments and rules to the Office of Management and Budget (OMB) for review in accordance with the PRA.[114] 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:[115]

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[101] 15 U.S.C. 77b(a)10.

[102] 15 U.S.C. 77e(c).

[103] *See* letter from SIFMA.

[104] *Id.*

[105] For example, for an issuer that is a subsidiary of a WKSI, the parent's Form 10–K would note its WKSI status. For the amount of non-convertible securities (other than common equity) outstanding or issued, the amounts in financial statements could be compared to prospectuses to determine that the securities were sold in registered offerings.

[106] 17 CFR 230.134(a)(17). These disclosures generally appear in ''tombstone'' ads or press releases announcing offerings. A communication is eligible for the safe harbor if the information included is limited to such matters as, among others, factual information about the identity and business address of the issuer, title of the security and amount being offered, the price or a bona fide estimate of the price or price range, the names of the underwriters participating in the offering and the name of the exchange where such securities are to be listed and the proposed ticker symbols.

[107] *See* letters from SIFMA, Davis Polk, Cleary, Roundtable, ASF and Debevoise.

[108] *See* letters from SIFMA and Davis Polk.

[109] *See* letter from SIFMA.

[110] *See* letter from Davis Polk. A proposal to expand Rule 134(a)(17) was included in the 2008 proposing Release. We received little comment on the proposal at that time. As we noted in the 2011 Proposing Release, we do not believe it is appropriate to expand the rule to cover all credit ratings issued because we do not believe it would be consistent with the otherwise limited disclosures covered by the Rule 134 safe harbor.

[111] *See* letter from Cleary. *See also* letters from Roundtable, ASF and Debevoise.

[112] One commentator pointed out that not all companies are eligible to use free writing prospectuses. *See* letter from SIFMA. The examples given by the commentator covered investment companies and business development companies. However, pursuant to Rule 134(g), those companies currently cannot rely on the safe harbor in Rule 134, so the amendment to Rule 134(a)(17) should not affect those companies. In addition, we note that the exclusion from the ability to use free writing prospectuses for ''ineligible issuers'' does not preclude such issuers (except for blank check companies, penny stock companies and shell companies) from using free writing prospectuses that are ''term sheets,'' which is a common way that issuers disclose the credit rating for a particular offering.

[113] 44 U.S.C. 3501 *et seq.*

[114] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[115] Although we are adopting amendments to Form S–4, Form F–4 and Schedule 14A, we do not

''Form S–1'' (OMB Control No. 3235–0065) ;
''Form S–3'' (OMB Control No. 3235–0073);
''Form F–1'' (OMB Control No. 3235–0258);
''Form F–3'' (OMB Control No. 3235–0256);
''Form F–9'' (OMB Control No. 3235–0377); and
''Form F–10'' (OMB Control No. 3235–0380).

We adopted all of the existing regulations and forms pursuant to the Securities Act or the Exchange Act. These regulations and forms set forth the disclosure requirements for registration statements and proxy statements that are prepared by issuers to provide investors with information. Our 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 criteria we are adopting for issuers of non-convertible securities, other than common equity, who are otherwise ineligible to use Form S–3 or Form F–3 to conduct primary offerings because they do not meet the aggregate market value requirement is designed to capture those issuers with a wide market following.

Some commentators believed that our estimates in the 2011 Proposing Release understated the number of companies that would no longer be eligible under the proposals.[116] One commentator reviewed data from March 2008 to March 2011 in the utility industry and believed that at least 60 utility companies would no longer have been eligible to use Form S–3 or Form F–3 over that three year period.[117] One commentator believed the potential number of utility companies who would lose eligibility may have been understated because utility companies did not make offerings due to market conditions.[118] Another commentator believed that our PRA figures were ''way off'' because there are ''far more S–1, S–3, F–1 and F–3 filings'' than described in the release, although the commentator did not provide any additional data.[119] We believe the changes we have made to the proposals will reduce the number of currently eligible issuers that would no longer be eligible to use Form S–3 and Form F–3, particularly utility companies. Our revised PRA estimates reflect the expected impact.[120]

We expect that under the new criteria, the number of companies in a 12-month period eligible to register on Form S–3 or Form F–3 for primary offerings of non-convertible securities, other than common equity, for cash will increase by approximately four issuers for Form S–3 and one issuer for Form F–3.[121] We expect that the issuers filing on Form S–1 and F–1 will decrease by the same amounts.

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

We are also rescinding Form F–9, which is the form used by qualified Canadian issuers to register investment grade securities. Because of recent Canadian regulatory developments, we no longer believe that keeping Form F–9 as a distinct form would serve a useful purpose. In addition, Canadian issuers have infrequently used Form F–9. As a result of the rescission of Form F–9, we believe there would be an additional six filers on Form F–10.[122] We do not believe that the burden of preparing Form F–10 will change because the information required by Form F–10 is substantially the same as that required by Form F–9.

C. Paperwork Reduction Act Burden Estimates

For purposes of the Paperwork Reduction Act, we estimate that there will be no annual incremental increase in the paperwork burden for issuers to comply with our collection of information requirements. We do estimate, however, that the number of respondents on Forms S–3, F–3 and F–10 will increase as a result of the amendments. As a result, the aggregate burden hour and professional cost numbers will increase for those forms due to the additional number of respondents. We also expect that the number of respondents will decrease for Forms S–1 and F–1, which will reduce the aggregate burden hour and professional costs for those forms.[123] These estimates represent the average burden for all companies, both large and small. For each estimate, we calculate that a portion of the burden will be carried by the company internally, and the other portion will be carried by outside professionals retained by the company. The portion of the burden carried by the company internally is reflected in hours, while the portion of the burden carried by outside professionals retained by the company is reflected as a cost. We estimate these costs to be $400 per hour. A summary of the changes is included in the table below.

anticipate any changes to the reporting burden or cost burdens associated with these forms, or the number of respondents as a result of the proposed amendments.

[116] *See* letters from SIFMA, Entergy and EEI.

[117] *See* letter from SIFMA.

[118] *See* letter from Entergy.

[119] *See* letter from Chang.

[120] In addition, our estimates reflect the expected impact after the expiration of the temporary ''grandfather'' provisions in Form S–3, Form F–3 and Form F–10. Those ''grandfather'' provisions will expire three years after the effective date of the new rules.

[121] In Section II.A.4.ii above, we estimated that approximately four companies who made an offering between January 1, 2006 and August 15, 2008 would no longer be eligible to use Form S–3 and Form F–3. We further estimated that 16 issuers would become newly eligible to use Form S–3 and Form F–3. As a result, we estimate that a net of 12 issuers would have become eligible to use Form S–3 and Form F–3 over that approximately 31-month time period. For purposes of the PRA estimates, we estimate that over a 12-month time period that five issuers would become eligible to use Form S–3 or Form F–3 (approximately one-third of 12). We further estimate that four of those five will become eligible to use Form S–3 and one will become eligible to use Form F–3.

[122] Based on a review of Commission filings, since January 1, 2007, only 22 issuers have filed on Form F–9. As a result, we estimate that over a 12-month period, approximately six additional Form F–10s will be filed.

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

TABLE 1—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES

	Current annual responses (A)	Proposed annual responses (B)	Current burden hours (C)	Increase/ (Decrease) in burden hours (D)	Proposed burden hours (E) = C + D	Current professional costs (F)	Increase/(Decrease) in professional costs (G)	Proposed professional costs = F + G
Form S–1	768	764	186,687	(972)	185,715	$224,024,000	($1,166,792)	$222,857,208
Form S–3	2,065	2,069	243,927	472	244,399	292,711,500	566,996	293,278,496
Form F–1	42	41	18,975	(452)	18,523	22,757,400	(541,843)	22,215,557
Form F–3	106	107	4,426	42	4,468	5,310,600	50,100	5,360,700
Form F–10	75	81	469	36	505	562,500	45,000	607,500
Total	.....	.....	.....	(874)	.....	.....	(1,046,539)	.....

IV. Cost-Benefit Analysis

A. Amendments

As discussed above, we are adopting rule amendments in light of Section 939A of the Dodd-Frank Act to eliminate references to credit ratings in our rules in order to reduce reliance on credit ratings.[124] Today's amendments 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 revising the transaction eligibility requirements of Forms S–3 and F–3 and other rules and forms that refer to these eligibility requirements. Currently, these forms allow issuers who do not meet the forms' other transaction eligibility requirements to register primary offerings of non-convertible securities for cash if such securities are rated investment grade by an NRSRO. The eligibility standard of having an investment grade rating has been used to indicate whether an issuer is widely followed in the marketplace. The revised rules would replace this transaction eligibility requirement with a requirement that, for primary offerings of non-convertible securities, other than common equity, for cash, an issuer is eligible if:

(i) The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) The issuer is a wholly-owned subsidiary of a WKSI as defined in Rule 405 under the Securities Act; or

(iv) The issuer is a majority-owned operating partnership of a REIT that qualifies as a WKSI; or

(v) The issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S–3 or Form F–3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments. We are making conforming revisions to Form S–4, Form F–4 and Schedule 14A. We are also revising Rules 138, 139, and 168 under the Securities Act, which address certain communications by analysts and issuers, to be consistent with the revisions to Form S–3 and Form F–3. We are also removing Rule 134(a)(17) so that disclosure of credit ratings information is no longer covered by the safe harbor that deems certain communications not to be a prospectus or a free writing prospectus. Finally, we are rescinding Form F–9.

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

B. Benefits

As we stated in the 2011 Proposing Release, we believe that having issued $1 billion of registered non-convertible securities over the prior three years would generally correspond with a wide following in the marketplace.[125] As described above, the amendments we are adopting today would allow additional issuers to remain eligible to use Form S–3 and Form F–3 based on a variety of criteria. The amendments would replace the investment grade criteria for eligibility to register offerings of non-convertible securities on Form S–3 or Form F–3. The criteria we are adopting today reserves the use of Form S–3 and Form F–3 for widely followed issuers while allowing a greater number of issuers to remain eligible to use those forms while also allowing some widely followed issuers to become newly eligible to use the forms.

Issuers will no longer be required to purchase ratings services in order to be eligible for registering a transaction on Form S–3 or Form F–3 and will benefit from not having to incur the associated costs of obtaining a credit rating to the extent that they decide not to obtain a credit rating for other uses. As a result, these rules could lessen the bargaining power rating agencies have with issuers (to the extent such bargaining power was artificially enhanced by the prior requirements of such forms), potentially lowering the cost of obtaining ratings. In addition, the removal of a provision in our forms requiring the use of a credit rating to establish eligibility for a type of registration generally reserved for widely followed issuers obviates a market externality that may have constituted a barrier to entry to potential competitors seeking to develop alternative methods of communicating creditworthiness to investors. Accordingly, removing any perceived imprimatur that may have resulted from the reference to credit ratings in Form S–3 and Form F–3 may increase

[124] *See* note 18 above and related text.

[125] *See* 2011 Proposing Release, *supra* note 15, at note 52.

competition in the financial services sector.

The change in the criteria would allow issuers of high yield securities or issuers of non-convertible securities (other than common equity) without a credit rating that were previously unable to avail themselves of the shelf offering process and forward incorporation by reference, to have faster access to capital markets and incur lower transaction costs.[126] These amendments therefore allow the set of issuers with credit risk profiles that are not ''investment grade'' but that are otherwise widely followed in the marketplace to have access to short-form registration and the shelf offering process. More broadly, to the extent that the eligibility criteria are a better measure of whether or not an issuer is widely followed than receipt of an investment grade credit rating, then any change to the eligible set of issuers would more closely follow the intent of allowing forward incorporation by reference for appropriate issuers.

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

We believe the benefits of the revisions to Rules 138, 139 and 168 will be to promote regulatory consistency by continuing to use the Form S–3 and Form F–3 standards to determine whether those rules can be relied on. In addition, we believe that removing Rule 134(a)(17) may have the benefit of reducing reliance on credit ratings because it would lessen the extent to which the Commission's rules provide an imprimatur to credit ratings, particularly those issued by NRSROs.

C. Costs

To the extent that the new eligibility standards result in some issuers who were previously eligible to use Forms S–3 and F–3 to register primary offerings of non-convertible securities other than common equity to be required to register on Form S–1,[127] this would result in increased costs of preparing and filing registration statements, which may decrease capital raising in registered offerings.[128] This would result in additional time spent in the offering process, and issuers would incur costs associated with preparing and filing post-effective amendments to the registration statement. In addition, the resulting loss of the ability to conduct a delayed offering ''off the shelf'' pursuant to Rule 415 under the Securities Act would result in costs due to the uncertainty an issuer might face regarding the ability to conduct offerings quickly at advantageous times. The increased costs of preparing and filing registration statements using Form S–1 or Form F–1 and the increased uncertainty regarding the issuer's ability to conduct offerings quickly at advantageous times are likely to increase an issuer's cost of capital. Moreover, this is not a one-time cost but would be incurred for each subsequent issuance.

One commentator believed the costs outweigh the benefits of the proposal.[129] That commentator estimated that a regulated insurance company registering non-variable annuity contracts on Form S–1 could face 250 hours of in-house legal time and 150 hours of business, outside counsel and auditor expenses if Form S–3 and Form F–3 were no longer available to such an issuer. The commentator believed the benefits noted in the proposing release were not significant enough to outweigh the costs and were inappropriate ''as collateral damage from legislation aimed at over-reliance on security ratings.'' [130] We expect the changes we have made to the proposal would limit the costs of the amendments since fewer companies would lose their ability to file on Form S–3 and Form F–3 as supported by our analysis of the issuers that issued non-convertible securities other than common equity between January 1, 2006 and August 15, 2008. In addition, we believe the ''grandfather'' provisions will also mitigate costs for any issuer that would become ineligible by giving such issuers time to adjust their capital raising practices.

We believe that the amendments could result in some issuers who are currently required to file on Form S–1 or Form F–1 becoming eligible to use Form S–3 or Form F–3. This could result in a cost to investors as there would be less information present in the prospectuses for these companies than there was previously. As a result, investors would have to seek out the Exchange Act reports (for example, by accessing the SEC Web site) of these issuers for company information which would no longer appear in the prospectus. However, we believe these costs might not be substantial to the extent that the new eligibility standards appropriately capture issuers with a wide market following for whom forward incorporation by reference is appropriate. Such new Form S–3 and Form F–3 issuers will also become eligible take advantage of the shelf offering process. This could result in additional costs to investors if they have less time to review available information before making an investment decision with respect to a takedown from a shelf registration statement.

If there are some issuers who become eligible to use Form S–3 or Form F–3 who are not widely followed, then there could be costs to investors if information about the issuer is not available or considered by the marketplace.

The amendments could also result in some issuers that would have been eligible to use Form S–3 or Form F–3 because of their investment grade ratings and those that continue to be eligible under the new widely followed standards to decide not to get their securities rated. This could result in a cost to the investors to the extent that credit ratings were providing additional information to the marketplace.

The amendments to Rules 138, 139 and 168 could result in somewhat higher compliance costs if it requires more effort to determine whether an issuer is eligible to use Form S–3 or Form F–3. An issuer is currently eligible to use Form S–3 or Form F–3 for offerings of non-convertible securities, other than common equity, if the non-convertible securities are investment grade, which is a single, objective, bright-line determination. The amendments adopted today will provide several alternative criteria to determine Form S–3 and Form F–3 eligibility,

[126] As discussed in Section II.A.4.ii above, we estimate that the amendments adopted today would result in 16 issuers who previously filed on Form S–1 or F–1 becoming eligible to file on Form S–3 or Form F–3.

[127] As discussed in Section II.A.4.ii above, we estimate that the amendments adopted today would result in four issuers no longer being eligible to use Form S–3 or Form F–3. As a result, these issuers would be required to file on Form S–1 or Form F–1.

[128] The ability to conduct primary offerings on short form registration statements confers significant advantages on eligible companies by reducing the costs and increasing the speed of conducting a registered offering. The time required to prepare and update Form S–3 or F–3 is significantly lower than that required for Forms S–1 and F–1 primarily because registration statements on Forms S–3 and F–3 can be automatically updated. Forms S–3 and F–3 permit registrants to forward incorporate required information by reference to disclosure in their Exchange Act filings. In addition, companies that are eligible to register primary offerings on Form S–3 and Form F–3 generally are able to conduct offerings on a delayed basis ''off the shelf'' without further staff review and clearance. This enables eligible issuers to take advantage of beneficial market conditions to improve their access to capital and may lower their cost of funds. *See* Section III, above, for a discussion of the estimates of the paperwork costs of preparing and filing on Form S–1 associated with the amendments that we have prepared for purposes of the PRA.

[129] *See* letter from Roundtable.

[130] *See* letter from Roundtable.

which may make it more difficult to determine at any given point in time whether an issuer is eligible to make an offering of non-convertible securities, other than common equity, on Form S–3 or Form F–3. As a result, determining whether a research report can be published within the safe harbors of Rule 138, 139, or whether certain business information may be released under Rule 168 may be more costly.

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

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

Section 23(a) of the Exchange Act [131] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act [132] and Section 3(f) of the Exchange Act [133] require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.

Overall, we believe the changes will increase the efficiency of the shelf offering process by focusing eligibility on those issuers that are widely followed in the market and removing reliance on obtaining a particular credit rating. Our analysis indicates that the amendments will have two distinct effects. First, some issuers currently eligible to register primary offerings of non-convertible securities, other than common equity, on Forms S–3 and F–3 and to use the shelf offering process will lose their eligibility. Second, some issuers will become newly eligible to use Forms S–3 and F–3 and the shelf offering process. We believe that the rules will likely result in more widely followed issuers being eligible for short-form registration, which is why the rules may increase efficiency and promote capital formation. Issuers who become eligible to register offerings on Form S–3 and Form F–3 and avail themselves of the shelf offering process may now face relatively lower issuance costs, which would positively affect efficiency and capital formation of those issuers. As noted throughout this release, we anticipate that the number of such issuers would be small. In addition, we believe the ''grandfather'' provisions we are adopting will mitigate the disruption for issuers who may become ineligible to use Form S–3 or Form F–3 by giving them time to adjust their market practices. Because the number of eligible issuers will be roughly the same as under the previous criteria, we believe there would be a negligible impact on competition.

Although we do not believe the new rules will have a significant impact on the eligibility of issuers to use Form S–3 or Form F–3, by reducing reliance on credit ratings there could be an effect on the amount and cost of issuer information available to the market. Without a requirement for an issuer to receive an investment grade credit rating, issuers may have less of an incentive to have their securities rated. They may continue to have their securities rated for other reasons. However, to the extent issuers overall obtain fewer ratings, investors may have to place greater reliance on other financial information providers in their assessment of investor creditworthiness.

From one perspective, this may provide greater opportunity for other information providers to compete to provide credit evaluation services. If the resulting competition reduces the cost, and maintains or increases the quality, of information in the marketplace regarding credit-worthiness, then this may result in a lower cost of capital and/or improved capital allocation decisions. However, if rating agencies provide investors with a unique set of information that other information providers cannot easily replicate—for instance, if they have access to issuer private information that is not common knowledge to the market—then investors may lose access to certain, valuable information to the extent that issuers chose not to have their securities rated. This may result in less efficient capital allocation. We do not believe this outcome likely because issuers may still find it beneficial to obtain a credit rating in order to provide that information to potential investors. As a result, we believe that the net effect of this rule will be to increase the level of informational efficiency.

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

VI. Regulatory Flexibility Act Certification

Under Section 605(b) of the Regulatory Flexibility Act,[134] we certified that, when adopted, the proposals would not have a significant economic impact on a substantial number of small entities. We included the certification in Part VIII of the 2011 Proposing Release. We did not receive any comments on the certification.

VII. Statutory Authority and Text of Rule and Form Amendments

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

List of Subjects in 17 CFR Parts 200, 229, 230, 232, 239, 240, and 249

Reporting and recordkeeping requirements, Securities.

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

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

* * * * *

Subpart N—Commission Information Collection Requirements Under the Paperwork Reduction Act: OMB Control Numbers

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

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

§ 200.800 [Amended]

■ 2. Effective December 31, 2012, amend § 200.800 by removing from paragraph (b) the entry for ''Form F–9''.

[131] 15 U.S.C. 78w(a).

[132] 15 U.S.C. 77b(b).

[133] 15 U.S.C. 78c(f).

[134] 5 U.S.C. 605(b).

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

■ 3. The 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, 78*l,* 78m, 78n, 78n–1, 78o, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.,* and 18 U.S.C. 1350 unless otherwise noted.

* * * * *

§ 229.10 [Amended]

■ 4. Effective December 31, 2012, amend § 229.10 by:
■ a. Removing the penultimate sentence from paragraph (c) introductory text;
■ b. Removing from the first sentence in paragraph (c)(1)(i) the acronym ''NRSRO'' and adding in its place the phrase ''nationally recognized statistical rating organization (NRSRO)''; and
■ c. Removing the last sentence from paragraph (c)(1)(i).

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

■ 5. The general authority citation for Part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, 80a–37, and Pub. L. 111–203, § 939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

■ 6. Amend § 230.134 by revising paragraph (a) introductory text, revising paragraph (a)(6), and removing and reserving paragraph (a)(17).

The revisions read as follows:

§ 230.134 Communications not deemed a prospectus.

* * * * *

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

* * * * *

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

* * * * *

(17) [Reserved]

* * * * *

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

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

(a) * * *
(2) * * *
(ii) * * *
(B) * * *

(*2*) Is issuing non-convertible securities, other than common equity, and the issuer meets the provisions of General Instruction I.B.2. of Form F–3 (referenced in 17 CFR 239.33 of this chapter); and

* * * * *

■ 8. Amend § 230.139 by revising paragraphs (a)(1)(i)(A)(*1*)(*ii*) and (a)(1)(i)(B)(*2*)(*ii*) to read as follows:

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

(a) * * *
(1) * * *
(i) * * *
(A)(*1*) * * *

(*ii*) At the date of reliance on this section, is, or if a registration statement has not been filed, will be, offering non-convertible securities, other than common equity, and meets the requirements for the General Instruction I.B.2. of Form S–3 or Form F–3 (referenced in 17 CFR 239.13 and 17 CFR 239.33 of this chapter); or

* * * * *

(B) * * *
(*2*) * * *

(*ii*) Is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F–3 (referenced in 17 CFR 239.33 of this chapter); and

* * * * *

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

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

* * * * *

(a) * * *

(2) * * *
(ii) * * *

(B) Is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F–3 (referenced in 17 CFR 239.33 of this chapter); and

* * * * *

§ 230.467 [Amended]

■ 10. Effective December 31, 2012, amend § 230.467 by removing:
■ a. ''F–9,'' from the heading;
■ b. ''Form F–9 or'' and ''§ 239.39 or'' from the second sentence of paragraph (a); and
■ c. ''Form F–9 or'' from the first sentence of paragraph (b).

§ 230.473 [Amended]

■ 11. Effective December 31, 2012, amend § 230.473 by removing ''F–9 or'' and ''§ 239.39 or'' from paragraph (d).

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

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

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

* * * * *

§ 232.405 [Amended]

■ 13. Effective December 31, 2012, amend § 232.405 by removing:
■ a. ''both Form F–9 (§ 239.39 of this chapter) and'' from the second sentence of Preliminary Note 1;
■ b. ''either Form F–9 or'' from paragraphs (a)(2) introductory text, (a)(3), and (a)(4); and
■ c. ''both Form F–9 and'' and ''Form F–9 and'' in the second sentence of Note to § 232.405, and ''both Form F–9 and'' in the penultimate sentence of Note to § 232.405.

PART 239 —FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 14. The general authority citation for part 239 is revised to read as follows:

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

* * * * *

■ 15. Amend § 239.13 by revising the paragraph heading to the undesignated paragraph following paragraph (b)(1)

and by revising paragraphs (b)(2) and (b)(5) to read as follows:

§ 239.13 Form S–3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

* * * * *

(b) * * *

Instruction to paragraph (b)(1): * * *

(2) *Primary Offerings of Non-Convertible Securities Other than Common Equity.* Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant:

(i) Has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) Has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(iv) Is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(v) Discloses in the registration statement that it has a reasonable belief that it would have been eligible to use this Form S–3 as of September 1, 2011 because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on this Form S–3 on or before September 2, 2014.

Instruction to paragraph (b)(2). For purposes of paragraph (b)(2)(i) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933 (15 U.S.C. 77b(a)(13), when using this Form S–3 to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia (''insurance contracts''), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act of 1933 (15 U.S.C. 77a)), issued in offerings registered under the Securities Act over the prior three years. For purposes of paragraph (b)(ii) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933, when using this Form S–3 to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act of 1933), issued in offerings registered under the Securities Act of 1933.

* * * * *

(5) The securities are investment grade securities. An asset-backed security is an investment grade security if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in 17 CFR 240.15c3–1(c)(2)(vi)(F)) 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 sub-categories or gradations indicating relative standing) signify investment grade.

* * * * *

■ 16. Amend Form S–3 (referenced in 17 CFR 239.13) by:

■ a. Revising General Instruction I.B.2.;

■ b. Revising General Instruction I.B.5(a)(i).; and

■ c. Revising Instruction 3 to the signature block to remove the word ''Requirements'' and add in its place the word ''Requirement'' and to remove the phrase ''B.2. or''.

The revision reads as follows:

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

Form S–3

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

I. Eligibility Requirements for Use of Form S–3

* * * * *

B. Transaction Requirements. * * *

2. *Primary Offerings of Non-Convertible Securities Other than Common Equity.* Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant (i) has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or (ii) has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or (iii) is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or (iv) is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or (v) discloses in the registration statement that it has a reasonable belief that it would have been eligible to use Form S–3 as of September 1, 2011 because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on Form S–3 on or before September 2, 2014.

Instruction. For purposes of Instruction I.B.2(i) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia (''insurance contracts''), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act over the prior three years. For purposes of Instruction I.B.2(ii) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act.

* * * * *

5. *Offerings of Investment Grade Asset-Backed Securities.*

(a) * * *

(i) The securities are ''investment grade securities.'' An asset-backed security is an ''investment grade security'' if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in Rule 15c3–1(c)(2)(vi)(F) under the Exchange Act (§ 240.15c3–1(c)(2)(vi)(F)) has rated the security in one of its generic rating categories which signifies investment grade; typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade.

* * * * *

■ 17. Amend Form S–4 (referenced in 17 CFR 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 for the securities to be registered on this registration statement; or

* * * * *

■ 18. Amend § 239.33 by revising paragraph (b)(2) to read as follows:

§ 239.33 Form F–3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.

* * * * *

(b) * * *

(2) *Primary Offerings of Non-Convertible Securities Other than Common Equity.* Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant:

(i) Has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) Has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act of 1933 (15 U.S.C. 77a); or

(iii) Is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(iv) Is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(v) Discloses in the registration statement that it has a reasonable belief that it would have been eligible to use Form F–3 as of September 1, 2011 because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on Form F–3 on or before September 2, 2014.

Instruction to paragraph (b)(2). For purposes of paragraph (b)(2)(i) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933 (15 U.S.C. 77b(a)(13)), when using this Form F–3 to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia (''insurance contracts''), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act of 1933 (15 U.S.C. 77a)), issued in offerings registered under the Securities Act of 1933 over the prior three years. For purposes of paragraph (b)(ii) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933, when using this Form F–3 to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act of 1933), issued in offerings registered under the Securities Act of 1933.

* * * * *

■ 19. Amend Form F–3 (referenced in 17 CFR 239.33) by:

■ a. Revising General Instruction I.B.2.; and

■ b. Removing Instruction 3 to the signature block.

The revision reads as follows:

Note: The text of Form 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 Other than Common Equity.* Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant (i) has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or (ii) has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or (iii) is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or (iv) is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or (v) discloses in the registration statement that it has a reasonable belief that it would have been eligible to use Form F–3 as of September 1, 2011 because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on Form F–3 on or before September 2, 2014.

Instruction. For purposes of Instruction I.B.2(i) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of

Columbia (''insurance contracts''), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act over the prior three years. For purposes of Instruction I.B.2(ii) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act.

* * * * *

■ 20. Amend Form F–4 (referenced in 17 CFR 239.34) by revising General Instruction B.1(a)(ii)(B).

The revision reads as follows:

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

Form F–4

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

* * * * *

B. Information with Respect to the Registrant

1. * * *

a. * * *

(ii) * * *

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

* * * * *

§ 239.38 [Amended]

■ 21. Effective December 31, 2012, amend § 239.38 by removing ''Form F–9,'' from paragraph (h)(3).

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

■ 22. Effective December 31, 2012, amend Form F–8 (referenced in 17 CFR 239.38) by removing ''Form F–9,'' from each of paragraph A.(3) of General Instruction III and paragraph B. of General Instruction V.

§ 239.39 [Removed and Reserved]

■ 23. Effective December 31, 2012, remove and reserve § 239.39 (referencing Form F–9).

§ 239.40 [Amended]

■ 24. Effective December 31, 2012, amend § 239.40 by removing ''Form F–9,'' from paragraph (c)(4).

■ 25. Effective December 31, 2012, amend Form F–10 (referenced in 17 CFR 239.40) by:

■ a. In General Instruction I.C.(3), removing ''and'' after the semi-colon;

■ b. In General Instruction I.C.(4), removing ''Form F–9,'' removing the period, and adding in its place ''; and''; and

■ c. Adding paragraph C.(5) of General Instruction I to read as follows:

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

Form F–10

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

C. Form F–10 is available to any Registrant that:

(1) * * *

(5) if it does not meet the requirements of I.C.(4) or I.H., discloses in Part II of the registration statement that it has a reasonable belief that it would have been eligible to make an offering of investment grade, non-convertible securities on Form F–9 as of December 30, 2012, discloses the basis for such belief, and files a final prospectus for an offering under the registration statement on or prior to December 31, 2015.

* * * * *

§ 239.41 [Amended]

■ 26. Effective December 31, 2012, amend § 239.41 by removing ''Form F–9,'' from paragraph (h)(3).

■ 27. Effective December 31, 2012, amend Form F–80 (referenced in 17 CFR 239.41) by removing ''Form F–9'' in paragraph A.(3) of General Instruction III and paragraph B. of General Instruction V.

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

■ 28. Effective December 31, 2012, amend § 239.42 by removing ''F–9,'' from the heading and from each of paragraphs (a) and (e).

■ 29. Effective December 31, 2012, amend Form F–X (referenced in 17 CFR 239.42) by removing ''F–9,'' from each of paragraphs (a) and (e) of General Instruction I, and each of paragraphs (a) and (c) of General Instruction II.F.

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

* * * * *

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

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

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* 18 U.S.C. 1350, 12 U.S.C. 5221(e)(3), and Pub. L. 111–203, § 939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

■ 31. Amend § 240.14a–101 by revising Note E(2)(ii) to read as follows:

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

* * * * *

Notes:

* * * * *

E. * * *

(2) * * *

(ii) Action is to be taken as described in Items 11, 12, and 14 of this schedule which concerns non-convertible debt or preferred securities issued by a registrant meeting the requirements of General Instruction I.B.2. of Form S–3 (referenced in 17 CFR 239.13 of this chapter); or

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

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

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

* * * * *

§ 249.240 [Amended]

■ 33. Effective December 31, 2012, amend § 249.240f by:

■ a. Removing ''F–9,'' in paragraph (a) introductory text;

■ b. Redesignating the ''Note'' following paragraph (a) introductory text as ''Note to paragraph (a)''; and

■ c. Removing in paragraph (b)(4) introductory text the phrase ''; *provided,*

however, no market value threshold need be satisfied in connection with non-convertible securities eligible for registration on Form F–9 (§ 239.39 of this chapter)''.

■ 34. Effective December 31, 2012, amend Form 40–F (referenced in 17 CFR 249.240f) by:

■ a. In General Instruction A.(i), removing ''F–9'';

■ b. Removing from paragraph (2)(iv) of General Instruction A. the phrase ''; provided, however, that no market value threshold need be satisfied in connection with non-convertible securities eligible for registration on Form F–9'' and adding in its place the phrase ''or the Registrant filed a Form F–9 with the Commission on or before December 30, 2012''; and

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

(2) Any financial statements, other than interim financial statements, included in this Form by registrants registering securities pursuant to Section 12 of the Exchange Act or reporting pursuant to the provisions of Section 13(a) or 15(d) of the Exchange Act must be reconciled to U.S. GAAP as required by Item 17 of Form 20–F under the Exchange Act, unless this Form is filed with respect to a reporting obligation under Section 15(d) that arose solely as a result of a filing made on Form F–7, F–8, F–9 or F–80, in which case no such reconciliation is required.

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

Dated: July 27, 2011.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19421 Filed 8–2–11; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[TD 9541]

RIN 1545–BJ60

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210–AB44

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[CMS–9992–IFC2]

45 CFR Part 147

RIN 0938–AQ07

Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act

AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Interim final rules with request for comments.

SUMMARY: This document contains amendments to the interim final regulations implementing the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Patient Protection and Affordable Care Act regarding preventive health services.

DATES: *Effective date.* These interim final regulations are effective on August 1, 2011.

Comment date. Comments are due on or before September 30, 2011.

Applicability dates. These interim final regulations generally apply to group health plans and group health insurance issuers on August 1, 2011.

ADDRESSES: Written comments may be submitted to any of the addresses specified below. Any comment that is submitted to any Department will be shared with the other Departments. Please do not submit duplicates.

All comments will be made available to the public. *WARNING*: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the Internet exactly as received, and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

Department of Labor. Comments to the Department of Labor, identified by RIN 1210–AB44, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.

• *E-mail*: *E-OHPSCA2713.EBSA@dol.gov*.

• *Mail or Hand Delivery*: Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N–5653, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, *Attention*: RIN 1210–AB44.

Comments received by the Department of Labor will be posted without change to *http://www.regulations.gov* and *http://www.dol.gov/ebsa*, and available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Washington, DC 20210.

Department of Health and Human Services. In commenting, please refer to file code CMS–9992–IFC2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov*. Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–9992–IFC2, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–9992–IFC2, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the