Guidance on New SEC Rating Agency Expert Consent Requirement

July 21, 2010

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, the most sweeping financial reform legislation in decades. Certain provisions of the Dodd-Frank Act will become effective immediately, whereas other provisions require studies and/or rule-making and, as a result, the full implementation of the Dodd-Frank Act will take some years.

Among the provisions which become effective immediately is a provision that eliminates Securities Act Rule 436(g). This provision of Rule 436 exempted credit rating agencies from the requirement that written consents be filed with the Securities and Exchange Commission in the event that any portion of a report or opinion of an expert is quoted or summarized in a registration statement or prospectus. With the elimination of Rule 436(g), written consents generally would be necessary in connection with references to credit ratings in registration statements and prospectuses, depending on the status of the filing and the character of such references. The implementation of the new consent requirement is made complex by the practice of many issuers to refer to credit ratings in their Securities Exchange Act reports that are incorporated by reference into registration statements and prospectuses. Moreover, the leading rating agencies have indicated preliminarily that they do not intend to provide consents.

In light of the conflict between the consent requirement and preliminary position adopted by certain of the rating agencies, we at Simpson Thacher have collaborated with a number of other law firms and have spoken with the staff of the Securities and Exchange Commission with a view to developing guidance with respect to the application of the consent requirement. The product of these discussions is a "white paper" setting forth such guidance. A copy of the white paper is annexed to this memorandum.

We understand that the staff of the SEC may shortly issue compliance and disclosure interpretations relating to the application of Rule 436 as amended. We expect that these "C&DIs" will be consistent with the guidance set forth in the white paper.

The guidance set forth in the white paper is general in nature and is not intended as legal advice. We urge issuers to consult with their legal advisors promptly regarding the issues discussed in the white paper in order to ensure that their access to the public capital markets is not impeded by the new consent requirement.

ANNEX

IMPACT OF THE REPEAL OF SECURITIES ACT OF 1933 RULE 436(G) PURSUANT TO THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

Many corporate issuers refer to the ratings of their debt and preferred securities in prospectuses or prospectus supplements for those securities as well as in their Annual Reports on Form 10-K, 20-F or 40-F, Quarterly Reports on Form 10-Q or reports on Form 6-K that are incorporated by reference into their registration statements. The repeal of Rule 436(g), effective this Thursday July 22, 2010, raises certain questions regarding the continued use of ratings information given that certain rating agencies have already indicated that they are currently unwilling to deliver consents in relation to such disclosures and other rating agencies are expected to take a similar position. After consultation with the Staff of the Securities and Exchange Commission (the "Commission"), the firms named below believe the following approaches with respect to the disclosure of ratings information for non-asset backed securities offerings are appropriate based on the application of the Commission's current rules and regulations.

- ***Disclosure of ratings in registration statements filed pursuant to the Securities Act of 1933 or Section 10(a) prospectuses for purposes of satisfying an issuer's disclosure obligations.*** Some ratings disclosures in Commission filings do not require the filing of a consent, even if those disclosures are incorporated into or included in a registration statement or prospectus. For example, consistent with the discussion in the proposing release for the Commission's rule proposal from 2009 to require disclosure of information regarding credit ratings used by issuers (Rel. No. 33-9070)[1] and footnote 53 of the Commission's concept release from 2009 regarding the repeal of Rule 436(g) (Rel. No. 33-9071), no consent should be required where an issuer includes disclosure about its credit rating in a filing with the Commission in the context of a discussion of changes to a credit rating, the liquidity of the registrant, the cost of funds for a registrant or the terms of agreements that refer to credit ratings.[2]

- ***Prospectuses and prospectus supplements.*** An appropriate consent must be filed as part of the registration statement prior to filing a prospectus or prospectus supplement that is first filed on or after July 22, 2010 that includes ratings information (other than disclosure-based ratings information as noted in the first bullet above or any ratings based information that was filed prior to July 22, 2010).

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1 This rule proposal would require issuers to include in the registration statement information regarding credit ratings (other than disclosure-based ratings information) used by issuers in connection with registered offerings. No action has yet been taken on this proposal. If this proposal is adopted, the application of the consent requirement would change since ratings used in securities offerings would be required to be disclosed in the Registration Statement.

2 Because Rule 436(g) by its terms did not apply to the disclosure of claims-paying ratings by insurance companies, its repeal should not affect the continued disclosure of such ratings.

- ***Free writing prospectuses and Rule 134 compliant term sheets and press releases.*** The repeal of Rule 436(g) should not affect the use of ratings in free writing prospectuses or in term sheets or press releases that comply with Rule 134. That is because Rule 436, which requires the filing of written consents by experts, only applies by its terms to "registration statements" and "prospectuses". Rule 436 does not apply to "free writing prospectuses" (since they are Section 10(b) prospectuses and the definition of "prospectus" in Rule 405 only refers to Section 10(a) prospectuses) or to term sheets or press releases that comply with Rule 134 (since communications that comply with Rule 134 are not prospectuses). Note that if a free writing prospectus is filed with the Commission not only as a free writing prospectus but also as a prospectus pursuant to Rule 424, the free writing prospectus would constitute a "prospectus" for the purposes of Rule 436 and, accordingly, the requirements noted above for prospectuses first filed on or after July 22, 2010 would apply.

- ***Registration statements.***

    - ***Registration statements that became effective prior to July 22, 2010.*** Rule 401(a) provides that the form and content of a registration statement and prospectus shall conform to the applicable rules and forms as in effect on the initial filing date of such registration statement and prospectus. Accordingly, issuers should be able to continue to use currently effective registration statements without regard to any information regarding ratings included or incorporated by reference therein until the next post-effective amendment to such registration statement, unless a new prospectus or prospectus supplement filed under Rule 424(b) contains non-disclosure based ratings information, as set forth in the second bullet point above. Since the filing of an issuer's Annual Report on Form 10-K, 20-F or 40-F is deemed to be a post-effective amendment for purposes of updating the prospectus contained therein pursuant to Section 10(a)(3), most issuers should be able to continue to use their currently effective registration statements until the filing of their next Annual Report on Form 10-K, 20-F or 40-F. If the filing of the issuer's next Annual Report includes ratings information (other than disclosure based ratings information as noted in the first bullet above), then it must be accompanied or preceded by the filing of the appropriate consents.

    - ***Amendments to registration statements filed on or after July 22, 2010.*** Amendments to registration statements (other than post-effective amendment which are addressed below) filed on or after July 22, 2010 (including the filing of quarterly and other reports pursuant to the Securities Exchange Act of 1934 that are incorporated by reference into a registration statement) must be preceded by the filing of the appropriate consents if the text of such amendment contains ratings information (other than disclosure based ratings information as noted in the first bullet above).

- ***Registration statements and post-effective amendments that become effective on or after July 22, 2010.*** Registration statements and post-effective amendments to registration statements that become effective on or after July 22, 2010, must include an appropriate consent if the registration statement includes or incorporates by reference any ratings information (other than disclosure-based ratings information as noted in the first bullet above) regardless of when such information was originally filed. To the extent that ratings information (other than disclosure-based ratings information as noted in the first bullet above) is contained in annual, quarterly and other reports filed pursuant to the Securities Exchange Act of 1934, to be incorporated by reference into a registration statement that is newly filed or subject to post-effective amendment and an issuer is unable to obtain required consents from ratings agencies, then the issuer would need to amend the reports to be incorporated into the registration statement prior to the filing of the registration statement or post-effective amendment, as the case may be, with the Commission.

The undersigned firms concur in the above conclusions (recognizing that advice in any situation is dependent on the particular facts and circumstances). None of the firms subscribing to this document intends thereby to give legal advice to any person. Issuers are urged to consult with their legal advisors promptly regarding the issues discussed in this memorandum in order to ensure that their access to the public capital markets is not impeded by the change in law.

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