

REIT Alert

An informational newsletter from Goodwin Procter's Real Estate Capital Markets Group

SEC Proposes to Revise Form S-11 to Permit Incorporation by Reference

On December 14, 2007, the SEC issued a proposal to amend Form S-11 to allow a registrant to incorporate by reference historical information from reports and documents previously filed under the Securities Exchange Act of 1934¹. The proposal, if enacted, should result in cost savings for non-exchange traded REITs, as well as publicly traded REITs ineligible to use Form S-3, by reducing the amount of information that would otherwise be required to be repeated in registration statements when it is already on file with the SEC. Blind pool REITs may also benefit from the proposed amendment.

The proposal would primarily benefit non-exchange traded REITs which by their nature are unable to meet the public float requirement of Form S-3. Non-exchange traded REITs are currently allowed only to conduct primary offerings on Form S-11 without the advantages of incorporation by reference. Similarly, the proposal would also benefit those publicly traded REITs that are ineligible to use Form S-3.

Under the proposal, historical incorporation by reference into Form S-11 could only be used by a registrant that:

- has filed at least one annual report;
- is current in its reporting obligations under the Exchange Act; and
- has made the incorporated Exchange Act reports and documents available on its website.

Blind pool REITs, which are subject to Industry Guide 5, could also potentially benefit from the proposed revisions to Form S-11. The staff at the SEC (the "Staff") has indicated that it may utilize incorporation by reference into Form S-11 as a means to improve disclosure provided by blind pool REITs which should result in cleaner and more concise post-effective amendments that are consistent with the plain English principles.

Currently, blind pool REITs undertake pursuant to Item 20.D of Guide 5 to file during the distribution period a sticker supplement describing properties that have not been identified in the prospectus whenever a reasonable probability exists that a property will be acquired. At least every three months, these stickers must be consolidated in a post-effective amendment. This post-effective

amendment must also include audited Rule 3-14 financial statements for all material property acquisitions that have been closed during the past three months. Historically, the Staff has taken the position that an individual property is material if, among other things, it exceeds 5% of the net proceeds collected as of the date of the acquisition. As a result of these requirements, registrants often file post-effective amendments heavily laden with sticker supplements describing both probable and completed acquisitions.

If incorporation by reference into Form S-11 is permitted, the Staff has suggested that in order to reduce the number of sticker supplements attached to post-effective amendments it would expect registrants to simply incorporate all Form 8-Ks filed during the preceding three month period into the post-effective amendment. This would be in lieu of consolidating all of the sticker supplements into the post-effective amendment itself. Instead of being an aggregation of property financial statements, the post-effective amendments filed during the distribution period would be more useful and better constructed disclosure documents focusing on material business information, such as property tables, lease expirations and selected financial information.

The Staff is also contemplating aligning the materiality and timing requirements for filing Rule 3-14 financial statements during the distribution period with the existing Item 2.01 Form 8-K filing requirements for completed property acquisitions. Rule 3-14 financial statements would no longer be required to be provided in the post-effective amendment at the 5% significance level. Instead, Rule 3-14 financial statements for completed acquisitions would only need to be included in a Form 8-K and would only be required for properties that represent 10% of a registrant's total assets as of the date of acquisition.² Furthermore, the Rule 3-14 financial statement filing requirement of Form 8-K would no longer be tolled during the distribution period when a post-effective amendment is filed. For instance, if a property representing 10% of a registrant's assets was acquired by the registrant 10 days before the post-effective amendment was due to be filed, Rule 3-14 financial statements for that property would not be required to be included in the post-effective amendment. The Rule 3-14 financial statements would only be required to be filed in a Form 8-K/A 71 calendar days after the date that the initial report on Form 8-K was filed disclosing the acquisition of the property.

There are a number of issues surrounding the mechanics of implementation that registrants should keep in mind, including the fact that Rule 3-14 financial statements filed in a Form 8-K and other previously filed Exchange Act reports are not included in a prospectus until they are specifically incorporated by reference. That is, the proposal does not call for "forward incorporation by reference."

Deadline for Comments

Comments regarding the proposal are due by January 22, 2008 and may be submitted by any of the following methods:

- using the SEC's internet comment form <http://www.sec.gov/rules/proposed.shtml>;
- sending an email to rule-comments@sec.gov, and including File Number S7-30-07 on the subject line;
- using the Federal Rulemaking Portal (<http://www.regulations.gov>) and following the instructions for submitting comments; or
- sending paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

¹ Proposing Release No. 33-8871. The proposed amendment to Form S-11 is identical to the amendments to Forms S-1 and F-1 previously adopted by the SEC and effective as of December 1, 2005.

² Measuring significance as 10% or more of a registrant's total assets as of the date of acquisition only applies during the distribution period and to registrants subject to the Item 20.D of Guide 5 undertakings. After the distribution period is complete, but before all of the net proceeds of the offering are invested, a registrant must file a Form 8-K with the required Rule 3-14 financial statements for acquisitions that represent 10% or more of the net proceeds collected. These alternate bases are only meant to provide a different base for measuring significance in determining when to file an Item 2.01 Form 8-K. That is, they are not meant to create additional reporting obligations. Registrants would revert to the standard measure of determining significance for purposes of filing an Item 2.01 Form 8-K (10% or more of the registrant's total assets as of its latest fiscal year end) once the net proceeds of the offering are completely invested.

If you would like additional information about the issues addressed in this REIT alert, please contact:

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