

News Bulletin

October 8, 2012



SEC Registration of Covered Bonds

This publication is intended to provide a brief summary overview of some of the considerations for a foreign issuer of covered bonds that is contemplating registering covered bonds in the United States with the Securities and Exchange Commission.

The process of registering covered bonds with the SEC by a foreign issuer raises different considerations in each issuer jurisdiction and, in some cases, for each issuer in a jurisdiction. There are different issuing structures for covered bonds in different jurisdictions, and sometimes more than one structure in the same jurisdiction. Moreover, individual issuers may have existing relationships with the SEC, may be subject to special accounting requirements, may be subject to certain prohibitions on disclosure or otherwise may present unique facts. There are nevertheless some general points to consider in SEC registration of a covered bond program.

SEC Registration Statement Forms

There is a conceptual point that needs to be understood before starting a discussion of SEC forms. Registration with the SEC registers the offer and sale securities; registration with the SEC does not register the issuer or its covered bond program.

Generally foreign issuers would register the offer and sale of securities with the SEC on Form F-1 for a one-time offering, or Form F-3 for a shelf offering. A shelf offering is usually desirable because it permits the issuer to register an amount of securities to be sold over three years, and to come to market multiple times over the three year period at times of the issuer's choosing.

However, in order to qualify for use of Form F-3 for a registration statement, the issuing entity¹ must have been reporting timely to the SEC for at least one year, and otherwise meet the transactional requirement of the form². In the event that the issuer does not qualify for Form F-3, it must register its covered bonds on Form F-1. Form F-1 can only be used for a one-time offering of securities that are to be sold after the SEC declares the registration statement effective. Using Form F-1 therefore can make it difficult for an issuer to take advantage of market opportunities because of the uncertainty of when the SEC will declare a registration statement effective.

Required Disclosure

Issuing Bank Disclosure. The disclosure required in the prospectus for an issuing bank will include full financial statements, presented in standard IFRS or reconciled to U.S. GAAP. Disclosure regarding the bank should be drafted in accordance with Guide 3, which is the disclosure guide applicable to banks. Periodic reporting will include annual filings on Form 20-F, and interim reporting and material event reporting on Form 6-K.

¹ Note that if there is a separate entity providing a guarantee as in the UK-type covered bond structure, the SEC staff takes the view that the guarantee is a security that also requires registration. Accordingly, the guarantor entity must also qualify for the registration statement form chosen for the filing. There are some special rules applicable to 100% owned subsidiaries (but not 99.9% owned) that permit the subsidiary to rely on the parent's qualification.

² The issuance of investment-grade debt securities will satisfy the transactional requirement.

Cover Pool Disclosure. Based on the recent no action letter granted to Royal Bank of Canada³ it is likely that the SEC staff will expect disclosure about the cover pool assets consistent with the requirements of Regulation AB that are applicable to master trust structures, such as credit card master trusts or UK RMBS master trusts. Prospectus disclosure will include static pool disclosure and statistical disclosure of the expected cover pool at the time of issuance, including delinquency and loss information. Static pool information is stratified disclosure of mortgage loans in the cover pool based on the year of origination of the loans. Thus, the tables will show, for example, the performance of all loans in the cover pool that were originated in 2004, including delinquency and loss information, for each year from 2004 to the date of the offering and similarly for each other year of origination of loans.

Periodic reporting of cover pool assets will include an annual filing on Form 10-K consistent with what an ABS issuer would report⁴, interim reporting on Form 10-D within 15 days of a distribution date of distribution amounts, application of collections on the assets, and performance of the cover pool and material event reporting on Form 6-K.

Strategic Alternatives to Form F-1

As noted above, if a foreign issuer of covered bonds does not qualify for use of Form F-3 because it has not been reporting to the SEC for at least one year, the issuer must use Form F-1, which requires the filing of a registration statement for each offering. However, only one offering is required to begin the reporting process. If the issuer wishes to come to market frequently during the year and finds the filing and approval process for Form F-1 interferes with market timing for an offering, the issuer may wish to consider using a Rule 144A private placement or a Section 3(a)(2) offering to enable quick market entry during the year when it is building its reporting history. It is also possible to offer Rule 144A securities with registration rights to be followed by the filing of a Form F-1 to register those securities. At the end of the one year period, a Form F-3 can be utilized.

We would be pleased to provide more detailed advice regarding SEC registration, and answer any questions you may have about the process.

For additional information on covered bonds, visit us at: <http://www.mofo.com/Covered-Bonds-Services/>

For further information, please contact any of the following Morrison & Foerster lawyers.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

³ Royal Bank of Canada, available May 18, 2012.

⁴ This will include an annual statement of the servicer of the mortgage loans regarding compliance with applicable servicing criteria, an attestation by an accounting firm on the servicer's statement and a statement from an authorized officer of the servicer regarding his review of the servicer's activities and its performance under the servicing agreement during the period and that based on such review and to the best of his knowledge the servicer has fulfilled all of its obligations under the servicing agreement. For a covered bond issuer utilizing a single tier issuance structure, such as a pfandbrief issuer, the SEC may request different statements and disclosure. To date, the SEC has only considered issuers using a two-tier, UK-type covered bond structure.