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Revisions to Form S–11 To Permit Historical Incorporation by Reference; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 239

[Release No. 33–8909; File No. S7–30–07]

RIN 3235–AK02

Revisions to Form S–11 To Permit Historical Incorporation by Reference

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to Form S–11, a registration statement used by real estate entities to register offerings under the Securities Act of 1933. The amendments permit an entity that has filed an annual report for its most recently completed fiscal year and that is current in its reporting obligations under the Securities Exchange Act of 1934 to incorporate by reference into Form S–11 information from its previously filed Exchange Act reports and documents. The amendments are identical to amendments to Form S–1 and Form F–1 previously adopted by the Commission and effective as of December 1, 2005.

DATES: *Effective Date:* April 15, 2008.

FOR FURTHER INFORMATION CONTACT: Michael McTiernan at (202) 551–3852, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3010.

SUPPLEMENTARY INFORMATION: We are amending Form S–11 [1] under the Securities Act of 1933.[2]

I. Discussion

A. Background

Form S–11 is the form that real estate entities generally must use to register offerings under the Securities Act.[3] The form is used for the registration of securities issued by real estate investment trusts and securities issued by other issuers whose business is primarily that of acquiring and holding for investment real estate, interests in real estate, or interests in other issuers whose business is primarily that of acquiring and holding real estate or interests in real estate for investment.[4] Prior to these amendments, Form S–11 did not permit an issuer to satisfy the disclosure requirements of the form through incorporation by reference to the reports and other documents that the issuer previously had filed under the Securities Exchange Act of 1934.[5]

On June 29, 2005, we adopted amendments to Form S–1 [6] and Form F–1 [7] to permit companies filing those forms to incorporate by reference information from their previously filed Exchange Act reports and documents.[8] The purpose of the amendments was to integrate further the Exchange Act and the Securities Act.[9] The ability to incorporate by reference is conditioned, among other things, on the company having filed its annual report for the most recent fiscal year, being current in its reporting obligations under the Exchange Act, and making the incorporated Exchange Act reports and documents available and accessible on a Web site maintained by or for the registrant.[10] Blank check companies, shell companies and penny stock registrants are not permitted to use incorporation by reference. Successor registrants may incorporate by reference if their predecessors were eligible.[11]

In 2005, we did not adopt similar amendments to Form S–11. However, we believe that Form S–11 should be consistent with Form S–1 with respect to incorporation by reference. Both Form S–11 and Form S–1 are long-form registration statements intended for new and unseasoned issuers. The only substantive difference between the two forms is that Form S–11 contains certain additional disclosure requirements specific to real estate entities. We believe that integrating disclosure under the Exchange Act and Securities Act should extend equally to the disclosure obligations of real estate entities.

On December 10, 2007, we proposed amendments to Form S–11 to permit a reporting issuer that has filed an annual report for its most recently completed fiscal year and that is current in its reporting obligations under the Exchange Act to incorporate by reference into its Form S–11 information from its previously filed Exchange Act reports and documents.[12] We received six comment letters in response to the proposed amendments.[13] We are adopting amendments to Form S–11 substantially as proposed with certain modifications to reflect comments received.

B. Amendments to Form S–11

1. Historical Incorporation by Reference

(a) Eligibility

We are amending Form S–11 to permit a reporting issuer that has filed an annual report for its most recently completed fiscal year and that is current in its reporting obligations under the Exchange Act to incorporate by reference into its Form S–11 information from previously filed Exchange Act reports and documents. A successor registrant will be able to incorporate information by reference on the same terms if its predecessor was eligible to do so.[14] Consistent with Form S–1 and the provisions outlined in the Proposing Release, the following issuers will not be able to incorporate by reference into a Form S–11:

- Reporting issuers who are not current in their Exchange Act reports; [15]
- Issuers who are or were, or any of whose predecessors were during the past three years:
  - Blank check issuers;
  - Shell companies (other than business combination related shell companies); or
  - Issuers for offerings of penny stock.[16]

In addition, to enhance the availability to investors of incorporated information, the ability to incorporate by reference is conditioned on the issuer making its incorporated Exchange Act reports and other materials readily accessible on a Web site maintained by or for the issuer. By conditioning the

[1] 17 CFR 239.18.

[2] 15 U.S.C. 77a *et seq.*

[3] Real estate entities may also use Form S–3 [17 CFR 239.13] and Form S–4 [17 CFR 239.25] if they meet the applicable eligibility requirements of those forms. When no other form is available, these entities are required to file on Form S–11 rather than Form S–1.

[4] See General Instruction A of Form S–11.

[5] 15 U.S.C. 78a *et seq.*

[6] 17 CFR 239.11.

[7] 17 CFR 239.31.

[8] See *Securities Offering Reform*, Release No. 33–8591 (Jul. 19, 2005) [70 FR 44722].

[9] *Id.* at 237.

[10] See General Instruction VII of Form S–1 and General Instruction VI of Form F–1.

[11] *Id.*

[12] *Revisions to Form S–11 to Permit Historical Incorporation by Reference*, Release No. 33–8871 (Dec. 14, 2007) [72 FR 72274] (the ''Proposing Release'').

[13] All comment letters are publicly available at *http://www.sec.gov/comments/s7-30-07/s73007.shtml* or at our Public Reference Room at 100 F Street, NE, Washington, DC 20549.

[14] The succession would have to be either primarily for the purpose of changing the state or jurisdiction of incorporation of the issuer or forming a holding company and the assets and liabilities of the successor would have to be substantially the same as the predecessor at the time of the succession, or all of the predecessor issuers would have to be eligible at the time of the succession and the issuer must continue to be eligible.

[15] As with Forms S–1, F–1 and S–3, to be current, at the time of filing the registration statement, the issuer must have filed all materials required to be filed pursuant to Exchange Act Section 13, 14 or 15(d) [15 U.S.C. 78m, 78n, or 78o(d)] during the preceding 12 calendar months (or for such shorter period that the issuer was required to file such materials).

[16] See Securities Act Rule 419(a)(2) [17 CFR 230.419(a)(2)], Exchange Act Rule 3a51–1 [17 CFR 240.3a51–1] and Securities Act Rule 405 [17 CFR 230.405] for definitions of ''blank check company,'' ''penny stock'' and ''shell company,'' respectively.

ability to incorporate by reference on the ready accessibility of an issuer's incorporated Exchange Act reports and other materials on its Web site, we are providing investors the ability to obtain the information from those reports and materials at the same time that they would have been able to obtain the information if it was set forth directly in the registration statement. Issuers may satisfy this condition by including hyperlinks directly to the reports or other materials filed on EDGAR or on another third-party Web site where the reports or other materials are made available in the appropriate timeframe and access to the reports or other materials is free of charge to the user.

(b) Procedural Requirements

Under the amendments we are adopting today, the prospectus in the registration statement at effectiveness must identify all previously filed Exchange Act reports and materials, such as proxy and information statements, that are incorporated by reference. There will be no permitted incorporation by reference of Exchange Act reports and materials filed after the registration statement is effective—known as ''forward incorporation by reference.'' [17] Under the amendments, an issuer eligible to incorporate by reference its Exchange Act reports and other materials into its Form S–11 must include the following in the prospectus that is part of the registration statement:

- A list of the incorporated reports and materials;
- A statement that it will provide copies of any incorporated reports or materials on request;
- An indication that the reports and materials are available through the Securities and Exchange Commission's EDGAR system or public reference room;
- Identification of the issuer's Web site address where such incorporated reports and other materials can be accessed; and
- Required disclosures regarding material changes in, or updates to, the information that is incorporated by reference from an Exchange Act report or other material required to be filed.

2. Form S–11 and Rule 415 Under the Securities Act

We have historically permitted registrants offering securities on a continuous basis pursuant to Rule 415 [18] under the Securities Act to use Form S–11. However, unlike the cover page of Form S–1, the cover page of Form S–11 does not require a registrant to reflect whether it is relying on Rule 415 under the Securities Act. In response to the suggestion of a commenter, as described below, we have amended the cover page of Form S–11 to conform to the cover page of Form S–1 so as to require a registrant to reflect whether it has relied on Rule 415 under the Securities Act.[19] This amendment also will assist the staff in assessing compliance with the requirements for incorporation by reference, particularly as they apply in the continuous offering context.

C. Comments on Form S–11 Amendments

Commenters strongly supported the proposed amendments to allow issuers to incorporate by reference historical Exchange Act filings into Form S–11.[20] One commenter suggested that Form S–11 should also permit forward incorporation by reference for filings made after effectiveness of a registration statement.[21] We are not adopting this suggestion. The purpose of these amendments is to revise Form S–11 to conform to Form S–1 and Form F–1 with respect to incorporation by reference and those forms do not permit forward incorporation by reference.

Another commenter suggested that we revise the eligibility requirement that the registrant must have filed an annual report required under Section 13(a) or 15(d) of the Exchange Act for its most recently completed fiscal year.[22] Again, since Form S–1 and Form F–1 include this eligibility requirement, we have not adopted the commenter's suggestion to provide an alternative requirement in Form S–11. We do not believe that this eligibility requirement will prevent the use of incorporation by reference in the multi-year continuous offerings commonly registered on Form S–11 by non-traded real estate investment trusts (''REITs''). These registrants regularly file post-effective amendments to reflect property acquisitions. A post-effective amendment to a Form S–11 may be filed after the end of a registrant's fiscal year but prior to the filing of its Form 10–K, raising the question of whether the registrant may continue to incorporate by reference historical Exchange Act reports in such post-effective amendment. In the continuous offering context, we believe that eligibility to incorporate by reference should be measured immediately prior to the time of filing a Form S–11 registration statement, as specified in Instruction H of the form, and thereafter, each time that a post-effective amendment is filed for purposes of updating the information contained in the prospectus pursuant to Section 10(a)(3) of the Securities Act.[23] Thus a post-effective amendment filed for purposes other than a Section 10(a)(3) update, such as a post-effective amendment to reflect property acquisitions, could continue to incorporate by reference historical Exchange Act reports to the extent the previous post-effective amendment filed for purposes of Section 10(a)(3) or, if not applicable, the original registration statement, was eligible to do so.

Two commenters requested guidance on whether a prospectus supplement may be used to update the information incorporated by reference into the prospectus included in a Form S–11 registration statement.[24] Rule 411 [25] under the Securities Act prohibits incorporation by reference of information into a prospectus except as specifically permitted in the registration statement form. If the registrant meets the requirements set forth in Instruction H of Form S–11, as we are adopting Instruction H in this release, then the registrant may elect to incorporate by reference ''into the prospectus contained in the registration statement'' the information in the documents set forth in Item 29 of Form S–11, as we are adopting Item 29 in this release. For purposes of these form instructions, a revised or supplemented prospectus is ''contained in the registration statement'' when it is part of a post-effective amendment to the registration statement. This is consistent with our earlier statement that there will be no permitted incorporation by reference of Exchange Act reports and documents filed after the effective date of the registration statement.

Two commenters [26] requested guidance on whether a new non-traded

[17] As discussed below, incorporation by reference of historical Exchange Act reports and documents will be permitted in post-effective amendments to the registration statement, provided the issuer otherwise satisfies the eligibility and procedural requirements set forth in Form S–11.

[18] 17 CFR 230.415.

[19] See letter from Bimini Capital Management, Inc. (''Bimini'').

[20] See, for example, letters from Bimini, The Investment Program Association (''IPA''), Corporate Property Associates 17—Global Incorporated (''CPA''), Hines Real Estate Investment Trust, Inc. (''Hines'') and Grubb & Ellis Company (''Grubb'').

[21] See letter from Bimini.

[22] See letter from IPA.

[23] 15 U.S.C. 77j(a). Section 10(a)(3) of the Securities Act requires that when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense.

[24] See letters from IPA and Hines.

[25] 17 CFR 230.411.

[26] See letters from IPA and Grubb.

REIT [27] would be a shell company and thus ineligible to incorporate by reference for at least three years. The determination of whether a particular registrant is a shell company depends on the facts and circumstances of that company as considered against the definition of the term ''shell company'' in Rule 405 and the principles underlying that definition as described in the release adopting that definition.[28] Under appropriate circumstances a non-traded REIT may not be deemed a shell company; however, the determination of whether certain registrants such as non-traded REITs are shell companies is outside the scope of these amendments. Furthermore, in adopting the definition of ''shell company'' in 2005, we declined to provide more specific or quantitative measurements, as we believed the definition in Rule 405 reflected the traditional understanding of the term ''shell company'' in the area of corporate finance.[29]

One commenter [30] suggested that we amend the disclosure requirements of Form S–11 to conform to the recent amendments to Regulation S–K [31] with respect to the disclosure requirements of smaller reporting companies.[32] Form S–11 includes some substantive disclosure requirements that are not contained in Regulation S–K.[33] Thus the recent amendments to Regulation S–K made in connection with the elimination of the small business registration forms do not impact these Form S–11 disclosure requirements. Since the purpose of these amendments is only to revise Form S–11 to conform to Form S–1 and Form F–1 with respect to incorporation by reference, we have not adopted the suggestion at this time. We may consider future amendments to Form S–11 to address any differences between Form S–11 disclosures and Regulation S–K disclosures.

One commenter [34] suggested that we amend an undertaking in Industry Guide 5 [35] related to disclosures made in connection with property acquisitions. Since the purpose of these amendments is only to revise Form S–11 to conform to Form S–1 and Form F–1 with respect to incorporation by reference, we have not adopted the suggestion at this time. We may consider future revisions to Industry Guide 5.

Finally, one commenter [36] requested we amend the cover page of Form S–11 to conform to Form S–1 and require a registrant to reflect its reliance on Rule 415 under the Securities Act. Registrants required to register offerings on Form S–11 are permitted to rely on Rule 415 to the extent permitted by the terms of the rule to the same extent as registrants registering on Form S–1. Accordingly, we have adopted the suggestion to revise the cover page of Form S–11 to require a registrant to reflect its reliance on Rule 415 under the Securities Act.

D. Effective Date

The amendments to Form S–11 shall take effect upon publication in the **Federal Register**. The Commission finds good cause to make the amendments effective prior to 30 days after publication to enable calendar fiscal year registrants eligible to incorporate by reference to satisfy their obligations to update the financial information contained in current prospectuses as required by Section 10(a)(3) of the Securities Act by incorporating their most recently filed Form 10–K. Calendar fiscal year registrants are required to satisfy these updating requirements by April 30, 2008. These registrants would need to make any incorporated reports or materials readily accessible on their Web site; investors, therefore, should be able to obtain the information from those reports or materials at the same time that they would have been able to obtain the information if it was set forth directly in the registration statement. In addition, because the amendments to Form S–11 relieve restrictions on companies to include information already on file with the Commission, we believe that it is appropriate that the effective date of the release be upon publication in the **Federal Register**.

II. Paperwork Reduction Act

A. Background

The amendments to Form S–11 contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[37] As discussed in the Proposing Release, we submitted a request for approval of these to the Office of Management and Budget in accordance with the Paperwork Reduction Act.[38] The title for this information is ''Form S–11'' (OMB Control No. 3235–0067).

Form S–11 was adopted pursuant to the Securities Act. This form sets forth the disclosure requirements for registration statements prepared by real estate entities to provide investors with the information they need to make informed investment decisions in registered offerings.

Our amendments to Form S–11 are intended to allow issuers that are required to use Form S–11 to incorporate by reference previously filed Exchange Act reports and documents. The amendments revise Form S–11 to conform to Form S–1 and Form F–1 with respect to incorporation by reference.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid control number. The information collection requirements related to registration statements on Form S–11 are mandatory. There is no mandatory retention period for the information disclosed, and the information disclosed will be made publicly available on the EDGAR filing system.

B. Summary of Information Collection

The amendments will decrease existing disclosure requirements for eligible issuers by eliminating the need to repeat information in a Form S–11 when that information was previously disclosed in Exchange Act filings. Any reporting issuer that has filed an annual report for its most recently completed fiscal year and that is current in its

[27] Typically a non-traded REIT has only cash assets at the time of effectiveness of its initial Form S–11 registration statement. The initial public offering generally is a best-efforts continuous offering and the proceeds of the offering are used to purchase real estate or real estate related assets that are not identified in the registration statement at the time of effectiveness.

[28] *Use of Form S–8, Form 8–K, and Form 20–F by Shell Companies*, Release No. 33–8587 (Jul. 15, 2005) [70 FR 42234] (adopting 17 CFR 230.405 and other rules). The shell company rules adopted in that release were intended to protect investors by deterring fraud and abuse through the use of reporting shell companies, including through ''pump-and-dump'' schemes and schemes to avoid Securities Act registration and prospectus delivery requirements.

[29] See *id.* The term ''shell company'' means a registrant, other than an asset-backed issuer as defined in Item 1101(b) of Regulation AB, that has

No or nominal operations; and

—Either:

—no or nominal assets;

—assets consisting solely of cash and cash equivalents; or

—assets consisting of any amount of cash and cash equivalents and nominal other assets.

[30] See letter from Bimini.

[31] 17 CFR 229.10 to 17 CFR 229.915.

[32] See *Smaller Reporting Company Regulatory Relief and Simplification*, Release No. 33–8876 (Dec. 19, 2007) [73 FR 934]. The final rules were effective as of February 4, 2008.

[33] For example, Items 11–15 of Form S–11 include specific disclosure requirements regarding general information about the registrant, its investment policies and its properties that are not contained in Regulation S–K.

[34] See letter from Grubb.

[35] 17 CFR 229.801.

[36] See letter from Bimini.

[37] 44 U.S.C. 3501 *et seq.*

[38] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

reporting obligation will be permitted to incorporate information by reference into its registration statement on Form S–11.

C. Summary of Comments and Revisions to Amendments

Four of the commenters indicated that the amendments will increase the efficiency of the registration process and decrease costs borne by registrants.[39] None of the commenters specifically addressed our request for comment on the Paperwork Reduction Act analysis contained in the Proposing Release. We are nevertheless revising our Paperwork Reduction Act estimates in light of certain rounding adjustments made in our submission to OMB.

D. Revised Paperwork Reduction Act Burden Estimates

As discussed in Section II.C. above, we are revising the Paperwork Reduction Act burden estimates in the Proposing Release to reflect the rounding of those calculations, as reflected in the submission made to OMB.

For purposes of the Paperwork Reduction Act, we now expect the annual decrease in the paperwork burden for issuers eligible to incorporate by reference to comply with Form S–11 to be approximately 37,950 hours of in-house company personnel time and approximately $45,540,000 for the services of outside professionals.[40] These estimates include the time and the cost of preparing and reviewing disclosure, filing documents, and retaining records. These estimates were based on the following assumptions:

- Each year, approximately 100 registration statements on Form S–11, including post-effective amendments, will incorporate information by reference.[41]
- The estimated paperwork burden for a Form S–11 that does not incorporate information by reference is 1,977 hours, which consists of 494.25 internal hours and 1,482.75 professional hours.[42]
- The estimated paperwork burden for a Form S–11 that incorporates information by reference will be the same as the burden currently imposed by Form S–3,[43] which is 459 hours, which consists of 114.75 internal hours and 344.25 professional hours.
- The amount of time eliminated for each Form S–11 that incorporates information by reference will be 1,518 hours per form (1,977 hours for a Form S–11 that does not incorporate information by reference minus 459 hours for a Form S–11 that incorporates information by reference).
- We estimate that the annual decrease in compliance burden after adoption of the amendments will be 151,800 hours (100 registration statements multiplied by 1,518 hours per form).[44] This would include 37,950 hours of issuer personnel time (100 registration statements times 379.5 [45] hours of issuer personnel time per registration statement) and 113,850 hours of professional time (100 registration statements times 1,138.5 [46] hours of professional time per registration statement).
- The annual cost savings will be approximately $45,540,000 for the services of outside professionals.

III. Cost-Benefit Analysis

A. Summary of Amendments

We are adopting revisions to Form S–11 that will allow real estate entities to take advantage of incorporation by reference for their previously filed Exchange Act reports and documents. Form S–1 and Form F–1, which are similar long-form registration statements, currently permit this type of incorporation by reference. The amendments revise Form S–11 to permit incorporation by reference on the same terms as currently provided in Form S–1 and Form F–1. The purpose of the amendments is to integrate further the disclosure obligations of the Exchange Act and the Securities Act for real estate entities.

B. Benefits

We anticipate that the amendments will enable real estate entities to access the capital markets at a lower cost. The amendments will enable eligible issuers to use their Exchange Act filings to satisfy a portion of their Form S–11 disclosure requirements without having to incur costs to replicate information that they already have disclosed in previously filed Exchange Act reports and other documents. For purposes of our Paperwork Reduction Act analysis, we estimate that our amendments to Form S–11 will reduce the annual paperwork burden by approximately 37,950 hours for issuer personnel time at a cost of approximately $6,641,250 [47] and by a cost of approximately $45,540,000 for the services of outside professionals. In addition, we believe that the reduction in the size of the prospectus as a result of incorporation by reference will also result in some cost savings and efficiencies in printing and delivering prospectuses.

The amendments are intended to result in regulatory simplification and efficiency by permitting incorporation by reference on Form S–11 and conforming the requirements of Form S–11 to the requirements of Form S–1 and Form F–1 in that respect. Incorporation by reference will allow eligible issuers to avoid duplicating disclosure in Form S–11 when the information has already been disclosed in Exchange Act reports. In addition, the revisions will simplify the disclosure regime for long-form registration statements by permitting incorporation by reference equally, regardless of industry. Although four of the commenters indicated that the amendments will increase the efficiency of the registration process and decrease costs borne by registrants,[48] none of the commenters specifically addressed our request for comment on the Cost-Benefits Analysis contained in the Proposing Release.

Two commenters requested guidance on whether a prospectus supplement may be used to update the information incorporated in a prospectus included in a Form S–11 registration statement.[49] As discussed above, we believe it is

[39] See letters from IPA, CPA, Hines and Grubb.

[40] Consistent with recent rulemakings and based on discussions with several private law firms, we estimate that the cost of outside professionals retained by the issuer is an average of $400 per hour.

[41] This estimate is based on prior filing history and future estimates. From September 1, 2006 to August 31, 2007, issuers that will be eligible to incorporate by reference under these amendments filed approximately 14 new registration statements on Form S–11 and 68 post-effective amendments to registration statements on Form S–11 (excluding post-effective amendments filed for the purpose of deregistering shares). A majority of these filings were made by non-traded REITs. With the elimination of small business registration forms, we estimate that the number of registration statements filed on Form S–11 will increase by 15. See Release No. 33–8876.

[42] Consistent with current OMB estimates, we assume that 25% of the total burden is borne by internal staff and 75% by professionals.

[43] 17 CFR 239.13.

[44] Generally, companies eligible to incorporate by reference on Form S–11 will have previously filed at least one Form S–11. The estimated decrease in the compliance burden discussed in this section reflects the reduced costs of preparing a subsequent Form S–11 as well as the reduced costs from utilizing incorporation by reference.

[45] Reflects the difference between the amount of internal time required to prepare a Form S–11 without incorporation by reference (494.25 hours) and the amount of internal time required to prepare a Form S–11 with incorporation by reference (114.75 hours).

[46] Reflects the difference between the amount of professional time required to prepare a Form S–11 without incorporation by reference (1,483 hours) and the amount of professional time required to prepare a Form S–11 with incorporation by reference (344.25 hours).

[47] Consistent with recent rulemaking releases, we estimate the value of work performed by the company internally at a cost of $175 per hour.

[48] See letters from IPA, CPA, Hines and Grubb.

[49] See letters from IPA and Hines.

appropriate to limit the use of incorporation by reference to revised or supplemented prospectuses included in post-effective amendments to the registration statement. We believe this limitation is consistent with our prior statements that forward incorporation by reference is not appropriate for long-form registration statements, such as Form S–11, while still reducing the overall filing burden associated with the form.

C. Costs

We expect that the amendments will result in some ongoing costs to issuers that elect to use incorporation by reference. These potential costs relate to the issuer's obligation to make the incorporated Exchange Act reports and documents available on its Web site and include creating and/or maintaining a Web site as well as actually posting the required filings on the Web site. However, we believe that a substantial majority of issuers eligible to use incorporation by reference already maintain Web sites and thus will not have to incur any additional costs to establish a new Web site for this purpose. In addition, we believe that many issuers eligible to use incorporation by reference already post their Exchange Act reports on their Web sites. Those that do not will incur incremental costs to post the required filings. Given that the amendments will not mandate use of incorporation by reference, issuers that are unwilling to bear the cost of complying with the Web site requirement can simply elect not to incorporate information by reference.

We also recognize that permitting incorporation by reference may impose an analytical burden on investors. For example, for offerings on Form S–11 today, much of the relevant information regarding an offering and the issuer is required to be contained in the registration statement. As a result of our amendments, offerings pursuant to Form S–11 could require an investor to assemble and assimilate information from various Exchange Act reports and the registration statement in order to compile all of the relevant information regarding an offering. Investors will have to compile the information integrated into the registration statement or delivered by means outside of the prospectus. We note, however, that Securities Act Forms S–3 and F–3 have long permitted incorporation by reference from the issuer's Exchange Act reports, as have Form S–1 and Form F–1 since December 2005, and we know of no indications that investors are unduly burdened when investing in offerings registered on these forms.

IV. Consideration of Promotion on Efficiency, Competition and Capital Formation

Section 2(b) of the Securities Act,[50] requires us, when engaged in rulemaking where we are required 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 will promote efficiency, competition and capital formation. In response to our request for comment in the Proposing Release on the impact of the proposed amendments on efficiency, competition and capital formation, four of the commenters indicated that the amendments will increase the efficiency of the registration process and decrease costs borne by registrants.[51]

The amendments will amend Form S–11 to permit incorporation by reference on terms equivalent to that currently provided in Form S–1 and Form F–1. We believe the amendments will provide benefits, as discussed in further detail above, by reducing the costs of complying with the Form S–11 disclosure requirements by enabling eligible issuers to incorporate their Exchange Act filings. Eased filing burdens resulting from the amendments will promote efficiency in capital formation for real estate entities and may provide a competitive benefit to entities filing on Form S–11 by allowing them to incorporate their periodic reports by reference to the same extent as registrants filing on Form S–1 and Form F–1.

V. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to amendments to Form S–11.

A. Reasons for and Objectives of the Amendments

In 2005, the Commission adopted revisions to Form S–1 and Form F–1 to permit incorporation by reference from previously filed Exchange Act reports and other documents. Currently, real estate entities are not permitted to use Form S–1 to register offerings under the Securities Act. Consequently, these entities are unable to take advantage of the important benefit of incorporation by reference that is enjoyed by companies in all other industries that file registration statements on Form S–1. The ability to use a prospectus that does not need to include information provided in previous Exchange Act filings permits companies to streamline the preparation of registration statements and raise capital more efficiently. Companies that are not permitted to incorporate by reference have a greater burden in preparing registration statements in connection with their public offerings. We believe there is no reason to distinguish between real estate entities and other industries for purposes of incorporation by reference.

The purpose of the amendments is to further integrate the Exchange Act and Securities Act by amending Form S–11 to permit incorporation by reference of Exchange Act filings on terms equivalent to that currently provided in Form S–1 and Form F–1. The amendments will extend an important benefit to real estate entities.

B. Significant Issues Raised by Public Comment

In the Proposing Release, we requested comment on any aspect of the Initial Regulatory Flexibility Act Analysis, including the number of small entities that would be affected by the proposals, and both the qualitative and quantitative nature of the impact. While several commenters supported the proposal because of the cost savings to real estate entities, they did not provide any specific comments on the Initial Regulatory Flexibility Act Analysis.

C. Small Entities Subject to the Amendments

The Regulatory Flexibility Act defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [52] The Commission's rules define ''small business'' and ''small organization'' for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.[53] Roughly speaking, a ''small business'' and ''small organization,'' when used with reference to an issuer other than an investment company, means an issuer with total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 issuers, other than investment companies, that may be considered reporting small entities.[54] The amendments will apply to all

[50] 15 U.S.C. 77b(b).

[51] See letters from IPA, CPA, Hines and Grubb.

[52] 5 U.S.C. 601(6).

[53] Rules 157 under the Securities Act [17 CFR 230.157], 0–10 under the Exchange Act [17 CFR 240.0–10] and 0–10 under the Investment Company Act [17 CFR 270.0–10] contain the applicable definitions.

[54] The estimated number of reporting small entities is based on 2007 data, including the Commission's EDGAR database and Thomson Financial's Worldscope database.

issuers required to file registration statements on Form S–11.

As previously noted, in the 12 months ended August 31, 2007, 82 registration statements on Form S–11 were filed, including new registration statements and post-effective amendments. We estimate that four of those were filed by small entities. We also estimate that approximately 15 registration statements were filed on Form SB–2 in the last fiscal year covering transactions by real estate entities that in the future will be required to register on Form S–11.[55] Thus, we estimate that 19 registration statements by small entities will be subject to the amendments.

D. Reporting, Recordkeeping and Other Compliance Requirements

The amendments are expected to impact all capital raising and selling security holder transactions that are registered under the Securities Act on Form S–11. Small entities required to register on Form S–11 will be able to take advantage of the ability to incorporate by reference previously filed Exchange Act reports and documents. We expect that permitting the incorporation by reference of previously filed Exchange Act reports and documents will reduce the aggregate costs incurred by small entities of preparing registration statements on Form S–11 by $9,914,438.[56]

We expect that small entities eligible to register on Form S–11 may need to incur some insignificant additional costs related to complying with the Web site requirements related to incorporation by reference, although issuers could avoid such costs by electing not to incorporate information by reference. They may also have already incurred this cost for other business reasons.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the amendments, the Regulatory Flexibility Act requires us to consider the following alternatives:

1. Establishing different compliance or reporting requirements that take into account the resources of small entities;

2. The clarification, consolidation, or simplification of disclosure for small entities;

3. Use of performance standards rather than design standards; and

4. Exempting smaller entities from coverage of the disclosure requirements or any part thereof.

Our amendments will extend the benefit of incorporation by reference to small entities that are required to file registration statements on Form S–11. Establishing a different standard for small business entities would impose a greater compliance burden on small entities and would be inconsistent with the benefits provided for small entities that register on Form S–1 and Form F–1.

VI. Statutory Authority and Text of the Amendments

The amendments described in this release are adopted under the authority set forth in Sections 6, 7, 8, 10 and 19(a) of the Securities Act, as amended.

List of Subjects in 17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

■ For the reasons set out in the preamble, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 1. The authority citation for part 239 continues to read in part 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*, 77mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 2. Amend Form S–11 (referenced in § 239.18) as follows:

■ a. Add General Instruction H;

■ b. Add to the cover page, above the check box related to ''Rule 462(b) under the Securities Act,'' a check box requiring the registrant to indicate whether it is relying on Rule 415 under the Securities Act;

■ c. In Part I, add Item 28A;

■ d. Redesignate Item 29 as Item 29A; and

■ e. Add new Item 29.

The additions read as follows:

Note— The text of Form S–11 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S–11

FOR REGISTRATION UNDER THE SECURITIES ACT OF 1933 OF SECURITIES OF CERTAIN REAL ESTATE COMPANIES

General Instructions

* * * * *

H. Eligibility To Use Incorporation by Reference

If a registrant meets the following requirements immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Items 3 through 28 of this Form in accordance with Item 28A and Item 29 of this Form:

1. The registrant is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934.

2. The registrant has filed all reports and other materials required to be filed by Section 13(a), 14, or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials).

3. The registrant has filed an annual report required under Section 13(a) or Section 15(d) of the Exchange Act for its most recently completed fiscal year.

4. The registrant is not:

(a) And during the past three years neither the registrant nor any of its predecessors was:

(i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2) of this chapter);

(ii) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§ 230.405 of this chapter); or

(iii) A registrant for an offering of penny stock as defined in Rule 3a51–1 of the Exchange Act (§ 240.3a51–1 of this chapter).

(b) Registering an offering that effectuates a business combination transaction as defined in Rule 165(f)(1) (§ 230.165(f)(1) of this chapter).

5. If a registrant is a successor registrant it shall be deemed to have satisfied conditions 1, 2, 3, and 4(b) above if:

(a) Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

(b) All predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession.

[55] See Release No. 33–8876.

[56] This estimate is based on our estimate that 19 registration statements by small entities will be subject to the amendments.

6. The registrant makes its periodic and current reports filed pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference pursuant to Item 28A or Item 29 of this Form readily available and accessible on a Web site maintained by or for the registrant and containing information about the registrant.

* * * * *

FORM S–11

* * * * *

If any of the Securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act, check the following box: [ ]

* * * * *

PART I—INFORMATION REQUIRED IN PROSPECTUS

* * * * *

Item 28A. Material Changes

If the registrant elects to incorporate information by reference pursuant to General Instruction H, describe any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest Form 10–K and which have not been described in a Form 10–Q or Form 8–K filed under the Exchange Act.

Item 29. Incorporation of Certain Information by Reference

If the registrant elects to incorporate information by reference pursuant to General Instruction H:

(a) It must specifically incorporate by reference into the prospectus contained in the registration statement the following documents by means of a statement to that effect in the prospectus listing all such documents:

(1) The registrant's latest annual report on Form 10–K filed pursuant to Section 13(a) or Section 15(d) of the Exchange Act which contains financial statements for the registrant's latest fiscal year for which a Form 10–K was required to have been filed; and

(2) All other reports filed pursuant to Section 13(a) or Section 15(d) of the Exchange Act or proxy or information statements filed pursuant to Section 14 of the Exchange Act since the end of the fiscal year covered by the annual report referred to in paragraph (a)(1) of this Item.

Note to Item 29(a). Attention is directed to Rule 439 (§ 230.439 of this chapter) regarding consent to use of material incorporated by reference.

(b)(1) The registrant must state:

(i) That it will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the reports or documents that have been incorporated by reference in the prospectus contained in the registration statement but not delivered with the prospectus;

(ii) That it will provide these reports or documents upon written or oral request;

(iii) That it will provide these reports or documents at no cost to the requester;

(iv) The name, address, telephone number, and e-mail address, if any, to which the request for these reports or documents must be made; and

(v) The registrant's Web site address, including the uniform resource locator (URL) where the incorporated reports and other documents may be accessed.

Note to Item 29(b)(1). If the registrant sends any of the information that is incorporated by reference in the prospectus contained in the registration statement to security holders, it also must send any exhibits that are specifically incorporated by reference in that information.

(2) The registrant must:

(i) Identify the reports and other information that it files with the SEC; and

(ii) State that the public may read and copy any materials it files with the SEC at the SEC's Public Reference Room at 100 F Street, NE, Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1–800–SEC–0330. If the registrant is an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (*http://www.sec.gov*).

* * * * *

Dated: April 10, 2008.

By the Commission.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–7967 Filed 4–14–08; 8:45 am]

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