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April 2, 2009

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Release No. 34-59343 (File No. S7-04-09)
Re-proposed Rules for Nationally Recognized Statistical Rating Organizations

Dear Ms. Murphy:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities and the Committee on Securitization and Structured Finance (the "Committees") of the Section of Business Law of the American Bar Association (the "ABA") in response to the request for comments by the Securities and Exchange Commission (the "Commission") in its February 2, 2009 release referenced above (the "Proposing Release").¹

The comments expressed in this letter represent the views of the Committees only and have not been approved by the ABA's House of Delegates or Board of Governors and, therefore, do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section of Business Law of the ABA, nor does it necessarily reflect the views of all members of the Committees.

As we noted in our July 28, 2008 comment letter (the "July 28 Comment Letter") to the Commission on Release No. 34-557967, Proposed Rules for Nationally Recognized Statistical Rating Organizations, and our September 12, 2008 comment letter to the Commission on Release Nos. 33-8940, 34-58071, 34-58070, IC-28327 and IA-2751, we agree with the Commission that the integrity of the process by which nationally recognized statistical rating organizations ("NRSROs") rate structured financial products- is critical to our credit and capital markets and that changes to the existing regulatory framework are necessary to improve the integrity of the rating process as well as the perception of the ratings process by the public and the marketplace. We further agree with the Commission that increasing the transparency, objectivity and accuracy of credit

¹ 74 Fed. Reg. 6485 (February 9, 2009).

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ratings is an essential component to enable users of credit ratings to better judge the quality of the ratings issued by the NRSROs. We support many of the approaches the Commission has set forth in the Proposing Release and in the Companion Adopting Release² and, where we disagree with an approach we have tried to propose an alternative for the Commission to consider.

Despite our general support, in discussing the Proposing Release and the Companion Adopting Release, our drafting committee has been concerned about whether these proposals can be implemented, consistent with the Commission's stated goals, without adversely affecting the credit and capital markets. We have two primary areas of concern:

- First, the proposed amendments to Rule 17g-5 could have the effect of chilling (or at least significantly delaying) the issuance of new structured finance products; and
- Second, the timing and mechanics of the proposed amendments to Rule 17g-5 may prevent meaningful unsolicited ratings from being issued before investors make their investment decisions.

Each of these concerns is discussed in more detail below.

We note, in particular, that the Department of the Treasury and the Federal Reserve Board have recognized an urgent need to revitalize the securitization market, as reflected in the implementation of the Term Asset-Backed Securities Lending Facility ("TALF"). We continue to be concerned that unsolicited ratings may create problems for issuers, investors and the market as a whole and, in particular, that an unsolicited rating could destroy the TALF-eligibility of an asset-backed security, and make the TALF program more vulnerable to the NRSROs' discretion. We urge the Commission to carefully consider how quickly the industry can reasonably implement the Commission's proposed amendments to Rule 17g-5 and select an effective date for any final amendments that will not delay redevelopment of this market.

Proposed Amendments to Rule 17g-2

Under the current convention that exists in the marketplace, NRSROs publicly announce initial credit ratings of public transactions as well as subsequent ratings actions immediately upon the occurrence of each such credit rating or action. We strongly believe that the Commission's final disclosure framework should not take the place of this existing practice but, rather, should be a mechanism to disseminate additional information to the marketplace on a delayed basis. Clarification to that effect would be helpful in the final rule release.

That being said, we agree with the Commission that the amendments to Rule 17g-2 adopted in the Companion Adopting Release will begin to provide users of credit ratings with information to assess the performance of those NRSROs that are registered with the Commission. We also support the Commission's proposal to expand the reach of Rule 17g-2 to 100% of issuer-paid credit ratings and rating actions, subject to a 12-month lag, which we feel

² 74 Fed. Reg. 6456 (February 9, 2009).

effectively balances the NRSROs' issues relating to the compliance burden and preserving the revenue stream from selling current compilations of this information.

We recognize that the proposed expansion of an NRSRO's disclosure obligations would satisfy only one portion of a need for a much larger solution. As we understand, most market professionals, with access to securities-related information such as the Bloomberg screen, may already have timely access to prior ratings histories for a broad range of securities. Those professionals, and others who have access to such information, may therefore not benefit from the proposals. There may, however, be a number of users of securities ratings who are not professionals, and who would benefit from the added disclosure. Although disclosure of past ratings histories, whether on a selective basis or on a general basis, may provide some indication of the quality of an NRSRO's ratings, we note that there are other factors which affect the analysis. For example, we assume for this purpose that the primary comparison of quality will be based on what is known regarding a rating at the date the user is evaluating an NRSRO. The user will not necessarily know, however, the information available to each NRSRO at the time of the rating, or whether the internal quality-control procedures of a NRSRO have changed since the date of the earlier rating. Moreover, to the extent that an NRSRO focused on one particular industry or type of security, changes in the market may differentiate that NRSRO's track record from those of its competitors. It would be important, in any final release and in its investor information programs, for the Commission to be mindful that greater disclosures with respect to prior ratings may be helpful, but should not be supplant the diligence that a user of ratings should apply to each security such user is evaluating.

We do think that the Commission's proposed amendments should be expanded to include unsolicited credit ratings (other than subscriber-paid credit ratings). Unsolicited ratings only fulfill their purpose, and the Commission's goals of increasing competition and transparency, if they are broadly available to market participants subject to the same market scrutiny of their overall history as issuer-paid credit ratings. On the other hand, a subscriber-paid rating system will only flourish with sufficient confidentiality protections to preserve the NRSROs' revenue stream. We feel that subscriber-paid ratings should remain private to foster this alternative ratings model.

The Commission asked in the Proposing Release whether the expanded ratings disclosure requirement should retroactively apply to all outstanding ratings. We believe such further expansion would be unduly burdensome and that such information may be of limited value given the number of ratings actions in the past 15 months and the market's recognition of the limitations in the assumptions on which many earlier ratings were based.

Finally, we have no objection to the Commission's proposal to use the XBRL format in the public disclosure contemplated by the proposed amendments to Rule 17g-2. Prior to implementing use of the XBRL format (which we understand has been developed primarily to communicate financial information and will need to be adapted for ratings databases), we recommend that the Commission consider the scope of the current XBRL taxonomies. We also suggest that care be taken that the final taxonomies and tags not inadvertently change the meaning of the ratings (for example, by imposing common definitions of terms that have different meanings for different NRSROs). We believe that only the following information

should be contained in the public disclosure of ratings actions contemplated by the proposed amendments to Rule 17g-2:

- Name of the related transaction;
- Date of the initial credit rating of the related transaction (or, if different, of the security affected by the disclosed ratings action);
- CUSIP number;
- Initial credit rating;
- Ratings actions taken since the date of the initial credit rating; and
- Date of each such ratings action.

We believe that any “overloading” of the required historical disclosures could be unnecessarily burdensome to NRSROs and would not likely provide meaningful comparative information to ratings users.

Proposed Amendments to Rule 17g-5

In the Proposing Release, the Commission re-proposes amendments to Rule 17g-5, which would make it a conflict of interest for an NRSRO to issue a rating for a structured finance product paid for by the product’s issuer, sponsor or underwriter (each, an “arranger”) unless information about the product provided by the arranger to the NRSRO to determine the initial rating and to monitor the rating is made available to other NRSROs. Under the proposed amendments to Rule 17g-5, (1) NRSROs would need to disclose, on password protected websites accessible only to other NRSROs, the structured finance products for which they are in the process of determining such credit ratings, (2) the arrangers would need to represent to the NRSROs they hire to rate structured finance products that they will provide information given to the hired NRSRO to other NRSROs on a password-protected basis and (3) NRSROs seeking to access information maintained by hired NRSROs and arrangers would need to furnish the Commission an annual certification that they are accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using the information so accessed.

We believe the Commission’s current proposal is a significant improvement over its original proposal to require public disclosure of all written information used in the ratings process. We appreciate the Commission’s consideration of the suggestion in our July 28 Comment Letter that the Commission adopt an “access-based solution” to encourage unsolicited ratings, rather than a public disclosure model. We believe that the proposed framework will serve the Commission’s goal of encouraging the issuance of unsolicited ratings without the burdens of the prior proposal, and, accordingly, in general, we support the Commission’s proposed amendments to Rule 17g-5. Our additional thoughts here should be considered “fine-tuning” only.

The Commission’s current proposals with respect to Rule 17g-5 relate to “structured finance products,” which the Commission defines broadly as “issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction.” We believe, however, that the definition as proposed is too broad, and the scope of these proposals should be clarified to avoid

confusion in the marketplace. For example, does the Commission intend for the rule to apply to project finance transactions, all synthetic transactions (in addition to synthetic collateralized debt obligations, as stated in the Proposing Release) or typical secured lending transactions (which include notes supported by collateral)? And what about structured finance products that are not related to pools of assets? For this reason, we continue to believe that structured finance products should be defined identically to the definition of “asset-backed securities” under Regulation AB, or that definition should be expanded with sufficient precision to clarify the intended scope.

Arrangers’ Websites

With respect to the proposed arrangers’ website posting requirements, we think a more precise time frame for posting—for instance, within two business days of the provision to issuer-paid NRSROs—would be more helpful than the proposed standard and would provide prompt access without unduly burdening arrangers. Also, while the information must be provided in a manner that indicates which information currently should be relied upon, it does not appear that the proposed rule would ever allow the information to be deleted, even if it is no longer current or the rated security is no longer outstanding. As with other stale information, we would prefer a rule under which the Commission permits removal of noncurrent information subject to a recordkeeping requirement. As proposed, NRSROs would need only identify on their password-protected websites instruments “for which it is currently in the process of determining an initial credit rating.” A similar approach seems reasonable for arrangers’ websites, where we feel it would be most useful to the NRSROs to include only such information as currently should be relied upon (and only for a specified period of time).

With respect to unsolicited credit ratings, we recommend that the Commission consider whether, once any such rating is issued, the applicable NRSRO should be required to monitor the underlying structured finance security as if it had issued an issuer-paid credit rating, and whether such NRSRO should be required to publicly disclose any ratings actions taken with respect to that security pursuant to Rule 17g-2. NRSROs typically are hired not only to issue the initial ratings on structured finance products, but also are paid surveillance fees to monitor the rated security for the life of the transaction. Requiring the ongoing monitoring of securities for which unsolicited ratings are issued would further the Commission’s objective of permitting users and market observers to compare how an issuer-paid rating (which the Commission fears may be less than objective) performs versus the performance of an unsolicited rating. In addition, requiring NRSROs to issue at least a minimum number of unsolicited ratings based on a percentage of transactions for which they have accessed issuer-paid and arranger websites, but not requiring them to monitor such initial ratings, could result in the issuance of unsolicited ratings that do not permit meaningful comparisons to issuer-paid ratings (in addition to becoming stale and possibly misleading). However, the cost of mandated ongoing surveillance for an unsolicited NRSRO may make the issuance of unsolicited ratings prohibitively expensive and, hence, fewer unsolicited ratings may be issued.

If the Commission elects to require ongoing monitoring of unsolicited ratings, then the Commission’s proposal to require arrangers to post on their websites materials for ongoing surveillance is warranted. Conversely, if the Commission does not require ongoing monitoring of unsolicited ratings, then there would appear to be no need for arrangers to post such materials

on their websites and we would not support a requirement that they do so. In any event, we believe that any subsequent ratings actions with respect to unsolicited ratings should be required to be disclosed by the NRSRO issuing such ratings pursuant to Rule 17g-2.

Treatment of Confidential Information

During the ratings process, arrangers may provide a significant amount of materials to issuer-paid NRSROs. These materials include, but are not limited to, draft and executed transaction documents, structural and computational materials, data tapes with respect to the related collateral, underlying documentation related to the collateral and the underlying obligors, legal opinions and organizational documents. The transaction documents are heavily negotiated by the parties and are revised to include, among other things, provisions that each issuer-paid NRSRO requires as part of its rating standards. Much of this information is competitively sensitive, and often subject to strict confidentiality agreements among the parties. Inadequate confidentiality arrangements may have the effect of deterring disclosure of sensitive information that appropriately should be part of the rating process.

We believe that arrangers may not be willing to issue securities in a framework that requires disclosure of a large volume of sensitive information to all NRSROs without strong confidentiality agreements being in place between the arrangers and such NRSROs. Therefore, we recommend that only NRSROs in good standing have access to such websites and that arrangers be allowed to require, as a condition of access to such information, that the applicable NRSRO either enter into such confidentiality arrangements as such arrangers may reasonably require or execute a certification similar to the one detailed under the amendments to Rule 17g-5 that expressly runs to the benefit of all arrangers (e.g., the issuer, sponsor and underwriter(s)) of the transaction for which such NRSRO proposes to issue unsolicited ratings (although we note that the confidentiality provisions in the form certification are much less stringent than those applicable to privately negotiated agreements and lack, for example, affirmative covenants, acknowledgements of rights to injunctive or other equitable remedies and similar provisions).

Further, as discussed above, the Commission does not specify how long such information must be maintained on the arrangers' websites. Despite the best intentions of all parties involved, security breaches are commonplace and the highly sensitive information posted on such websites could be extremely valuable to individuals inclined to improperly access such information. Further, even the most secure website may be compromised by an errant employee or similar party. Tracing the distribution of information (once improperly accessed or made public) would be difficult and the unauthorized disclosure of confidential information may be materially injurious to an issuer. Accordingly, we recommend that arrangers be given flexibility to make alternative arrangements to disclose their most competitively sensitive information, such as posting contact information to allow the NRSRO to receive the needed documentation instead of the information itself. We also feel that permitting arrangers to remove such confidential information from their websites after a short period of time; as discussed above, will serve to minimize the risk of inadvertent or inappropriate disclosure of such information. Further, given the Commission's hope that as many as 30 NRSROs could be accessing this information on a routine basis, we believe it is critical that resources and time be spent discussing security measures with members of the technology and information systems community before these proposals are implemented. Arrangers will only participate in a system that contains the

proposed framework once they are fully confident that their confidential information will remain confidential.

We further note that the Commission's proposal may exacerbate a problem inherent in the determination of unsolicited (and not subscriber-paid) credit ratings. Normally, the credit rating process is an interactive process between arrangers and NRSROs. NRSROs may comment with respect to transaction documents, asset composition and transaction structures as part of their being able to provide credit ratings on the structured finance products to be issued, and often the transaction documents and other arrangements may be changed to reflect these discussions. Any NRSRO that has a passive role in the documentation and structuring of a transaction could therefore be at a disadvantage with respect to any rating of that security. Although the Commission has attempted to address this concern,³ it is not clear to us how the proposed amendment would reflect the interactive nature of the communications between the arranger and the issuer-paid NRSRO, and how such communications would be able to be posted in "real time."

Password Protected NRSRO Websites

We agree with the Commission's proposal to require NRSROs to maintain a password-protected website for information about new issuances of structured finance products they are hired to rate. The requirements to establish and maintain such websites and to post very limited information on such websites do not appear to be unduly burdensome to NRSROs.

The Commission has asked whether NRSROs should be required to affirmatively notify other NRSROs of their intent to provide an issuer-paid credit rating for a transaction. We believe they should not have such an obligation. Under the proposed rules, NRSROs that wish to issue unsolicited credit ratings will be able to obtain adequate information about upcoming transactions by monitoring other NRSROs' websites, and they should be responsible for doing so.

The Commission has also asked whether NRSROs should be permitted to charge a fee for access to their websites required by the proposed amendments to Rule 17g-5. Unless it were conclusively demonstrated that the fee for the creation and maintenance of such a website is material, we believe that other NRSROs should not have to pay to access an issuer-paid NRSRO's website to obtain information about pending transactions. The Commission has stated that one of its goals in creating the unsolicited credit ratings framework is to increase competition among NRSROs. The imposition of fees could deter ratings agencies from seeking such information, especially without any parameters as to what fees might be charged. The Commission should not allow existing NRSROs to establish a cost-related barrier to accomplishing this goal, and should avoid establishing any rules that would serve to create a bar

³ Further to this point, we note that the Proposing Release states "The Commission considered only requiring that the final information be posted on the Internet Web site. However, this could put the NRSROs developing ratings using the Internet Web sites at a disadvantage since they might be getting the information shortly before the hired NRSRO issues its initial rating. The Commission preliminarily believes that the inclusion of all iterations of the various components of information (e.g., loan tapes, legal documents) used to determine the credit rating would allow the NRSROs accessing the Internet Web site to more actively participate in the rating process as they could follow the progression of changes that lead to the final information upon which the credit rating should be based."

to entry for any NRSRO that might want to participate in the final unsolicited credit ratings framework.

Certifications by Arrangers to Registered Ratings Agencies

We have several concerns about the proposal to require issuer-paid NRSROs to obtain arranger certifications as to compliance with the posting rules. We do not believe that it should be the responsibility of the NRSROs to enforce or police the obligations of arrangers to post information to their websites. Further, we believe that making NRSROs the enforcers of this disclosure requirement conflicts with the Commission's overarching goal of reducing market participants' over-reliance on credit ratings and NRSROs.

We also do not think an NRSRO should be prohibited from issuing a rating or, more importantly, taking a subsequent rating action if the arranger fails to provide such certification or to post all required information on its website. In particular, we do not believe an issuer should be able to block a rating action simply by failing to provide a certification. This would seem to have an effect that fundamentally conflicts with the Commission's goals.

In lieu of delivering certifications to NRSROs, we think that the better approach would be for the Commission to amend its rules to require that the issuer, sponsor and/or underwriter post on its website all written information delivered by it to issuer-paid NRSROs, and to require any certification to be delivered to the Commission, rather than the NRSROs. It is, however, not clear to us how this would be implemented within the existing statutory authority of the Commission.

Requirements with Respect to Arrangers' Websites

In addition to the concerns that we raised above with respect to ensuring that arranger information remains confidential (see our discussion above in "Treatment of Confidential Information"), there are several aspects of arranger websites that we believe the Commission should consider. We also want to respond to several questions posed by the Commission on various aspects of arranger websites.

It is common for more than one entity to satisfy the Commission's definition of "arranger" for any structured finance transaction. In the Proposing Release, the Commission states that "[u]nder proposed new paragraph (a)(3)(iii)(A), the arranger would need to represent that it will maintain the information described in proposed paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of Rule 17g-5 available on an identified pass-word protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating." It is unclear whether the Commission is requiring each such arranger in a transaction to create a separate website for information that it provided to issuer-paid NRSROs or whether one arranger could host all information for all of the arrangers in a given transaction. If each arranger is obligated to create a separate website, NRSROs attempting to access such information for the purpose of issuing an unsolicited credit rating might need to piece together information from multiple websites, and could potentially receive duplicate information from different arrangers, creating administrative burdens and inefficiencies. We suggest that the Commission clarify in its final amendments to Rule 17g-5

that the use of a single website for all of the arrangers in a given transaction is permissible. Use of a single website may, however, complicate an arranger's ability to certify (if a certification is required) that it has posted on the website all information that has been provided to the issuer-paid NRSROs. For that reason, and for the reasons articulated above, a preferable alternative would be to eliminate the certification requirement and simply (1) make arrangers obligated to post to the website (whether a single website or individual websites for the different arranger parties in a transaction) all information provided to issuer-paid NRSROs and (2) prohibit both issuer-paid NRSROs and other NRSROs from using written information provided through any other means.

Proposed Amendments to Regulation FD

We concur with the proposed amendments to Regulation FD to permit the disclosure of material nonpublic information to NRSROs irrespective of whether they make their ratings publicly available. However, because the term "arranger" in the Proposing Release includes issuers, sponsors and underwriters, we encourage the Commission to review whether any final rule would involve disclosure of nonpublic information by an issuer to any entity which may not be within the scope of the existing or proposed exclusions (such as "sponsors") and to provide corresponding exemptive relief in the amendments to Regulation FD.

We also concur that the proposed amendment to Rule 100(b)(2)(iii) of Regulation FD to eliminate the definition of "credit rating agency" and to substitute the statutory definition now set forth in Section 3(a)(61) of the Exchange Act is appropriate.

The Committees appreciate the opportunity to comment on the Commission's proposals and respectfully request that the Commission consider our concerns and the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and its Staff and to respond to any questions.

Respectfully submitted,



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Chair, Committee on Federal Regulation of Securities



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Securities and Exchange Commission
April 2, 2009

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