



September 8, 2008

U. S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Attention: Secretary

File No.: S7-18-08

Re: Realpoint LLC (“Realpoint”) Comments to Release No. 34-58071 Security Ratings [or Credit Ratings] by Nationally Recognized Statistical Rating Organizations (“NRSROs”)

Summary:

- NRSROs should be permitted to deliver pre-sale reports solely to the NRSRO’s subscribers.
- Issuers should be required to disclose credit ratings in registration statements and, if available, include the ratings of at least one unsolicited NRSRO.
- No NRSRO should be required to have any of its ratings published without its consent.

Proposed Amendments to Rule 134(a)(17); NRSROs should be permitted to deliver pre-sale reports solely to their subscribers.

In response to the Commission’s request for comments to Rule 134(a)(17),¹ Rule 134(a)(17) should be amended to permit an unsolicited, or subscriber-based, NRSRO to deliver pre-sale reports solely to the NRSRO’s subscribers. Realpoint previously opined, in its comments to SEC File No. S7-13-08,² that for new issues of structured finance products, certain rules needed to be amended for this purpose. Realpoint hereby supplements that comment. Regulation FD, Regulation AB, Rule 134(a)(17) and the Commission’s proposals for new Rule 17g-5(a)(3) (17 CFR § 240.17g-5(a)(3)) need to be amended to permit an unsolicited, or subscriber-based NRSRO, to deliver pre-sale reports solely to the NRSRO’s subscribers.

With respect to issuances of commercial mortgage-backed securities (“CMBS”), such pre-sale reports may disclose ABS informational and computational materials such as (i) underlying property information and other loan-level information that may have been provided to all of the NRSROs by the issuer or other arrangers under the Commission’s proposed disclosure requirements under amended 17 CFR § 240.17g-5(a)(3), (ii) additional data, research or due diligence reports purchased or developed by the NRSRO, and (iii) the NRSRO’s credit ratings and analyses developed therefrom. Without such amendments, a subscriber-based NRSRO may have access to underlying information but, for a registered public offering, be unable to provide its subscribers with pre-sale report information and credit ratings without also triggering an obligation of the issuer to publicly disclose such pre-sale report information and credit ratings under Rule 426 or 433. Similarly, in the event of a private issue of a structured finance product or tranche thereof, a subscriber-based NRSRO needs to be permitted to deliver its pre-sale report

¹ SEC File Number S7-18-08 at page 40116

² Proposed Rules for Nationally Recognized Statistical Rating Organizations, Release No. 34-57967, SEC File No. S7-13-08, 73 Fed. Reg. 36212 (June 25, 2008) [hereinafter, “SEC File No. S7-13-08”].

information and credit ratings solely to its subscribers without that disclosure being treated as a public disclosure thereof. Unless a subscriber-based NRSRO, who is not compensated from the new issue or otherwise by the issuer or other arrangers, is permitted to disclose such information and credit ratings solely to its subscribers, the subscriber-based NRSRO will have no authority to deliver pre-sale report information and credit ratings to its subscribers and no direct financial incentive to develop any such pre-sale report information and credit ratings.

Rule 134(a)(17) should only allow for disclosure of ratings assigned by NRSROs. The Commission should revise Rule 134(a)(17) to only allow for disclosure of ratings assigned by NRSROs. The Commission should not “revise [Rule 134(a)(17)] to allow for disclosure of ratings assigned by any credit rating agency, not just NRSROs, notwithstanding that any such “disclosure must also note that the credit rating agency is not an NRSRO, if that is the case,”³ including disclosures of ratings in “tombstones” or other advertisements of securities or transactions.⁴ Otherwise, an unregulated credit rating agency would be authorized to publicly disclose ratings without having published its track record, rating procedures and methodologies, and other information required to be disclosed by NRSROs. Even if the unregulated credit rating agency had disclosed its rating procedures and methodologies, it could issue ratings that were not developed in accordance therewith without being subject to examination under 15 U.S.C. § 78q(b) or Rule 17 CFR § 240.17g-2. With respect to structured finance products, and, in particular, CMBS, ratings are developed after extensive review and analysis of ABS informational and computational materials such as underlying property information and other loan-level information and additional data, research or due diligence reports purchased or developed by the rating agency. With respect to the underlying basis for, and the integrity of, ratings, the Commission’s proposal would create confusion in the capital markets. The Commission’s approach is therefore inconsistent with “[t]he purposes of the Credit Rating Agency Reform Act of 2006,” which “are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.”⁵

Proposed Amendments to Security/Credit Rating Disclosures; Issuers should be required to disclose credit ratings in registration statements and, if available, include the ratings of at least one unsolicited NRSRO

Registration statements should include “enhance[d] security[/credit] rating disclosure so that investors are better able to understand the terms of [such] a security[/credit] rating and the limitations on the rating.”^{6,7} Mandatory disclosure of ratings in registration statements is consistent with, and will

³ Security Ratings, Release 34-58071, SEC File Number S7-18-08, 73 Fed. Reg. 40106 (July 11, 2008) [hereinafter, “SEC File Number S7-18-08”] at page 40116. “Rule 134(a)(17) permits the disclosure of security ratings in certain communications deemed not to be a prospectus or free writing prospectus.” *Id.*

⁴ In SEC File Number S7-18-08 at page 40116, the Commission requested comment on the following questions: “Should we continue to allow disclosure of security ratings in “tombstones” to be deemed not to be a prospectus or free writing prospectus? Is it appropriate to allow such disclosure of a security rating by any credit rating agency and not limit the allowance to NRSROs? If the credit rating agency is not an NRSRO, is it appropriate to require additional disclosure to that effect?” *Id.*

⁵ Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, Release No. 34-55857, SEC File No. S7-04-07, 72 Fed. Reg. 33564 (June 18, 2007). “Increased confidence in integrity of NRSROs and the credit ratings they issue could promote participation in the securities markets. Better quality ratings could also reduce the likelihood of an unexpected collapse of a rated issuer or obligor, reducing risks to individual investors and to the financial markets.” *Id.*

⁶ SEC File Number S7-18-08 at page 40114. “Regulation AB codified disclosure requirements and assisted in providing more disclosure with greater comparability for investors in the asset-backed securities markets. While the adoption of Regulation AB has enhanced the disclosure about asset-backed securities, it did not significantly address securities ratings disclosure.” *Id.*

promote compliance with, the mandatory disclosure requirements proposed by the Commission, in SEC File No. S7-13-08, for new Rule 17g-5(a)(3), to require arrangers to disclose to unsolicited credit rating agencies all information that they provide to their solicited NRSROs to develop credit ratings.⁸ Realpoint previously opined, in its comments to SEC File No. S7-13-08, that: (i) such disclosures to unsolicited credit rating agencies be made simultaneously with the disclosures to the solicited NRSROs; (ii) that arrangers should only be required to simultaneously disclose to all NRSROs information that they provide to their solicited NRSROs to develop credit ratings; and (iii) that an unsolicited, or subscriber-based NRSRO, be permitted to deliver pre-sale reports solely to the NRSRO's subscribers. With those modifications to proposed Rule 17g-5(a)(3), mandatory disclosure of ratings in registration statements will promote compliance with mandatory disclosures to unsolicited NRSROs because, during the pre-sale period, investors will be in a position to require their receipt of pre-sale reports from unsolicited NRSROs. The investors will be able to review their subscriber-paid pre-sale reports not only for independently-developed letter ratings but also to determine whether a rating and underlying analytical report was qualified by a lack of certain information or was based on less information than that typically provided to the solicited NRSROs.⁹

After the sale of an issue of asset-backed securities, the issuer need not be required to file notices of material changes in ratings. During the surveillance period for the issue, however, the servicers and other arrangers should continue to be required to disclose to unsolicited credit rating agencies all information that they provide to their solicited NRSROs under their service agreement. Under current practices for asset-backed securities, a typical service agreement includes extensive reporting requirements. Loan-level information such as operating, inspection and other reports are provided to the NRSROs that initially rated the issue.¹⁰ If servicers and other arrangers were obligated to simultaneously

⁷ In SEC File Number S7-18-08 at page 40115, the Commission requested comments on the following questions: "Prior to 1981 the Commission precluded disclosure regarding security ratings in registration statements under the Securities Act. Should we revise our disclosure policy to prohibit disclosure of security ratings in an issuer's Securities Act registration statements or Exchange Act periodic reports? Should we simply delete Item 10(c) and provide no established disclosure policy regarding credit ratings?" *Id.* While Item 10(c) currently only recommends disclosure, commenters on the 1994 Ratings Release expressed that most issuers provide this disclosure in their Securities Act filings. Do issuers generally provide this disclosure today? Is disclosure about an issuer's securities rating appropriate disclosure for their Securities Act filings? Is it appropriate disclosure for their periodic Exchange Act filings? Is there any reason that this disclosure should only be recommended rather than required? *Id.* In addition to the information Item 10(c) currently recommends disclosure regarding security ratings would it be valuable for investors to have additional disclosure of all material scope limitations of the rating and any related designation (or other published evaluation) of non-credit payment risks assigned by the rating agency with respect to the security assist investors in better understanding the credit rating and assessing the risks of an investment in the securities? What additional disclosure would be helpful to investors in making these assessments? *Id.* If we were to mandate security rating disclosure, should disclosure be required for any published designation that reflects the results of any evaluation, other than a credit risk evaluation, done by a credit rating agency? Should disclosure be required for any evaluation by a credit rating agency that is communicated to the issuer, regardless of whether it is published? *Id.*

⁸ *Id.* at page 40115, n.118; SEC File Number S7-13-08 at page 36219 *et seq.*

⁹ Regarding its proposed Rule 17g-5(a)(3), "the Commission, if this proposal is adopted, intends to monitor whether it results in a significant reduction in the information provided to NRSROs." SEC File Number S7-13-08 at page 36220.

¹⁰ In SEC File Number S7-18-08 at page 40116, the Commission requested comment on the following questions: (I) "Having previously proposed requiring material changes in security ratings be reported on Form 8-K under the Exchange Act, 119 we recognize that such security rating changes can be important information to an investor in making investment and voting decisions. We note, however, that issuer-paid rating agencies make their rating designations public. The current failures of security ratings, particularly in the asset-backed securities markets, have led us to re-evaluate the required level of disclosure regarding security ratings. Would requiring detailed current and/or periodic reporting of an issuer's security ratings provide investors and the markets sufficient, timely information about an issuer's security ratings to assist them in making their investment decisions? Would a Form 8-K provide investors with material and timely information about an issuer's security ratings and changes in those ratings? Would periodic reports on Form 10-K, Form 20-F, Form 10-Q and Form 10-D provide investors with material and timely information about an issuer's security ratings and changes in those ratings? Is the

disclose to subscriber-based NRSROs the information provides to the solicited NRSROs, then investors would be able to obtain independent ratings from subscriber-based NRSROs in addition to any ratings published by the solicited NRSROs. In addition, issuers would not face uncertainty over whether a rating or rating change triggered an obligation of the issuer to publicly disclose such information under Rule 426 or 433.

Disclosure of an unsolicited NRSRO credit rating¹¹ (when such a rating is available) in a registration statement (with the consent of the NRSRO that issued the rating) is also consistent with both enhanced disclosure of ratings in registration statements and additional disclosure requirements under new Rule 17g-5(a)(3).¹² To implement this requirement, the Commission could amend the definition of "Requisite NRSROs"¹³ to include therein at least one unsolicited NRSRO credit rating, when such a rating is available, then amend the registration requirements to require disclosure by Requisite NRSROs. The Commission's proposals regarding potential conflicts of interest, under Rule 17g-5(c), may need to be further amended to permit an unsolicited NRSRO to remain an unsolicited NRSRO despite giving its consent to having its credit rating published in a registration statement provided that such consent was given for no direct compensation.

Issuers should not be required to provide the credit rating of more than one unsolicited NRSRO. Issuers should also not be required to publish a credit rating that was not based on a review of the information available under the disclosure requirements under new Rule 17g-5(a)(3). If unsolicited NRSROs have access to the same information provided, by the arrangers, to the solicited NRSROs, such ratings will then be based on the appropriate level of information and a review thereof in accordance with the NRSROs published rating procedures and methodologies.

A registration statement should also disclose whether a solicited NRSRO's preliminary (or more fully-developed) rating was obtained but not published.^{14,15} The rating itself should not be disclosed to

information that would be provided regarding a material change in a rating in a Form 8-K already provided by the credit rating agency? Would a Form 8-K be unduly burdensome? Should a Form 8-K requirement be limited to solicited ratings? If a credit rating agency does not publicly disclose the security rating of an issuer's securities, should we require disclosure of the rating in a Form 8-K or in the issuer's periodic reports? How would the existence of subscriber paid credit rating agencies affect your response?" *Id.* (II) "Are there any issues with periodic disclosure regarding security ratings that are particular to ABS issuers? For instance, how would the responsibility to monitor changes or development in security ratings impact ABS offerings?" *Id.*

¹¹ "[A]n "unsolicited rating" is one that is determined without the consent and/or payment of the obligor being rated or issuer, underwriter, or [other] arranger of the securities being rated." Proposed Rules for Nationally Recognized Statistical Rating Organizations, Release No. 34-57967 73 FR 36212 (June 25, 2008) at page 36219, n.65. "Arrangers earn fees from originating, structuring, and underwriting." *Id.* at page 36216.

¹² In SEC File Number S7-18-08 at page 40115, the Commission requested comments on the following questions: "Should we require disclosure of unsolicited ratings? It has been suggested that such ratings may not reflect the level of information on the security that is reflected in a solicited rating, at least in part because of a lack of access to the issuer by the unsolicited credit rating agency. Is there a difference between solicited and unsolicited ratings such that they should be treated separately? Should it matter if the issuer uses the unsolicited rating in the offer and sale of the securities being rated? If we were to require disclosure of unsolicited ratings, should there be limitations on how many ratings or which credit rating agencies ratings should be required to be disclosed? At what point would this create too great a burden on the issuer?" *Id.*

¹³ Under existing Rule 2a-7, "Requisite NRSROs" means: (i) [a]ny two NRSROs that have issued a rating with respect to a security or class of debt obligations of an issuer; or (ii) [i]f only one NRSRO has issued a rating with respect to such security or class of debt obligations of an issuer at the time the fund acquires the security, that NRSRO. 17 CFR § 270.2a-7(a)(21). This response includes a recommendation that the Commission amend its definition of "Requisite NRSROs" to include at least one unsolicited NRSRO credit rating.

¹⁴ In SEC File Number S7-18-08 at page 40115, the Commission requested comments on the following questions: "In Release 34-57967, we expressed our concerns about ratings shopping by issuers and the potential for credit rating agencies to use less conservative rating methodologies in order to gain business, presumably lessening the value of the ratings. If an issuer

avoid creating either the appearance that such rating was issued or confusion with the final ratings that were issued by other rating agencies. A brief statement as to the reason the contacted rating agency did not issue a rating for the issue may also be helpful, such as: (i) "the rating agency's fee requirement was not acceptable to the issuer," (ii) "the rating agency had a conflict of interest that prevented it from undertaking the engagement," or (iii) "the rating agency declined to undertake the rating." Other explanatory responses (but with a goal of having a fairly limited universe of responses) need to be developed. This type of disclosure would be intended to limit "ratings shopping" and related practices for which the Commission has expressed concern in SEC File Number S7-18-08 and other releases.

Proposed Amendments to Security/Credit Rating Disclosures; no NRSRO should be required to have any of its ratings published without its consent

Disclosure of an unsolicited NRSRO credit rating, in a registration requirement, should not be made without the consent of the NRSRO that issued the rating. Realpoint is opposed to the Commission's proposal, in this release (SEC File No. S7-18-08), to amend Rule 436(g) (17 CFR § 230.436(g) "to permit issuers to disclose security/[credit] ratings provided by any credit rating agency without requiring [the] consent" of the agency that published the rating.^{16,17} Realpoint stated in its comments to SEC File No. S7-13-08 that no NRSRO should be required to disclose research or data it developed or purchased, or publish its ratings, for free.¹⁸ To require unsolicited, subscriber-based NRSROs to disclose their research or data, or publish their ratings, for free will put them out of business. During the course of surveillance, many NRSROs subscribe to several third-party vendors that specialize

would be required to provide ratings disclosure where the issuer has obtained either a preliminary security rating or a final security rating from a rating agency, would such disclosure enhance investors' understanding of, and therefore the value of, the ratings? Would it help to address our concerns with ratings shopping? If you do not believe such disclosure would be helpful, how would you suggest that we address these concerns? Should we include a disclosure requirement for indications of a rating prior to a preliminary rating? Would disclosure of indication from a credit rating agency of a likely or possible rating be appropriate?" *Id.*

¹⁵ In SEC File Number S7-18-08 at page 40116, the Commission requested comment on the following questions: "If we were to interpret that a security rating is "obtained" if: it is solicited by or on behalf of an issuer from a credit rating agency; or the issuer pays a credit rating agency for services related to a rating issued by that credit rating agency, would the standard capture sufficient disclosure about an issuer's security ratings and the credit rating agencies that have issued them? Could that lead to non-substantive or procedural modifications to the practice of assigning ratings so that issuers could avoid the disclosure requirement? Would that lead to disclosure of security ratings that would not be useful to investors? What standard would provide the most useful information for investors? Could this threshold lead to ratings being obtained in connection with an offering but not being disclosed?" *Id.*

¹⁶ *Id.* at page 40115.

¹⁷ In SEC File Number S7-18-08 at page 40116, the Commission requested comments on the following questions: (I) "We are only proposing to amend Item 10(c) to remove references to consents in conjunction with our proposed amendments to Rule 436(g) to no longer requiring consents from any credit rating agencies for inclusion of their ratings in an issuer's registration statement. Should there be a written consent requirement? Would a written consent requirement create any issues if the Commission were to require disclosure regarding those ratings? Would issuers find it problematic or costly to obtain consents?" *Id.* (II) "Should we require the consent of a credit rating agency for the use of its security rating by an issuer? What would be the additional costs of such a requirement? Would a consent requirement result in fewer ratings being obtained?" (III) "Should we continue to limit the consent requirement to non-NRSROs as our rules currently do? Does our proposed regulatory oversight and additional disclosure regarding the ratings process and results of ratings justify allowing the use of NRSROs ratings without requiring consents? Would such a provision provide a "seal of approval" for NRSROs? Would there be any competitive effect on non-NRSRO credit rating agencies?" *Id.*

¹⁸ In SEC File Number S7-18-08 at page 40116, the Commission requested comment on the following questions: (I) "Should we revise Rule 100(b)(2) of Regulation FD to eliminate the requirement that the entity's ratings be publicly available or to require public disclosure of information submitted to credit rating agencies by issuers? If so, please explain the basis for recommending the change and discuss how to implement such changes." *Id.* (II) "How would requiring disclosure under Regulation FD affect security ratings?" *Id.*

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in the collection of data. Examples of data obtained from third-party vendors include data bases of general economic census data or data on Class A commercial properties and their major tenants. NRSROs that purchase this type of data do so to gain a competitive advantage over NRSROs who do not make the same investment. NRSROs purchase this type of data to be able to provide more complete, accurate and timely credit ratings. Requiring NRSROs to disclose their data would: (i) impair the ability of NRSROs to obtain data necessary for proper surveillance in a cost-effective manner, because third-party vendors faced with the potential for broad dissemination of that data for no consideration would be unwilling to sell their services and data to NRSROs; and (ii) discourage NRSROs from purchasing data from third-party vendors, thereby lessening the competition among NRSROs to use such data in developing and substantiating their credit ratings.

**Proposed Amendments to Security/Credit Rating
Disclosures; Reference to Credit Ratings**

For consistency, the Commission should replace its references to “security ratings” with references to “credit ratings.”¹⁹ As noted by the Commission, the Exchange Act now defines “credit rating” and includes references thereto.²⁰ Many of the Commission’s rules refer to “credit ratings” (e.g., Regulation FD and the rules applicable to NRSROs (17 CFR § 240.17g-1 *et seq.*)) while only a few rules refer to “security ratings” (e.g., Rules 230.134(a)(17) and 436(g), both noted above, and Rule 229.10 under Regulation S-K).

Thank you for the opportunity to comment on the above-referenced proposed amendments. Please do not hesitate to contact us if you have any questions.

Very truly yours,



Robert Dobilas
CEO and President
Realpoint LLC

¹⁹ In SEC File Number S7-18-08 at page 40115, the Commission requested comments on the following questions: “Item 10(c) of Regulation S-K currently refers to “security ratings” while the 2006 Credit Rating Agency Reform Act added the definition of “credit rating” to the Exchange Act, which means an assessment of the creditworthiness of an obligor as an entity or with respect to specific securities or money market instruments. Should we revise the reference to “security rating” in Item 10(c) to refer to “credit rating” instead? Would such a revision increase or decrease the scope of ratings covered by 10(c)? Would such a change limit the types of ratings that could be disclosed in a registration statement? In particular, are there any types of ratings that are issued that would not be covered by the term “credit rating,” particularly for ABS or structured products that should be covered by Item 10(c)? Are there any other changes we should make to Item 10(c) to align it with the Credit Rating Agency Reform Act or otherwise modernize it? For instance, should we specifically delineate structured products and asset-backed securities in the list of securities covered by the item since it currently only lists debt securities, convertible debt securities and preferred stock?” *Id.*

²⁰ 15 U.S.C. § 78c(a)(60). The Exchange Act also defines “credit rating agency,” § 78c(a)(61), and “nationally recognized statistical rating organization,” § 78c(a)(62).