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By Electronic and United States Mail

July 28, 2008

Ms. Florence E. Harmon  
Acting Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-1090

Re: File No. S7-13-08  
Release No. 34-57967  
Proposed Rules for Nationally Recognized Statistical  
Rating Organizations

Ladies and Gentlemen:

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 in response to the request for comments by the Securities and Exchange Commission (the "Commission") in its June 16, 2008 release referenced above (the "Proposing Release").<sup>1</sup>

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

We applaud the Commission's effort to seek a regulatory solution to the current issues involving the role of credit rating agencies in the capital markets. As noted in some of the key materials referenced by the Commission in the Proposing Release, the inability of credit ratings to adequately reflect the risks of certain structured finance products has been a significant contributor to the current market turmoil. We believe it is of utmost importance to the capital markets and the economy to restore investor confidence in ratings, and in particular in ratings on structured finance products. The Committees wish to join the Commission in considering the best approaches to these problems.

<sup>1</sup> 73 Fed. Reg. 36212 (June 25, 2008).

At the same time, we believe that it is important, as Secretary of the Treasury Henry M. Paulson, Jr. noted in the cover memorandum to the March 2008 Policy Statement on Financial Market Developments of the President's Working Group on Financial Markets, to "implement these recommendations with an eye toward not creating a burden that exacerbates today's market stresses." The Commission is moving very quickly on proposed reforms, while numerous other regulatory agencies, accounting groups and industry organizations also are working on expedited timetables to adopt reforms aimed at correcting certain of the issues that led to the current market disruptions. We appreciate and share the sense of urgency that those charged with oversight of markets and financial institutions feel in regard to efforts to stabilize global markets. However, we are concerned that the implementation of major changes in haste, when considered on their own and when amplified by other changes in the regulation of the financial markets, may indeed create the burden against which Mr. Paulson cautions. In particular, we are concerned about the proposal's impact on sectors of the asset-backed securities ("ABS") markets that have not demonstrated the same quality issues as residential mortgage-backed securities ("RMBS") and collateralized debt obligations ("CDOs") of RMBS. These sectors already face significant funding challenges as a result of loss of investor confidence in securitization and in ratings generally, and may be further pressured by the changes proposed in the Proposing Release, resulting in a further contraction of liquidity and the availability of consumer credit.

We support, with little or no reservation, a number of proposals in the Proposing Release, especially with respect to conflicts of interest and enhanced disclosures by rating agencies. We believe, however, that some of the Commission's proposals would significantly compromise the functioning of the structured finance markets, while providing little or no benefit to investors, at least in the near term. We have tried to explain the basis for our views. Finally, where we believe the Commission's goals are clearly articulated but would not be achieved by the proposed changes to the regulatory regime, we have suggested alternative approaches that we believe would be more supportive of those goals.

## **1. Disclosure of Information Used in the Rating Process**

### **a. The importance of Regulation AB as a touchstone for disclosure**

In December 2004, after a number of years in development and an extensive comment period during which there was broad-based participation from investors, industry groups, issuers, accountants and others involved in the structured finance markets, the Commission codified the disclosure requirements for publicly issued ABS issued on or after January 1, 2006. Regulation AB significantly expanded the line item disclosures for registration statements and reporting from those that previously had been required by the Commission and were then customary in the marketplace. At that time, a number of investors expressed the view that certain information commonly provided to rating agencies but not to investors—for instance, static pool data and FICO scores—was material, and the Commission responded to those views by mandating disclosures of the requested information under Regulation AB.

Given this history and the very thoughtful, deliberate and comprehensive process that accompanied the Commission's adoption of Regulation AB, we do not believe it is appropriate to mandate new disclosures where the scope of such disclosures would be determined not by the substance of the information but by the nature of its recipient. If there is additional information that investors now feel is material to which they do not currently have access, then amendments to Regulation AB could be proposed to add specific requirements, subject to an appropriate comment process. But the Commission's proposal reflects, in our view, a delegation to the credit rating agencies of the responsibility for setting disclosure requirements for this industry. This is contrary to the current securities liability regime in which the Commission establishes the parameters of required disclosures and issuers, underwriters and their advisors bear the burden of materiality decisions. We would consider the Commission's approach inappropriate even if it were not proposed in the context of an effort to diminish, rather than expand, the influence of those credit rating agencies.

We also do not believe that additional disclosure requirements should be viewed as a panacea for the current ills of the structured finance markets, because we believe that insufficient disclosure was not the root cause of the market problems. A disclosure-based solution is appropriate with respect to a disclosure-based problem, but our experience with the credit rating agencies and structured finance markets suggests that the issues are more fundamental: problems with financial models, diligence, staffing, rating analyst experience and depth of knowledge, financial conflicts of interest and a failure to keep up with new structuring technologies and to reevaluate existing structuring technologies in light of changing market conditions. These problems have been compounded in the structured finance markets not by insufficient information but by insufficient understanding of the information that is already available to investors. While there are many structured finance investors who are knowledgeable about these products, we believe many other investors "bought the ratings" with little or no analysis of the structures, cash flows, or asset pool characteristics, and perhaps without the fundamental background to perform such an analysis in a comprehensive way. As the Commission notes in the Proposing Release, "the complexity of assessing the risk of structured finance products and the lack of commonly accepted methods for measuring the risk has caused investors to leave the market, . . . particularly investors that had relied primarily on registered credit rating agencies credit ratings in assessing whether to purchase these instruments. This has had a significant impact on the liquidity of the market for these instruments."<sup>2</sup> Investors who actively conduct their own analyses have already, as part of the extensive comment process surrounding the adoption of Regulation AB, advised the Commission of the data they considered essential for a full evaluation and have the ability to demand additional information, both in public offerings and in Rule 144A and other exempt offerings. For those without adequate experience to make an informed investment decision using information currently required in these transactions, additional disclosures will not help. Rather than needing more information, these investors need both the commitment and the tools to analyze and distill the information that is already available.

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<sup>2</sup> 73 Fed. Reg. 36212, at 36218.

None of this is to say that the current market crisis may not ultimately lead to the conclusion that even the significant information provided under Regulation AB should be expanded in the future, or that the structured finance market may benefit from enhanced disclosures in certain areas. However, we do not believe that the disclosures suggested in the Proposing Rules will meet the more immediate goals identified by the Commission of “further enhancing the utility of [registered credit rating agencies] disclosure to investors [and] strengthening the integrity of the ratings process.”<sup>3</sup> Moreover, as discussed below, additional disclosure requirements in the form proposed could well deepen the current crisis in the structured finance markets, discouraging issuers from relying on the structured finance markets as a source of capital and liquidity. The Commission would be establishing a fundamentally different disclosure regime for structured finance products where the issuer pays for a credit rating, creating a significant disincentive to the issuance of such rated structured finance products. To avoid this, any expanded disclosure requirements should be based on a methodical process, comparable to that for the adoption of Regulation AB, geared towards identifying specific additional disclosures that should be required, rather than effectively delegating such determinations to the credit rating agencies.<sup>4</sup>

**b. Risk of increased disclosure of immaterial information**

If the proposed rules are adopted, we are concerned that the information publicly disclosed under these rules may be of significant volume but of negligible materiality, unlike the well thought out disclosures currently required by Regulation AB. Examples include financial information about obligors that do not meet the materiality thresholds established by the Commission; extensive computational materials that use a variety of different assumptions relating to specific ratings models; and early drafts of disclosure documents and interim drafts of

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<sup>3</sup> 73 Fed. Reg. 36212, at 36218.

<sup>4</sup> We note that the securitization industry has already begun this process on a voluntary basis. On July 16, 2008, the American Securitization Forum (the “ASF”) announced the public launch of its Project on Residential Securitization Transparency and Reporting (i.e., “Project RESTART”), which is intended to restore investor confidence in mortgage and asset-backed securities. Project RESTART seeks to identify areas of improvement in the process of securitization and refashion, in a comprehensive and integrated format, the critical aspects of securitization with market-based solutions and expectations. At the same time, the ASF released the first major deliverable under Project RESTART—a request for comments on a recommendation for a model disclosure package for private-label RMBS. Similar efforts are expected to be pursued in other major asset classes such as student loan, credit card and automobile securitizations and CDOs. Chairman Cox noted that “the ASF’s Project RESTART is a valuable response to the President’s Working Group’s . . . recommendation in March that a private sector committee develop best practices regarding disclosure to investors in securitized credits” and that he is “very pleased that the industry is working with investors and a wide range of other important market participants to improve the securitization process” Statement of Christopher Cox, Chairman of the SEC, as printed in a memorandum from the American Securitization Forum (July 16, 2008). Although such private industry initiatives do not replace regulatory action by the Commission, we believe that, given the broad industry group (including representatives of issuers, originators, underwriters, accountants and credit rating agencies) contributing to ASF’s initiatives, Project RESTART and similar industry projects will provide meaningful assistance to the Commission in identifying appropriate areas for regulatory intervention in the structured finance markets.

operative documents. Some information may be both immaterial and not susceptible to disclosure, such as tours of servicing facilities or discussions of investment philosophy with officers of the issuers, but still present a disclosure dilemma for issuers. The Commission traditionally has been concerned not only that specific information material to an investment decision be disclosed, but that the material information be disclosed in a meaningful fashion and not be obscured by a blizzard of immaterial information. In the most directly relevant example, the adopting release for Regulation AB emphasized that “participants should view [Regulation AB] as an opportunity to evaluate whether there is information that has been included in registration statements and prospectuses that is not required, not material and not useful to investors, and therefore should be reduced or omitted.”<sup>5</sup> In another recent example, the Commission noted that “disclosure should emphasize material information that is required or promotes understanding and de-emphasize (or, if appropriate, delete) immaterial information that is not required and does not promote understanding.”<sup>6</sup> The proposed disclosure requirements may make it even more difficult for investors to understand which aspects of the available disclosure really are critical to an informed investment decision.<sup>7</sup>

**c. Confidentiality, Regulation FD and the curtailing of free and frank communications**

The Commission has requested comment on whether the disclosure requirements in the Proposing Release will limit the information that arrangers will be willing to make available to credit rating agencies, and in our view it will. For instance, information disclosed to the credit rating agencies, such as customer lists or again, financial information about smaller obligors, may be proprietary or subject to confidentiality agreements. It is common for transaction parties to negotiate an exception to confidentiality requirements to permit disclosures to credit rating agencies, where they would not be comfortable with a broader exception to agreed confidentiality. Other information provided to the credit rating agencies, such as legal opinions, as discussed below, or accountants’ agreed-upon procedures letters, may be subject to restrictions on use.

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<sup>5</sup> 70 Fed. Reg. 1506, at 1532 (Jan. 7, 2005).

<sup>6</sup> Interpretation: Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operations, Sec. Act Rel. No. 33-8350 (Dec. 29, 2003).

<sup>7</sup> The Proposing Release raises one additional issue under Regulation AB that is not directly related to the proposed disclosure rules when it states that in shelf offerings of ABS, pooling and servicing agreements “should be filed by the time of the offering of securities. Therefore they should be filed at the time of the takedown . . . .” 73 Fed. Reg. 36212, at 36224. This runs contrary to the standard practice in the ABS markets of filing the operative documents in final form as promptly as practical after the closing date, but in any event within 15 days, which was discussed in great detail with the Commission staff during the Regulation AB comment process. It is not feasible to file final documentation on or prior to the closing date—particularly for mortgage-backed securities, which may involve complex cash flows, multiple servicers, derivative instruments and cash flow structures that may change shortly before issuance of the securities.

We note that the Commission has long had a policy of encouraging full and frank communications with the credit rating agencies. For instance, Rule 100(b)(2)(iii) of Regulation FD provides an exception for information communicated to nationally recognized statistical rating organizations (“NRSROs”) in the ratings process, adopted to permit issuers to continue to share nonpublic information with rating agencies. In its recent release proposing rating agency-related changes to the Securities Act of 1933, as amended (the “Securities Act”) and the Securities Exchange Act of 1934, as amended (the “Exchange Act”), the Commission noted that “disclosures to an entity whose primary business is the issuance of security ratings are excluded from coverage provided the information is disclosed solely for the purpose of developing a credit rating and the entity’s ratings are publicly available.”<sup>8</sup> In our view, this exception continues to be appropriate, and we are reluctant to see an erosion of confidential communications between issuers and credit rating agencies, especially at a time when all parties are trying to identify ways to increase confidence in credit ratings.

In addition, where there is a conflict between information requested by a rating agency and that which the issuer is willing to disclose publicly, that conflict may delay or prevent the issuance of the structured finance products, thereby further impeding the restoration of the structured finance market. The inability to agree on the information to be provided also may result in a different sort of forum shopping than that which currently concerns the Commission.

**d. Inability to expertise data and additional effects on accountant reviews and legal opinions**

Underwriters in structured finance transactions, as part of their due diligence procedures, typically require the issuer’s independent registered public accounting firm to provide either a comfort letter or an agreed-upon procedures letter with respect to financial information included in the offering documents. As a result, issuers have worked extensively with their auditors to develop methodologies to review the financial information included in these offering documents. We are concerned that the expanded disclosures proposed by the Commission may include financial information that is not susceptible to verification by independent registered public accounting firms through agreed-upon procedures due to cost and timing considerations, and therefore may be not be expertized.

Rating agencies often require, as a part of their analysis, opinions as to the legal isolation of the securitized assets, such as true sale and non-consolidation opinions, tax opinions, opinions as to perfection and priority of security interests, and general corporate opinions. Many of these opinions are reasoned, rather than flat, opinions, in which (as a matter of customary practice, which governs the rendering and interpretation of legal opinions) the conclusions are interwoven with the underlying reasoning, the limitations of which form an integral part of the conclusion. Reliance on, and even viewing of, such opinions generally is limited to the addressees, in part as a means to avoid unwarranted over-reliance on the conclusions by those who are less familiar with the applicable body of law. Although it is not clear whether the proposed disclosure of

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<sup>8</sup> 73 Fed. Reg. 40106, 40116 (July 11, 2008).

information about legal structure is intended to require disclosure of legal opinions, in our view such disclosure would not be appropriate. If the Commission did determine that these opinions were required to be disseminated to the general public as part of the information regarding the “legal structure” of the transactions on which rating agencies rely, lawyers would be much less willing to render them, which could have serious negative consequences on both the ability to obtain appropriate ratings and even the integrity of the transactions themselves. Law firms may also be unwilling to provide negative assurance letters or opinions as to compliance with forms if the disclosure requirements are expanded to the scope envisioned by the Commission.

We are concerned that the market may be further hindered by an increase of information for which law firms and accountants are not willing or able to give comfort. We view this risk as a significant unintended consequence of the proposed disclosure rules and urge the Commission to carefully consider this issue.

**e. Furthering the goal of unsolicited ratings: an alternative proposal**

We do not believe the proposals as currently drafted would further the Commission’s goal of encouraging unsolicited ratings. First, there are significant timing issues. Rating agencies typically begin working with arrangers weeks if not months prior to a proposed transaction. If the information provided to other rating agencies were publicly disclosed at the time of sale, credit rating agencies would not have time to complete the same comprehensive process for unsolicited ratings as they perform for those for which they are engaged. Other than to the extent of unsold allotments, all initial purchase decisions will have been made before any unsolicited ratings become available. And while other credit rating agencies might be able to provide such unsolicited ratings at some point after the securities were issued, we are not sure what their incentives would be to do so or how that would affect secondary trading in the securities.<sup>9</sup> Second, each credit rating agency’s process is different and idiosyncratic, and the information requested by one credit rating agency may not correspond to what another credit rating agency would wish to see. Finally, we do not see the proposals establishing significant incentives for rating agencies to spend the time and effort necessary to fully analyze a structured finance transaction when they are not being paid to do so.

In the past, credit rating agencies have indicated an intention to provide unsolicited ratings as a way of pressuring issuers to pay for credit ratings—a different form of conflict of interest than those the Commission is currently addressing, but a significant one nonetheless. In our view, any effort to promote unsolicited ratings also must impose constraints against any coercive use of such ratings. As we discuss below with respect to conflicts of interest surrounding fee discussions, one way to address this is to ensure that analysts not only do not participate in fee negotiations but also are not informed of the amount of the fee or whether a fee

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<sup>9</sup>The Commission’s alternative timing suggestion, that solicited ratings not be made available until a set period of time after the final pool is settled, would create significant delays for issuers dependent on swift market access and exacerbate current liquidity issues.

had been or will be paid at all. This conflict could also be addressed if the Commission were to establish regulations that prevent the use of unsolicited ratings in a coercive fashion.

Given the issues surrounding the scope and timing of the proposed disclosures, we suggest that the Commission consider an access-based solution to encourage unsolicited ratings, rather than a disclosure-based solution. For example, issuers could be required to notify all credit rating agencies registered with the Commission at the time they decide to commence any rating process, allowing those who wish to provide an unsolicited rating the opportunity to signify their intent to do so. Arrangers would then be required to provide comparable levels of information and access to those rating agencies providing unsolicited ratings—perhaps through a private electronic data room—as they provide to those rating agencies specifically engaged to issue the ratings. (The Commission would have to ensure that all entities to which such access was granted were, in fact, legitimate credit rating agencies and are required to maintain the confidentiality of information provided to them in response to such rules, except to the extent reflected in their ratings.) Such a procedure would make it possible for unsolicited ratings to be provided consistent with overall transaction timing and would, we believe, create a more level playing field for those wishing to provide unsolicited ratings. For the reasons discussed above and throughout this response, we believe that this information should be made available only to other credit rating agencies, and not to the general public.

**f. Additional disclosure of rating assumptions**

One area in which we think additional disclosure might be helpful to investors surrounds the credit ratings themselves. We appreciate that the Commission has already proposed substantial new disclosures of methodologies and performance statistics for credit rating agencies, but one area that has not been addressed is the specific assumptions made in connection with particular transactions. For example, the Commission might require credit rating agencies to disclose the material assumptions used in generating the “worst case” scenarios that supported their ratings, such as the highest maximum default rate and the lowest minimum recovery rate modeled with respect to the pool. For ratings paid for by issuers and used in their offering documents, this information could be required to be included in the prospectus. For ratings provided under a “subscriber-pay” model, the information could be required to be included with the materials publishing the credit ratings to the subscriber base. In either case, investors would then be able to make their own evaluations of these stressors and could also monitor pool performance over time with respect to those assumptions. Additional disclosures, such as descriptions of the diligence performed by credit rating agencies, might also be useful, but we do not think there should be additional requirements for issuer and underwriter due diligence disclosures as the requirements for these are sufficiently well-established. There are a number of issues with respect to such disclosures, such as ensuring that the issuers and underwriters are not liable for these disclosures, over which they have no control, and addressing possible timing delays in issuance as credit rating agencies prepare the required disclosures. We do not see this as a short-term solution, but rather as one that merits additional exploration and discussion. To preserve the value of investor-funded credit rating agency models, such as subscriber-pay models, and to encourage unsolicited ratings by such credit rating agencies, we



believe that these credit rating agencies should be allowed to maintain such ratings as proprietary information available only to their subscriber base.

**g. Surveillance information and Exchange Act filings**

Section 15(d) of the Exchange Act specifically provides that an issuer's reporting obligations under that section cease as of the first fiscal year, other than the year in which the registration statement giving rise to the reporting obligation becomes effective, in which all securities registered are held by fewer than 300 persons. With respect to the Proposing Release's continuing reporting obligations for rating agency surveillance—which would significantly overlap the Commission's Form 10-D requirements—the Commission appears to be attempting to extend the Exchange Act reporting obligations for issuing entities even where such entities would not have a continuing obligation under Section 15(d). Although there may be merit in requiring ongoing Form 10-D reporting for structured finance securities even where those securities are held by fewer than 300 holders, we are concerned that such a requirement would be inconsistent with statutory provisions and therefore open to challenge. To the extent the Commission wishes to alter the approach to reporting in these circumstances, we suggest that the Commission consider pursuing a legislative solution rather than a rulemaking one.

**h. Issues specific to exempt offerings**

We appreciate that a significant driver of the current market upheaval has been CDOs that have been supported to a large extent by subprime RMBS. We realize, too, that these offerings are typically made pursuant to Rule 144A, Regulation S or another exemption that does not require registration of the offer and sale of such securities with the Commission. Although we can sympathize with the desire to regulate and set disclosure requirements for the offering of structured finance securities even to large institutional investors (which have always been presumed to be capable of taking care of themselves) and to offshore investors (the protection of which may be outside the jurisdictional authority of the Commission), we would argue strongly against such an approach. Even if the Commission decides to proceed with the disclosure requirements substantially as proposed in the public offering context, we urge the Commission not to take the same path with regard to exempt offerings.

In our experience, issuers have a variety of reasons for deciding to undertake exempt offerings rather than registered public offerings. Most such reasons relate to the speed of the offering or a desire to limit disclosure of confidential, proprietary or otherwise sensitive information to a limited number of sophisticated investors who assume express confidentiality obligations. The proposed rules would foreclose the ability to offer rated securities, either privately or offshore, without making significant information available to the general public, and as such would eliminate issuers' ability to address confidentiality issues through confidential nonpublic transactions. We believe that the rules as proposed would further limit access to the structured finance markets by requiring public disclosure of information that would normally not go beyond the credit rating agencies and the investors—and would require such public disclosure even where the investors had access to the full information made available to the credit rating

agencies. To the extent the Commission wishes to address disclosure issues in the private and offshore structured finance markets, the Commission can remind market participants that Regulation AB is intended to be the standard for all material disclosures and that comparable levels of disclosure should be considered as part of satisfying the Rule 10b-5 standard. But the Commission should not prevent issuers which cannot make certain public disclosures from accessing alternative markets.

In addition, the publication of such materials might well compromise the availability of the securities law exemptions on which both such transactions and secondary trading in the relevant securities depend, for instance by raising issues of whether such publication constitutes “directed selling efforts” or a “general solicitation.” In particular, the proposed public disclosure requirements would present major issues for underwriters in connection with private placements or Regulation S offerings with unsold allotments (*i.e.*, securities retained by the issuer or initial purchaser and still being marketed to investors after the closing date). Because the Commission has proposed requiring public disclosure on the first business day after the transaction closes, the proposal would result in broad public dissemination of information about the offering while the issuer and the initial purchaser or placement agent may still be trying to complete the offering. On the other hand, if the timing of the public disclosure were to be significantly delayed while unsold securities continue to be marketed, the timing of disclosure could vary substantially among otherwise similar transactions.

As noted earlier, there are a number of industry initiatives under way, such as Project RESTART, to address “best practices” disclosures for offerings of structured finance products. Private market participants have strong incentives to address these issues in exempt offerings, and we urge the Commission to help guide a private solution for exempt offerings rather than making such a significant change in regulatory policy with respect to such offerings and risking further dramatic contraction of market liquidity and capital raising opportunities.

**i. If the disclosure rules are adopted substantially as proposed**

Primarily because of our strong concerns about the Proposing Release’s requirements, our comments generally do not focus on implementation of those proposals. However, if despite those concerns, the Commission decides to adopt the new rules substantially as proposed, there are a number of changes that we believe are critical.

- As the Commission has suggested, there should be a safe harbor for credit rating agencies which rely in good faith on representations from issuers that they will disclose the required information.
- The Commission should clarify that the proposed rules do not require disclosure of any personal identifying information about consumers, including loan and credit card numbers.

- The Commission should clarify the scope of application of the rules. We believe that the decision not to use the definition of “asset-backed security” from Regulation AB in determining which entities or securities are subject to the rules will create significant uncertainty.
- For registered public offerings, it is not clear that all of the required public disclosures would fall within the Commission’s rules on the use of written communications. The definition of “ABS informational and computational materials” should explicitly include a catch-all line item covering all required disclosure that does not fit within the other line items of the existing definition. Also, Rule 164(e)(2) should be modified so as to permit otherwise ineligible issuers to treat these disclosures as free writing prospectuses. In our view, the Commission’s suggestion that disclosure of any of the required information would require an amendment to the registration statement is impractical.
- The Commission should make clear that any required disclosures in connection with a private placement or Regulation S offering do not constitute a prohibited general solicitation or directed selling efforts. In our view, the only effective way to do this would be for the Commission to adopt a safe harbor. We are concerned, however, that it will be difficult to craft such a safe harbor without raising the possibility of abuse.

## **2. Conflicts of Interest**

### **a. Rating agency consultation with issuers**

We appreciate the Commission’s concern about many of the conflicts of interest identified in the Proposing Release, and in general we support the Commission’s efforts to put in place regulatory restrictions to minimize them. We are concerned, however, that the proposed restrictions reflected in new paragraph (5) to Rule 17g-5(c) do not reflect fundamental aspects of the rating process for structured finance securities and would make it exceedingly difficult for issuers and other arrangers to structure rated transactions. We do not accept as true the Commission’s characterization of the dialogue between credit rating agencies and arrangers to achieve a particular rating as a conflict of interest. In our view, the credit rating agencies are not “rating their own work” or providing consultation services that are inconsistent with an independent rating analysis. In structured finance transactions, the rating is not placed on an existing structure; instead, the structure is designed, through discussions between the rating agency and the arrangers, to achieve the specified rating.

Arrangers of structured finance deals start from the premise that for a transaction to be viable, its senior-most class of securities must be structured to achieve a particular rating, usually AAA or its equivalent, though in some circumstances a lower investment grade rating will suffice. They then present the rating agency with preliminary information about the pool, the

structure, the originator, the servicer or collateral manager, and other key aspects of the transaction, and begin the process of determining what modifications, if any, will need to be made to achieve that rating. They may receive investor requests during the process that would also require modifications of the structure, and they discuss with the rating agencies whether such modifications can be made consistent with the proposed ratings. To eliminate these discussions would add significant delays to the rating process or even make it impossible—arrangers would be left guessing at the flaw that had prevented a particular rating and, unless they could figure out the answer on their own, the transaction would not be completed.

Every structured finance transaction is different, and ratings models only provide the basic framework—the remaining process of evaluating various complexities and nuances in the structure, many of which may be beneficial to investors, is an iterative process involving extensive dialogue between the rating agencies and the arrangers. In our view, one of the critical issues of structured finance ratings in the last few years is the extent to which the rating agencies have failed to engage in that dialogue, whether due to time constraints or analyst inexperience. At its best, the discussion between the issuer and the analyst allows the analyst to fulfill the credit rating agencies' oversight function by engaging the arranger with respect to all legal and economic aspects of the structure. We believe that to improve the rating process, there should be more discussion between arrangers and credit rating agencies, not less. This is particularly important in the case of new transaction structures or transactions backed by emerging asset classes, but, as we have seen with well-established products such as RMBS, there is a need to add depth to the process across the board. We see the proposed prohibition of these discussions as a serious misstep, and urge the Commission to eliminate it.

**b. Fee discussions**

We agree with the Commission that establishing walls between those persons within a credit rating agency who negotiate fees and those with direct responsibility for participating in determining credit ratings or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models, would help mitigate the inherent conflict involved in issuers paying for ratings. As a general principle, we also believe it would be a "best practice" for those who directly supervise credit analysts and approve the procedures, models and methodologies used to determine credit ratings to likewise be excluded from fee negotiations. We have two concerns in this regard: first, that at the highest levels within credit rating agencies, executives will need to understand both the revenue aspects of the business and the general ratings approach; and second, that in the smaller credit rating agencies whose development the Commission is encouraging, such segregation may not be administratively feasible. In both instances, we recommend that the Commission consider such organization and administrative difficulties in crafting a final rule.

We also suggest that the Commission consider expanding the proposed rule to prohibit the sharing of fee information entirely—or even whether a fee is being paid—with analysts. As we discuss elsewhere in this letter, while we support the Commission's goal of encouraging unsolicited ratings, the threat of providing negative unsolicited ratings has in the past been used by rating agencies to coerce issuers into paying rating fees. If unsolicited ratings can be

provided in such a way that the analysts working on the project do not know whether a rating is paid or unsolicited, and the rating process is identical for both types of ratings, the risk of such coercion will significantly diminish and unsolicited ratings will provide a more unbiased check on the accuracy of issuer-pay ratings.

We also suggest that the Commission consider other limits on credit rating agency fee arrangements. The Commission could limit the use of fees that are agreed upon before the substantive rating agency process begins but modified thereafter, fees that contain any variable components that could be deemed to be "transaction based" and fees that incorporate an "incentive" component.

Certain conflicts of interest are inherent in the ratings process and cannot be eliminated simply by walling off fee information. In particular, arrangers often hire talented analysts away from the rating agencies, and the potential for future employment may provide inappropriate motivations for certain analysts. At the same time, there is a need for more talent in the rating agencies, and any proposal that would restrict analysts' employment opportunities to eliminate that conflict might well discourage people from seeking those positions. Rather than having a specific legal restriction, we suggest addressing this particular conflict by requiring a code of conduct for analysts. We recommend that the Commission look further at ways of mitigating this conflict without unduly restricting analysts' future employment opportunities.

**c. Gifts**

We agree with the Commission's proposal to limit the gifts and gratuities credit rating analysts may receive from transaction parties. It does not appear to us that limiting these gifts and gratuities would have any adverse effect on the ratings process or the capital markets, and we agree that such a limit will reduce the appearance of impropriety that surrounds such gifts. We do have some concern that the \$25 limit may be too low to accommodate reasonable food items distributed for consumption at working meetings, and suggest the Commission consider a \$50 limit in this context.

**3. Enhanced Record Keeping Requirements**

We appreciate the Commission's desire to make the ratings process more transparent, increase the accountability of credit rating agencies for their ratings actions and stimulate competition among the credit rating agencies. In general and except as noted below, we support additional internal record keeping requirements for the credit rating agencies as a means by which the Commission and the credit rating agencies and their accountants can more easily assess whether a credit rating agency is complying with its internal procedures for the issuance of ratings actions. However, we question whether certain of the proposed record keeping requirements will further the Commission's objectives, particularly those that would require the maintenance of records with respect to third-party complaints relating to analysts. Moreover,

any such record keeping requirements should be carefully crafted so as to not be overly burdensome on the credit rating agencies and to avoid unintended constraints on the credit rating agencies' ability to modify and improve their ratings models to adjust to market changes.

**a. Proposed Rule 17g-2(a)(8) requirement for maintaining and making publicly available a record of rating actions**

The Commission proposes to amend Exchange Act Rule 17g-2 to require registered credit rating agencies to make and retain records of all ratings actions (initial ratings, upgrades, downgrades and placements on watch for upgrades or downgrades) and to publicly disclose such actions on the agencies' internal websites. The Commission notes that the purpose of this proposed rule is to foster greater accountability, transparency and competition. Its expectation is that such additional information will allow the marketplace to create better and more useful means for comparing credit ratings and make it easier for market participants to judge the accuracy of a credit rating agency's ratings actions. The proposed rule would apply to all currently rated securities or obligors as well as to all future credit ratings. Although our focus has been on structured finance products, we believe such records would provide valuable information with respect to all rated securities, including corporate and municipal bonds.

We agree that making ratings actions publicly available will increase the transparency of the ratings process and foster greater accountability. Perhaps it will foster competition, as well, but, consistent with our comments above regarding the Commission's proposed disclosure requirements, we are concerned that the Commission's proposal does not adequately address the distinction between ratings paid for by the issuer or underwriter (the "issuer-pay" model) and those provided to investors and other subscribers independently of the offering process (the "subscriber-pay" model). We believe that proposed Rule 17g-2(a)(8) should make a distinction between these two business models. Prompt public disclosure should be required for all ratings actions provided under the issuer-pay model. However, to preserve the value of subscriber-pay models and encourage the use of subscriber-pay services, we believe that the credit rating agencies should be required to maintain records of unsolicited ratings actions which would be available for review by the Commission but would not be made publicly available. Cumulative track record information could be required to be made publicly available by these credit rating agencies, but track record information related to nonpublic ratings should only be required to be made available on an aggregate basis. The modified disclosure requirements would assist the Commission in achieving its objectives without unnecessarily jeopardizing the subscriber-pay model.

In addition, we question whether the proposed rule should apply to ratings on all currently issued securities and obligors. We are concerned that the collection of such information would be overly burdensome to the credit ratings agencies and may result in disclosure of more information than can be absorbed by the market. In addition, we note that Regulation AB's mandated disclosure requirements are limited generally to material information from the preceding five years. We would urge the Commission to consider whether the proposed new rule should apply only with respect to securities issued in the five years preceding the

effective date of the rule, and, consistent with Regulation AB, only to the extent that such information is reasonably available to the credit rating agencies and can be complied without undue effort and expense.

This proposed rule poses many questions of a technical or economic nature, such as use of the XBRL Interactive Data File and the creation of new "tags," that are better addressed by those with more relevant expertise. We would like to respond, however, to some of the Commission's other specific questions. As noted above, we do not believe that the public disclosure requirements should apply to ratings provided under the subscriber-pay model. We believe that the six-month delay before publicly disclosing a ratings action under the issuer-pay model is sufficient time to address the rating agencies' business concerns. At the same time, we question how much deference the Commission should be according those concerns. If a credit rating paid for by the issuer was initially included in the disclosure materials for a security, arguably any actions with respect to that credit rating should also be promptly publicly disclosed, even if this curtails a revenue source for the credit rating agencies. And if a credit rating is made available only to a credit rating agency's subscriber base, then a change in that credit rating should likewise be made available promptly to that subscriber base (though we do not believe it should be required to be made public). The proposed rule does not address the effective date by which the disclosure requirements will be required to be implemented, and we believe that a longer transition period may be necessary in order for the credit rating agencies to have sufficient time to develop and implement systems and procedures required to comply with the proposed rules. Additionally, we believe that retroactive application of the proposed disclosure requirement should not be required without additional research that provides a clearer picture of whether compliance with this requirement on a retroactive basis is possible, over what time frame and at what cost.

The Commission also asked for comment on whether NRSROs should be required to sort the credit ratings, such as by asset class or type of ratings, and the appropriate mechanisms for identifying rated securities. We suggest that the ratings on individual securities be identified by the mechanism currently used in the marketplace to identify and trade in such securities (such as CUSIP and CIK numbers). As discussed in more detail below, there can be significant overlap among types of structured finance products and significant distinctions within categories that appear largely the same. We are concerned that placing ratings in artificial categories or sorting mechanisms would unnecessarily complicate the implementation of the rule and the retrieval of such information by users. We would, however, encourage the credit rating agencies themselves to consider ways to make such information more accessible.

The Commission also noted that it anticipates that the data provided by rating agencies would be simple and repetitive (such as the name, CUSIP, date and rating action), but requested input on whether there is a need for more detailed categories of data. We do not believe that more detailed categories of data would be useful to investors. We are concerned that more detailed disclosure requirements will be unduly burdensome to the credit rating agencies and should not be required without additional research as to the necessity for and cost of providing such additional information.

**b. Proposed rule 17g-2(a)(2) requirement for maintaining a record of material deviation from model output**

The Commission proposes to require each NRSRO to maintain records of certain material deviations from its ratings models in connection with the issuance of current credit ratings, specifically with respect to any material deviation from any quantitative model that is a substantial component of any ratings model. We appreciate the Commission's desire that registered credit rating agencies maintain adequate records of their ratings determinations, and agree that such records would facilitate review by the Commission's examiners and internal auditors of credit rating agencies to determine whether agencies are following their documented ratings procedures and protocols. We are concerned, however, that the proposed rule might have the effect of restricting credit rating agencies' ability to modify and improve their models over time to account for changes in the broader economy, to implement any other improvements to their models that would increase the quality of the ratings they issue or to adequately reflect structural innovations or specific characteristics of an asset pool that may not be captured by the models. Moreover, the proposed rule would do little to make the ratings process more transparent or aid investors in better understanding why a particular security is assigned its credit rating.

We believe that the Commission's objectives could be achieved with an alternative approach that would not have a chilling effect on modifications and improvements to ratings models, but would increase transparency to the ratings process. As described in the first part of this letter, rather than requiring that the credit rating agencies track deviations from their model, we propose that the credit rating agencies be required to disclose to the issuer of a security the rating assumptions, and other information material to the rating, used in rating the security. For example, as noted above, the Commission might require credit rating agencies to disclose the material assumptions used in generating the "worst case" scenarios that supported the ratings (e.g., the highest maximum default rate and the lowest minimum recovery rate modeled with respect to the pool of assets). Additional disclosures, such as the due diligence performed by the credit rating agency, might also be required to be disclosed. If the issuer includes the rating in the offering document, it also could be required to include the disclosure provided by the credit rating agency, subject to appropriate exemptions from liability for such disclosure.

Our proposal reduces reliance on the ratings model as a baseline but achieves the same policy goals as the Commission's proposal. Disclosure of all key assumptions and variables in the rating process would enable both the Commission and investors to reconstruct the analytical process by which a credit rating was determined without hindering the rating agencies' ability to modify and improve their ratings models and to maintain the confidentiality of the specific mechanics of their quantitative models.

As noted above, there are a number of issues with respect to such disclosures, such as ensuring that issuers and underwriters are not liable for these disclosures and the potential delay in the offering process that might result from the use of such disclosures. Additionally, as we anticipate that there could be some resistance from the credit rating agencies to required disclosure of modeling processes or assumptions that they perceive to be proprietary in nature,



careful consideration will need to be given to the nature of the ratings information that is required to be disclosed. We view our proposal as a possible long-term solution that merits additional thoughtful consideration by the Commission and the market.

In connection with its proposed rule, the Commission has asked whether the proposal has the impermissible effect of regulating the substance of credit ratings in any way. Although we do not believe that the record keeping requirement is intended to have such an effect, it does open the door to the possibility that credit rating agencies would modify their ratings models or processes over time to reduce the number of “material deviations” or to avoid repeated inquiries from the Commission’s examiners as to why such deviations were made under the circumstances of a particular security. In our view, either the Commission’s proposed rule or our alternative proposal should only be adopted after careful consideration of the consequences of such a rule.

In addition, the Commission has asked whether it should define in the rule when the use of a model would be a “substantial component” in the process of determining a credit rating or define when divergence is “material.” As we noted elsewhere above, each credit rating agency’s ratings process is different and idiosyncratic. What might be a “substantial component” for one credit rating agency may not be significant for another credit rating agency. We believe that formulating a definition that could apply to all ratings models for all of the different asset types would be difficult to achieve. Moreover, a rule that defines a “substantial component” and “materiality” more readily lends itself to a charge of impermissible regulation by the Commission of the “substance” of credit ratings.

**c. Proposed rule 17g-2(b)(8) requirement for maintaining records concerning third-party analyst complaints**

The Commission also proposes to amend Rule 17g-2 by adding a new paragraph (b)(8) requiring NRSROs to maintain records concerning third-party complaints with respect to the performance of credit analysts in determining credit ratings. The Commission has suggested that the rule would assist it in reviewing how the credit rating agencies address conflicts of interest that could impair the integrity of the ratings process. We do not believe that the proposed rule is necessary to address conflicts of interest. Moreover, we do not believe that such a rule would result in meaningful improvement in the quality of ratings issued by a credit rating agency.

Despite the recent problems in certain areas as evidenced by the current market issues, many issuers of structured finance securities—especially those issuers who are regular participants in these markets and depend on securitization as a key source of funding—would be equally resistant to an unjustifiably high rating as they are to an unjustifiably low one. They understand that it is vital to their continuing access to liquidity that the ratings of their securities be appropriate and sustainable over time and a variety of market conditions. In our experience, issuers’ complaints regarding analysts tend to focus on issues of responsiveness, efficiency and, to a lesser extent, the analyst’s understanding and comprehension of the securities being offered, and not on concerns by issuers or underwriters that the analyst is too conservative or will not support the desired credit rating for a proposed structure. A requirement to maintain records of complaints regarding the timeliness of analysts’ responses or analyst inefficiency would do little

to address the Commission's concern with respect to conflicts of interest because such complaints (the analyst's poor performance) are "unconnected" to a conflict of interest. In situations where the complaint centers on the analyst's lack of comprehension of the securities (i.e., his or her "poor performance"), the result desired by the issuer or underwriter is a more rigorous review by the credit rating agency that will result in a more well-founded ratings decision by it and, again, is "unconnected" to a conflict of interest with the issuer or underwriter. Again, in our view a code of conduct that encourages the reporting of complaints relating to true conflicts of interest would provide a better means of addressing inappropriate pressures on analysts.

Additionally, final decisions on credit ratings generally are made by committees rather than an individual analyst. Ratings decisions may be based on an individual analyst's recommendation but ultimately reflect the collective judgment of the credit rating agency itself. As a result of this committee process, complaints by third parties against certain individual analysts, even those that result in re-assignment of that analyst, are not likely to result in a significant change in the ratings assigned to securities of an issuer by a specific credit rating agency. To the extent that credit rating agencies feel pressured to rate structured products in a fashion calculated to maintain their business relationship with an issuer or underwriter, the proposed rule would do little to address this perception. However, other measures discussed in this comment letter, such as separating the setting of ratings fees from the actual credit ratings process, would seem to better address the Commission's concern.

The Commission requests additional comment on whether the rule should require credit rating agencies to publicly disclose when an analyst has been re-assigned from the responsibility to rate an obligor or the securities of a particular issuer, underwriter or sponsor. We oppose such a requirement. As discussed above, while the actual rating assigned by a credit rating agency to a security is the result of a committee process, the complaints would be attributed to and filed against an individual analyst. The proposal to make such information publicly available raises confidentiality and employment law issues. Moreover, we believe it will serve as a deterrent to attracting qualified, competent individuals to serve this vital role in the securities issuance process.

Finally, the Commission requests comment on whether registered credit rating agencies should be required to retain communications from obligors, issuers, underwriters or sponsors requesting assignment of a specific analyst to a transaction in addition to the proposed requirement to retain complaints about a particular analyst. In our experience, requests for assignment of a particular analyst are based on the analyst's familiarity with the securities or obligor to be rated and/or prior working relationship with the issuer, underwriter, sponsor or obligor, and not with a view toward improperly influencing the rating outcome. For these reasons, we oppose any requirement that the credit rating agencies be required to report such communications.

**4. Additional Proposals Relating to NRSROs**

**a. Enhanced ratings performance measurement statistics and disclosure of ratings methodologies**

We generally support the Commission's proposed amendments to the instructions to Form NRSRO. We agree that the additional information provided in Form NRSRO as a result of such amendments will provide investors and arrangers of structured finance products with useful information about a particular NRSRO's historical performance and track record of accurately rating new issues of such structured finance products and such NRSRO's ability to accurately perform ongoing ratings surveillance. We do, however, encourage the Commission to carefully analyze the additional burdens that the proposed amendments to Form NRSRO will place on NRSROs. If existing or future rating agencies are unable to economically comply with the additional reporting requirements, the proposed amendments could have the unintended consequence of discouraging rating agencies from opting into the NRSRO reporting regime and therefore reduce the amount of information made available to ABS market participants. Moreover, to the extent the amendments proposed by the Commission in Release 34-58070, Release 33-8940 and Release IC-28327 aimed at decreasing reliance on ratings in the Commission's rules and regulations are adopted, the significance of NRSRO status will likely diminish. Accordingly, we encourage the Commission to consult with existing NRSROs to determine the additional burdens that such additional reporting will place on NRSROs.

With respect to the Commission's questions about standards for performance statistics and requiring a more granular form of presentation, such as by asset type or type of structure, we believe that additional disclosure granularity based on legal structure (e.g. CDOs, RMBS, commercial mortgage backed securities, credit cards) could provide market participants with useful information. However, given the large diversity of asset classes and legal structures, and the degree of overlap among such structures, we are concerned that it may be difficult to describe relevant categories in a way that is meaningful. For instance, in the current market crisis, the ratings on RMBS backed by subprime mortgages have had different outcomes than those backed by prime mortgages, and RMBS transactions with monoline insurance guarantees have performed differently than those without such guarantees. Collateralized loan obligation transactions backed by corporate loans have performed very differently than similar structures backed by RMBS. Structured finance markets are constantly evolving as arrangers and investors work together to develop new mixes of assets and structures. If the Commission decides to require additional granularity based on asset classes, there should be sufficient flexibility around the class designation to facilitate new products and overlapping structures. Form NRSRO should be regularly and automatically updated to account for newly developed asset classes and structures.

We believe the proposed one (1), three (3) and ten (10) year time periods for statistical reporting are appropriate. We do not think that disclosure of rating actions for securities after ten

(10) years will provide market participants with useful information because many ABS transactions have materially amortized by the end of the tenth year.

**b. Annual report of credit rating actions**

We agree that a requirement that NRSROs provide the Commission with a report of the number of credit rating actions (upgrades, downgrades, and placements on watch for an upgrade or downgrade) during the fiscal year for each class of credit ratings for which the NRSRO is registered with the Commission will provide useful information in evaluating the overall performance of the credit rating agencies and the stability of ratings. We note that such a requirement may be redundant with the information that would be required on Exhibit 1 to Form NRSRO after applying the proposed enhancements set forth in the Proposing Release.

**c. Early warning report**

Although we understand the initial appeal of the idea of an “early warning” report, we are concerned that requiring such a report may have the unintended consequence of discouraging NRSROs from taking timely ratings action when credit conditions in a particular asset class rapidly deteriorate so as to avoid triggering the reporting requirement. Nor do we think that, by the time the credit rating agencies begin to downgrade such securities, we would still be in the “early warning” phase of a rating crisis. Moreover, the financial press has quickly reported large volumes of downgrades and the markets reacted accordingly as evidenced by the dramatic reduction in deal volume. Accordingly, we do not see any benefit to investors in requiring an “early warning” report.

That being said, we believe reconsideration of rating standards for a particular transaction type significantly precedes any formal action by the credit rating agencies, including the formal placing of securities on credit watch for possible downgrade. We think the credit rating agencies should be encouraged to begin dialogue with the Staff of the Commission at the same time that they are beginning any reevaluation that they believe likely to lead to large scale ratings adjustments.

**d. Rule 17g-7 special reporting or use of symbols to differentiate credit ratings for structured finance products**

As discussed above, we agree that there was a significant problem in the quality of the ratings process for subprime RMBS and CDOs backed by subprime RMBS. We also recognize that structured finance products have unique qualities and benefits that make them different from corporate or municipal bonds. As is the case with any investment decision, it is crucial that investors in structured finance products evaluate all of the material information available to them at the time they are making investment decisions. Regulation AB and other disclosure provisions in the Securities Act have successfully provided structured finance products market participants with a meaningful set of guidelines to assist them in determining what is, or is not, material disclosure to be included in the applicable disclosure documents for investor

consideration. Consistent with a disclosure-based approach, we support the Commission's proposal to require credit rating agencies to publish a report each time such agency is publishing a credit rating for a structured finance security. Such a report would describe how the credit ratings procedures and methodologies and the credit risk characteristics for structured finance products differ from those of other types of rated instruments. The report could be included with the offering documents for that security and would provide investors with meaningful and useful information that could assist them in making an informed investment decision when deciding whether or not to make a structured finance product investment. Conversely, we do not support the Commission's proposal to allow NRSROs to use symbols (so called "scarlet letters") to differentiate credit ratings for structured finance products as an alternative to providing such a report.

While we believe that a report explaining the methodologies and procedures for determining structured finance products ratings would assist investors in their internal credit approval processes and prompt them to spend more time performing due diligence on the structures, the assets and the transaction parties, we do not believe differentiated ratings would benefit investors or otherwise be beneficial to the structured finance markets. We understand that there has been strong opposition to a differentiated rating scale from both industry participants and, more importantly, investors. We join those industry groups and investors in our opposition to permitting NRSROs to use differentiated ratings for structured finance products.

In our view, the recent problems with the ratings for certain types of ABS products reflect a failure of the ratings process rather than a different level of risk or complexity inherent in ABS. The "AAA" ratings assigned to mortgage backed securities were intended to represent the same (or lower) level of risk as a corresponding rating for a corporate bond. Historically, this has been true. Even today, while sub-prime related transactions have experienced unprecedented downgrades, there have been very few credit rating downgrades in ABS not linked to sub-prime mortgages.<sup>10</sup> For example, data published by Fitch, Inc. indicates that, even with a dramatic increase in Fitch downgrades in 2007, the average annual global structured finance default rate over the 17-year period ending in 2007 was 0.77% (as opposed to 0.68% for the 17-year period ending in 2006). In 2007, global structured finance defaults for "AAA", "AA" and "A" tranches rated by Fitch were at 0.09%, 0.21% and 0.31%, respectively.<sup>11</sup> Over the long-term, ABS credit ratings have been remarkably stable and we believe the better goal is to restore that stability rather than to permit a differentiation that can be used to justify loosening standards.

We would like to see the credit rating agencies, the Commission and the industry as a whole work towards restoring confidence that a rating of "AAA" means just that, whether that

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<sup>10</sup> We include in the credit rating downgrades those downgrades related to the downgrades of the corporate credit ratings of financial guaranty insurance companies that had provided insurance policies supporting "AAA" ratings for many structured finance products tranches, rather than to deteriorations of the underlying assets and the "shadow" ratings for those tranches.

<sup>11</sup> FitchRatings, Credit Market Research, "Fitch Ratings 1991-2007 Global Structured Finance Transition and Default Study" ( April 18, 2008).

“AAA” rating is associated with a structured finance product or a corporate or municipal bond. We believe it is vital to the long term health of the structured finance products markets, and correspondingly the global economy and capital formation processes across all asset classes, that the ratings for structured finance products are brought back in line with the corresponding corporate ratings. We believe that this goal will be accomplished by adopting proposals that fix the process rather than proposals that permit NRSROs to take the path of least resistance by applying a different rating symbol which, from a liability perspective, will afford NRSROs the defense of saying that they never promised that the “AAAsf” rating was the same as a “AAA” rating. In our view, “AAA” for structured finance products should and, assuming the Commission, industry participants and investors impose adequate restrictions on NRSROs, will be the same in quality and kind as a “AAA” rating for corresponding corporate or municipal bond.

A cosmetic alteration to the labeling of a rating would not address the root of the problems that created the deterioration of the rating quality for structured finance products, namely a breakdown in the process for establishing those ratings. Because we believe that permitting NRSROs to change the rating labels for structured finance products will (i) discourage NRSROs from providing more transparent disclosure on the procedures and methodologies used to rate structured finance products, (ii) not assist in the process of correcting the underlying process for determining structured finance products ratings or provide investors with any meaningful information and (iii) further damage and prolong the recovery of the structured finance products markets, we strongly encourage the Commission to remove in its final rules any ability of NRSROs to use differentiated ratings.

We defer comment on technical aspects of the proposal to change rating designations to those with more relevant expertise, but we are concerned that the use of differentiated rating symbols would have a material adverse effect on automated securities trading, routing, settlement, clearance, trade confirmation, reporting, processing, and risk management systems and will require significant and costly changes to such systems, software and reporting. We are very concerned, however, that any difficulties or transitional delays, regardless of magnitude or duration, which may result from the imposition of differentiated rating symbols will exacerbate the illiquidity currently being experienced in the structured finance markets and further suppress deal volume.

In our view, the use of differentiated rating symbols would have wide ranging consequences. We appreciate the efforts the Commission is making to decrease reliance in its own rules on credit ratings, but there are a myriad of other federal and state statutes and regulations that continue to rely on these ratings. In addition, because investment guidelines for various public and private funds and companies and a variety of legal documents use rating symbols as proxies for more fundamental credit standards, often with a restriction that excludes products that have a subscript or extra designation, we are concerned that differentiated ratings would require significant amendments to such guidelines and documents. Where such amendments to laws, guidelines or documents are not possible or cannot be made quickly, differentiated ratings would further curtail the number of investors able to invest in structured

finance products, would further suppress demand for structured finance products and would further exacerbate current liquidity issues. Rather than mandating differentiated symbols, the Commission should encourage rating agencies to continue to use consistent symbols for corporate debt and structured finance products.

Finally, we note that credit ratings are not designed to address market or liquidity risk and we do not believe that requiring rating symbols to take into account market and/or liquidity risk will be meaningful or even possible. Ratings generally are designed to address the risk that an investor will or will not receive a return of its principal and timely interest. Ratings do not address an investor's ability to sell a security. Liquidity for a particular type of security is not predictable and cannot be meaningfully incorporated into any credit rating, be it for ABS or for a corporate or municipal bond. These types of risks should be addressed in the applicable disclosure documents and/or the NRSRO report that the Commission has proposed in the Proposing Release.

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The Committees appreciate the opportunity to comment on the proposal and respectfully request that the Commission consider 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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Keith F. Higgins  
Chair, Committee on Federal Regulation of Securities



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Vicki O. Tucker  
Chair, Committee on Securitization and Structured Finance



Securities and Exchange Commission

July 28, 2008

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