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April 7, 2023

Ms. Vanessa Countryman
Secretary, Office of the Secretary
And
Mr. Erik Gerding
Director, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F St. NE
Washington, DC 20549-1090

Copy: Office of Credit Ratings, U.S. Securities and Exchange Commission; Supervision of Credit Rating Agencies, European Securities and Markets Authority; and Credit Rating Supervision, UK Financial Conduct Authority

Via Electronic Mail

Re: U.S. Securities and Exchange Commission "Petition for Rulemaking 'File No. No. 4-799' (Petition for Policy Clarification on Credit Rating Agencies)" AND April 7, 2023 Call With Division of Corporation Finance Staff and Petition Signatories Regarding "[Item] III. Clarify that NRSROs Are Subject to Liability under Section 11" (Ford Motor Credit No-Action Letter)

Dear All,

This letter and the three other documents that the delivering email attached collectively comprise a submission to the U.S. Securities Exchange Commission regarding both subject-line matters.

My name is Bill Harrington and I am Senior Fellow at the non-profit research and action Croatan Institute.[1] Since 2011, I have worked on a fulltime, largely uncompensated basis to "inject accountability into the U.S. and global financial systems.[2]

The Ford Motor Credit No-Action Letter has shielded NRSROs from *ALL* accountability in assigning credit ratings to many if not most asset-backed securities and structured debt since July 22, 2010.

> "*I am writing to urge the Commission to re-propose and extensively revise rule changes relating to Nationally Recognized Statistical Rating Organizations (NRSROs). In addition, I also urge the Commission to enforce Section 939G of Dodd-Frank, which makes NRSROs subject to expert liability under Sections 7 and 11 of the Exchange Act for disclosures of ratings in securities registration statements.*
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> *"Since Dodd-Frank became effective, the Commission has suspended enforcement of Section 939G by means of administrative fiat—namely, the No-Action Letter relating to Ford Motor Credit Company LLC of November 23, 20101 and a preceding staff response letter. Failure to enforce Section 939G undermines the clear intent of Congress to change the liability standard for NRSROs and redress a root cause of the financial crisis: the lack of NRSRO accountability in assigning inflated ratings to asset-backed securities (ABS).*
>
> *"To date, the Commission has enabled NRSROs to assign inaccurate ratings with impunity. Failure to enforce Section 939G allows NRSROs to continue inflating ABS ratings, while the industry-friendly rule changes under consideration would empower NRSROs to continue rating inaccurately across all sectors—municipal, state, sovereign, supra-national, corporate, and financial, as well as ABS."*[3]

The SEC has shielded *ITSELF* from all accountability in perpetuating the Ford Motor Credit No-Action Letter since July 22, 2010.

> "*This no-action letter is framed as a temporary accommodation, but it has no expiry and remains in place almost four years after enactment of Dodd-Frank.*
>
> *"The Commission seemingly places 100% priority on facilitating ABS issuance (irrespective of whether an ABS is adequately capitalized) and 0% priority on enforcing Congressional mandates under Dodd-Frank to instill accountability into ABS ratings so that rating accuracy, information, and quality, as well as ABS transparency, are improved. 'Seemingly' is the operative word (and 'questionable legality' an operative*

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[1] (https://croataninstitute.org/).

[2] (https://croataninstitute.org/2021/05/30/injecting-accountability-into-the-u-s-and-global-financial-systems/) and (https://croataninstitute.org/william-j-harrington/).

[3] Harrington, William J. "Electronic Letter to the SEC Regarding 'File Number S7-18-11 Request for Re-proposal Relating to Nationally Recognized Statistical Rating Organizations'", May 29, 2014, p1. (https://www.sec.gov/comments/s7-18-11/s71811-84.pdf).

phrase); the Division of Corporate Finance did not post a notice or a request for comments prior to issuing the staff response letter of July 22, 2010 or the Ford Motor Credit Company No-Action Letter of November 23, 2010.

"Nor has the Commission published 1) a rationale for not enforcing Section 939G; 2) an assessment of the costs and benefits of not enforcing Section 939G; or 3) a request for comments regarding the utility of enforcing Section 939G and the appropriateness of actions by the Division of Corporate Finance to suspend enforcement of Section 939G."[4]

From October 2015 to November 2016, *Debtwire ABS* employed me as a byline research journalist. *In that capacity, I reported on two interconnected aspects of willful, gross negligence by NRSROs in systematically assigning and preserving the highest possible credit ratings for asset-backed securities and structured products globally. The SEC has abetted NRSRO willful, gross negligence since July 22, 2010, via the Ford Motor Credit No-Action Letter.*

(1) the-swap-contract-with-flip-clause; and
(2) failure to assess legal final maturity defaults by tranches of FFELP student-loan-asset-backed securities, the vast majority of which were initially assigned the highest possible credit ratings!

Regarding the first instance of credit rating company malfeasance — namely, the swap-contract-with-flip-clause — please see my rulemaking petition to ban the flip clause (Number 4-790 of July 21, 2022), the five supporting Exhibits, and my six supporting comments (of, respectively, August 31, October 20, November 16, and December 21, 2022, and February 13 and March 14, 2023.)[5]

Regarding the second instance of credit rating company malfeasance — namely, the failure to assess legal final maturity defaults by tranches of FFELP SLABS — please see the following three documents that the delivering email attached.

(1) "DW ABS WJH 2016-7-26 NY Fed & SLABS" (Bill Harrington, "FFELP ABS downgrades drag on 18 months after Fed alert; just a 'technicality'?", *Debtwire ABS*, July 26, 2016);
(2) "DW ABS WJH 2016-5-16 Margin posting - swaps increase ABS issuance costs by 1%, 3%, 7%...of deal size" (Bill Harrington, *Debtwire ABS*, May 16, 2016); and
(3) "DW ABS WJH 2015-2016 16 FFELP ABS Articles" (Bill Harrington, *Debtwire ABS*, 16 articles, including the two immediately above, from November 21, 2015, to September 21, 2016).

Further to the failure to assess legal final maturity defaults by tranches of FFELP SLABS, consider the following. **Moody's Investors Service claims to evaluate *all* FFELP SLABS credit exposures to**

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[4] "Ibid.", p17. (https://www.sec.gov/comments/s7-18-11/s71811-84.pdf).

[5] (https://www.sec.gov/rules/petitions/2022/petn4-790.pdf), (https://www.sec.gov/rules/petitions.htm), and (https://www.sec.gov/comments/4-790/4-790.htm).

all **ESG factors "expected to unfold within" legal final maturities that can extend to 2080 and beyond, but intentionally elides credit risk of non-repayment in full of FFELP tranches that will almost certainly unfold within legal final maturities of next month and next year.**

> "*Simply put, the [Moody's] structured finance provisions in the [ESG] proposal are outright lies!*
>
> *"As example, the following cannot possibly be true. 'For structured transactions, we consider the impact of ESG risks that are expected to unfold within the legal final maturity of the transaction'.*
>
> *"The legal final maturities of some transactions, such as Navient student loan asset-backed securities, extend to 2083!"*[6]
>
> II
>
> *"How does Moody's assess the credit implications to ABS with legal final maturities as far into the future as 2083 given Navient policy to buyback stock rather than apply cash to improve the likelihood that ABS deals will re-pay debt in full when due?"*[7]
>
> II
>
> *"For 31 FFELP SLABS that Navient obtained RACs to extend legal final maturities to as far as 2083, see my letter to CFTC Secretary Christopher Kirkpatrick '31 Misrepresentations in CFTC Letter No. 17-52' of February 2, 2018, pages 30-33. For each of the 31 deals, the final maturity extension greatly increased expected losses. (https://www.wikirating.com/data/other/20180203_Harrington_J_William_31_Misrepresentations_in_CFTC%20_Letter_No_17-52.pdf).*
> *Also, Cezary Podkul, Wall Street Journal, 'A Borrower Wil be 114 When bonds Backed by Her Student Loans Mature,' January 7, 2020.*
> *(https://www.wsj.com/articles/a-borrower-will-be-114-when-bonds-backed-by-her-student-loans-mature-11578393002?mod=searchresults&page=2&pos=16)."*[8]

While reporting for *Debtwire ABS* In December 2015, I induced then SEC Commissioner Michael Piwowar to publicly divulge that the SEC orchestrated the Ford Motor Credit No-Action Letter.

"Does Ford Motor Credit itself still support "its" no-action letter?"

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6 Harrington, William J., "Electronic Letter to Moody's Investors Service Regarding 'Request for Comment: "General Principles for Assessing Environmental, Social and Governance Risks: Proposed Methodology Update," September 23, 2020'", October 19, 2020, p10. (https://croataninstitute.org/wp-content/uploads/2021/08/WJH-Response-to-Moodys-Investors-Service-Request-for-Comment-General-Principles-for-Assessing-ESG-Risks-1.pdf).

7 "Ibid.", p11.

8 "Ibid.", p15.

My 2018 *Croatan Institute Working Paper* "Can Green Bonds Flourish in a Complex-Finance Brownfield?" tied the no-action letter to pervasive credit rating inflation of asset-backed securities and structured debt since 2010 and reported the origin story that Piwowar divulged.

> "*The SEC backs the unsubstantiated 'free speech' of Moody's, S&P, and the other rating agencies that have registered as NRSROs to the hilt. Most notably, the SEC continues to shield NRSROs from a Dodd-Frank provision that subjects them to expert liability in certain instances of assigning ABS ratings. Had the provision — Dodd-Frank Section 939G — taken automatic effect on 22 July 2010 as plainly specified, NRSROs would almost certainly have retired the respective methodologies for flip clause swaps, many ABS, and other crisis-causing products.*
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> "*This author's [WJH] research unearthed the disquieting information that the SEC acted preemptively to prevent Dodd-Frank Section 939G from taking effect. The preemption sequence — an incoming letter from two Ford Motor Company entities that requested suspension of the provision, followed by the SEC no-action letter that effectuated the suspension — appeared to be market generated but in fact was orchestrated by the SEC.*
>
> "*The information was divulged at a credit rating conference that the Carnegie Mellon Tepper School of Business held from December 3-5, 2015. A conference presenter had invited the author of this working paper [WJH] owing to his having provided significant research assistance which figured prominently in the presenter's paper.*
>
> "*In one session, this author [WJH] asserted that the SEC continued to 'nullify' Dodd-Frank Section 939G. Another attendee [then SEC Commissioner Michael Piwowar] responded defensively, researched the assertion, conceded that it was accurate at a later session, and described the SEC machinations as follows. The SEC: unilaterally decided that Section 939G should never take effect; asked the Ford entities to submit a request for suspension; and then immediately issued the no-action letter before the provision was to have taken effect on July 22, 2010.*
>
> "*The entire group assembled — academicians, financial regulators, and market practitioners — heard that the SEC had unilaterally decided to violate the clear intent of Congress as stated in the plain language of Dodd-Frank Section 939G. However, to the best of the author of this working paper's knowledge, no other attendee has tied the SEC decision to the glaring deficiencies in NRSRO ratings and methodologies, including those for ABS deals with flip clause swaps. In short, the academic attendees have shortchanged both their own work and their students' education in not using and building on all available information regarding: SEC policy; NRSRO ratings; ABS deal construction; flip*

clause swaps; the origins of the financial crisis; and the best means to avoid another one."[9]

While reporting for *Debtwire ABS* In July 2016, I learned from then Federal Reserve System Co-Chair of LISCC Liquidity Program Adam Ashcraft that, while Head of Credit Risk Management in the New York Fed Risk Group in 2015, his team alerted NRSROs Fitch Ratings, Moody's Investors Service, and S&P Global Ratings to likely legal final maturity defaults by a slew of FFELP tranches.[10]

"*All of this because a team in the Federal Reserve Bank of New York posed this same question to individual rating agencies in early 2015 — were rating models projecting some FFELP tranches to extend past the respective legal final maturity dates? The New York Fed team wanted to corroborate the surprise findings that its own in-house modeling had shown, according to a source familiar with the matter*

"The answers started to trickle in 'several months later', according to the source, when Moody's and Fitch began placing tranches on review for possible downgrade. Subsequently, the agencies added more and more tranches to the respective watchlists and removed only a few.

"The reluctance of the rating agencies to finally fully downgrade is reflected in descriptions of the failure of a FFELP tranches to be repaid in full by legal final maturity. The new Fitch methodology terms such a failure to be a 'technical event of default' and sets up two sets of cash flows to model a transaction. The first set stresses 'the transaction from a credit perspective' and is given more emphasis than the second, which assesses the 'probability of missing the legal final maturity date, even if principal is paid thereafter.'

"Moody's analysts make a similar distinction — "We are not talking about a credit issue here; we're talking about a technicality" — as previously reported (see article 30 June).

"However, the source familiar with the New York Fed disagreed. Failure to pay in full by legal final maturity is a 'real default, not a technical one.' This fundamental disagreement reflects an underlying driver for the New York Fed team to model FFELP tranches in-house in the first place. The team was looking at vendor prices as an

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[9] Harrington, Bill, "Can Green Bonds Flourish in a Complex-Finance Brownfield?", *Croatan Institute Working Paper*, July 2018, pp11-12. (https://croataninstitute.org/2018/07/01/can-green-bonds-flourish-in-a-complex-finance-brownfield/).

[10] Ashcraft freely offered the information as we left a DC conference where we spoke on the same panel. Before relaying his account, Ashcraft offered to speak for attribution. However, a short while after finishing, Ashcraft requested partial anonymity, which my *Debtwire ABS* article of July 26, 2016, provided. At the time, my editor and a colleague advised that Ashcraft's initial agreement to speak for attribution meant that my article *could* identify him. Seven years later, doing so serves the public interest.

alternative to structured finance [credit] ratings, noticed there were few vendor prices for FFELP ABS and started its own modeling.

"In other words, the NY Fed was not looking for extension risk in FFELP ABS per se but rather in the course of its own due diligence caught the rating agencies asleep at the wheel, again. Disappointing, but not a complete surprise. Many of the rating teams that surveil FFELP ABS are the 'same teams' that had surveilled RMBS ratings, observed the source.

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"Spokesperson from Fitch, Moody's and S&P each declined to comment."[11]

Collectively, the 16 *Debtwire ABS* articles that the delivering email attached chart the refusal by Fitch Ratings, Moody's Investors Service, and S&P Global to accurately adjust FFELP credit ratings and methodologies in the period November 20, 2015, to September 21, 2016 — well after the NY Fed alerted the NRSROs to all-but-certain events of default.

The first *Debtwire ABS* headline alone tell much of the grossly negligent story.

(1) **"FFELP downgrades—Moody's stalls, Fitch plays catch-up, and S&P abstains", 20 November 2015.**
(2) "Fitch may prop up FFELP ABS; stakeholders squirm", 11 December 2015.
(3) "The wait for rating action on FFELP watch bonds goes on, and on, and on", 22 January 2016.
(4) "Government guaranteed … eventually; Navient hits market with 2070, 2071 legal finals", 29 February 2016.
(5) "Navient peers far, far into the FFELP future with new SLABS", 14 April 2016.
(6) "Navient stumbles as stakeholders wring hands over legacy program, ABS", April 18, 2016. (Pyburn Allison, Bill Harrington, and Reshmi Basu).
(7) "Moody's & FFELP ABS: 97 AAA and AA bottles of beer on the watch list?", 25 April 2016.
(8) "Margin posting - swaps increase ABS issuance costs by 1%, 3%, 7%...of deal size", 16 May 2016.
(9) "Navient extension of SLM Trust 2013-2 Class A: Aaa off ramp from Moody's watchlist?", 14 June 2016.
(10) "Moody's FFELP downgrades might start rolling very soon; Good luck modeling this one", 17 June 2016.
(11) "Moody's rolling rating reviews", 23 June 2016.
(12) "FFELP ABS downgrades drag on 18 months after Fed alert; just a 'technicality'?", 26 July 2016.
(13) "FFELP abs ratings; paralysis by . . .?", 28 July 2016.

[11] Harrington, Bill, "FFELP ABS downgrades drag on 18 months after Fed alert; just a 'technicality'?", *Debtwire ABS*, July 26, 2016.

(14) "FFELP bonds trade as investors shrug off Fitch ratings drop", 22 August 2016. (Bolger, Ryan, Al Yoon, and Bill Harrington)
(15) "Fitch re-rate of FFELP ABS uncovers 'liquidity risk' in recent deals", 2 September 2016.
(16) "Are FFELP raters and sponsors communicating on tough downgrades?", 21 September 2016.

Seven years later, the FFELP ABS story remains "*Moody's stalls, Fitch plays catch-up, and S&P abstains.*" At best, NRSROs repeatedly announce "day-late-dollar-short" downgrades of FFELP tranches soon to incur events of default for failure to re-pay in full by respective legal final maturities. However, in some instances when a FFELP tranche finally incurred a long-telegraphed event of default, a given NRSRO surreptitiously withdrew the applicable credit rating without bothering to first downgrade or issue an announcement. In these instances, the NRSRO distorted its respective credit rating database and transition matrix.

Please see the following nine instances of Moody's investors Service closing the credit rating barn long, long, long after myriad tranches of FFELP SLABS ambled off.

(1) "Moody's takes rating actions on 11 Navient FFELP securitizations", 23 November 2022. *"The rating actions also consider the change in the weighted average remaining term for the transactions. Due to the significant increases in forbearance previously, **the weighted average remaining terms continue to rise for most transactions, reducing collateral pool amortization rates and increasing the risk of notes pay down by their legal final maturity dates [emphasis added]**."*
(2) "Moody's downgrades three tranches from three SLM Student Loan Trust securitizations", 1 November 2022. *"Today's downgrade actions are primarily a result of the Class A notes' approaching their legal final maturities and the reliance on Navient's support to pay off the notes in full by their legal final maturity dates.*[12] *The maturity dates for these notes are between April and July 2023."*
(3) "Moody's downgrades five tranches from five Navient FFELP securitizations", 18 October 2022. "*Today's downgrade actions are primarily a result of the Class A notes' approaching their legal final maturities and the reliance on Navient's support to pay off the notes in full by their legal final maturity dates. The maturity dates for these notes are between April 2023 and November 2027.* II "*Earlier this year, for SLM 2007-2 and SLM 2007-3 Navient paid off the class A notes on its legal final maturity date by exercising the optional clean-up call and for SLM 2008-1 Navient paid off the class A notes on its legal final maturity date by using the revolving credit facility. **However, for SLM 2007-7, SLM 2008-3 and SLM***

[12] **N.B.,** Moody's should not have mechanically based FFELP credit ratings on "*the reliance on Navient's support to pay off the notes in full by their legal final maturity dates*" for at least two good reasons. (1) Moody's assigns below-investment grade credit ratings to Navient, which indicates the company lack resources to "*pay off the notes in full by their legal final maturity dates.*" (2) Moody's knows, but fails to disclose or record in its credit rating database and transition matrix, that Navient often chooses not "*pay off the notes in full by their legal final maturity dates.*" **See Footnote 13, immediately below.**

***2008-4 Navient's revolving credit facility was not used to pay off the class A notes at their legal final maturity dates [emphasis** added].*" [13]

(4) "Moody's takes rating actions on two classes of notes in FFELP student loan securitizations sponsored or administered by Nelnet", 17 May 2022. "*Today's rating actions reflect updated performance of the transactions and updated expected loss on the tranches across Moody's cash flow scenarios. Moody's quantitative analysis derives the expected loss of the tranche using 28 cash flow scenarios with weights accorded to each scenario.*[14] *II "The downgrade of Class A-4 notes in CIT Education Loan Trust 2005-1 reflects the lower collateral pool amortization rate and the increased risk of the notes paying down by their final maturity dates, driven by the significant increases in forbearance previously and the persistently high levels of loans to borrowers in non-standard payment plans, including deferment, forbearance and Income-Based Repayment (IBR).*"

(5) "Moody's takes rating actions on 13 Navient FFELP securitizations", 19 April 2022. *"Moody's has upgraded the ratings of two classes of notes, and downgraded the ratings of eleven classes of notes issued in thirteen student loan securitizations sponsored, serviced and administered by Navient Solutions, LLC. II "Moody's quantitative analysis derives the expected loss for a tranche using 28 cash flow scenarios with weights accorded to each scenario.*[15] *II "The rating actions consider the change in the weighted average remaining term for non-consolidation transactions. Due to the significant increases in forbearance previously, the weighted average remaining terms continue to rise for certain transactions reducing collateral pool amortization rates and increasing the risk of notes pay down by their legal final maturity dates.*"

(6) "Moody's downgrades eight tranches issued by seven Navient FFELP securitizations," 7 March 2022. "*Today's downgrade actions are primarily a result of the Class A bonds'*

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[13] **N.B.** Navient picks and chooses when to exercise "*the optional clean-up call*" to repay a tranche in full by legal final maturity and when it does not.
N.B.B. The tranches that Navient did not repay in full at maturity—namely, the initially Aaa-rated Class A-4 Notes of SLM 2007-7 and initially Aaa-rated Class A-3 Notes of SLM 2008-3—defaulted at the respective legal final maturities. However, Moody's merely withdrew the respective credit ratings on the respective default dates without first downgrading or issuing an announcement. As a result, Moody's distorted its credit rating database and transition matrix. See (https://www.moodys.com/credit-ratings/SLM-Student-Loan-Trust-2007-7-credit-rating-720616534/ratings/view-by-tranche) and (https://www.moodys.com/credit-ratings/SLM-Student-Loan-Trust-2008-3-credit-rating-720795590/ratings/view-by-tranche), respectively.

[14] **N.B.** My reviews of the applicable Moody's credit rating methodology shows that the "*28 cash flow scenarios*" and "*weights accorded to each scenario*" are wholly arbitrary, albeit seemingly rigorous and empirically derived. In fact, Moody's credit rating methodology defines the "scenarios" and respective "weights" to best serve Moody's franchise by disguising the risk of non-repayment by legal final maturity. Hence, the slew of day-late-dollar-short downgrades. See Harrington, Bill, "Moody's FFELP downgrades might start rolling very soon; Good luck modeling this one", *Debtwire ABS*, June 17, 2016.

[15] **N.B.** Ditto.

approaching their legal final maturities and the reliance on Navient's support to pay off the bonds in full by their legal final maturity dates. The maturity dates for these bonds are between July 2022 and July 2023." [16]

(7) "Moody's downgrades six tranches issued by four Navient FFELP securitizations", 20 August 2021. "*Today's downgrade actions are primarily due to the increased likelihood of occurrence of an event of default (EOD) on the transactions due to the inability of the Class A notes to pay off in full on their legal final maturity dates. The maturities for these tranches are between October 2021 and July 2022.*" [17]

(8) "Moody's takes rating actions on 12 Navient FFELP securitizations", 29 July 2021. "*The rating actions consider the change in the weighted average remaining term for non-consolidation transactions. Due to the significant increases in forbearance previously, the weighted average remaining terms continue to rise for certain transactions reducing collateral pool amortization rates and increasing the risk of notes pay down by their legal final maturity dates. II "Moody's considered Navient's willingness and ability to support and prevent their securities from defaulting at their legal final maturity dates. In addition to the 10% clean-up call, Navient can use other forms of liquidity support. The downgrade actions of Class A-4 notes of SLM Student Loan Trust 2007-2 and SLM Student Loan Trust 2007-3 are primarily due to the bonds' approaching maturities. The maturities for these tranches are between January 2022 and July 2022.*" [18]

(9) Moody's elided the legal final maturity default of the Class A-4 Notes of SLC 2008-2 on June 15, 2021. As with the initially Aaa-rated Class A-4 Notes of *SLM 2007-7 and initially Aaa-rated Class A-3 Notes of SLM 2008-3, which also defaulted at the respective legal final maturities, Moody's merely withdrew the credit rating of the initially Aaa-rated Class A-4 Notes of SLC 2008-2 on the default date without either first downgrading or issuing a press release. As a result, Moody's distorted its credit rating database and transition matrix.* See (https://www.moodys.com/credit-ratings/SLC-Student-Loan-Trust-2008-2-credit-rating-720958365/ratings/view-by-tranche).

Best regards,

Bill Harrington

[16] **N.B.** The downgrade announcement of 7 March 2022 pertained to at least one tranche with a legal final maturity of "July 2022", a perfect example of Moody's "day-late-dollar-short" approach to monitoring the credit ratings of FFELP ABS, including tranches that were initially rated Aaa.

[17] **N.B.** The downgrade announcement of 30 August 2021 pertained to at least one tranche with a legal final maturity of "October 2021", a perfect example of Moody's "day-late-dollar-short" approach to monitoring the credit ratings of FFELP ABS, including tranches that were initially rated Aaa.

[18] **N.B. See Footnotes 12 and 13 further above** explaining why "Moody's should not have mechanically based FFELP credit ratings on '*the reliance on Navient's support to pay off the notes in full by their legal final maturity dates*.'"