



April 30, 2010

**By email**

Mr. Randall W. Roy, Assistant Director  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-7010

Re: Amendments to Rule 17g-5

Dear Mr. Roy:

The Securities Industry and Financial Markets Association (“SIFMA”) writes regarding the amendments to Rule 17g-5 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), that have been adopted by the Securities and Exchange Commission (the “SEC” or the “Commission”) – in particular, paragraphs (a)(3), (b)(9) and (e) of Rule 17g-5 (such provisions, the “Rule”). The “compliance date” for the Rule is June 2, 2010.

There have been differing views expressed by various participants in the securities industry, including nationally recognized statistical rating organizations (“NRSROs”), as to certain issues regarding the application and scope of the Rule. In view of the approaching compliance date for the Rule, SIFMA would like to set forth views as to those issues based on the text of the Rule, the proposing release (the “Proposing Release”)<sup>1</sup> and the adopting release (the “Adopting Release”),<sup>2</sup> and ask that the staff of the Commission (the “Staff”) advise us as to its agreement with those views. In addition, for some of those issues, we advocate additional interpretive views, and request the Staff to issue consistent interpretive guidance. Otherwise, we expect that many of SIFMA’s members will take our views into account in determining how to implement compliance with the Rule.

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<sup>1</sup> Re-Proposed Rules for Nationally Recognized Statistical Rating Organizations, Rel. No. 34-593434, 74 Fed. Reg. 6485 (Feb. 9, 2009).

<sup>2</sup> Amendments to Rules for Nationally Recognized Statistical Rating Organizations; Proposed Rules for Nationally Recognized Statistical Rating Organizations; Final Rule and Proposed Rule, Rel. No. 34-61050, 74 Fed. Reg. 63832 (Dec. 4, 2009).

### **Compliance Date**

We understand that most NRSROs have taken the general position that the Rule applies if an NRSRO is engaged on or after June 2, 2010 to assign a rating, rather than applying to any structured finance product to which a rating is assigned on or after June 2, 2010. The text of the Adopting Release does not directly address this question. However, because it is the NRSROs that are required to comply with the Rule, their interpretations of the meaning of the Rule (when they assert one) would generally govern, absent Staff guidance.

We agree with the NRSROs' interpretation. We note that if the contrary view were adopted and the rating process were initiated prior to the compliance date for a rating issued on or after the compliance date, it would be impossible to comply with the Rule's requirement that information be provided to competing NRSROs "at the same time" that it is provided to the hired NRSROs, except by making information available to competing NRSROs prior to the date on which compliance is required to commence (which would be inconsistent with the very concept of a compliance date), or by posting only information provided on or after the compliance date (which would be of little practical utility).

### **Oral Communications**

To the extent that oral communications between an arranger and a hired NRSRO are covered by the Rule, it may not be possible for all such communications to be posted on the arranger's website simultaneously. It is our understanding that issuers, sponsors and underwriters are engaged in the process of determining individually how best to ensure that they are able to comply with the Rule by posting such communications as promptly as is reasonably practicable after they are made.

### **Confidential or Private Ratings**

Neither the text of the Rule nor the Proposing Release or Adopting Release expressly distinguishes between public ratings and ratings that are confidential or private. We question whether including all confidential or private ratings within the Rule's requirement to share information with competing NRSROs is consistent with the purposes of the Rule, which include improving ratings quality for the protection of investors and fostering accountability, transparency, and competition in the credit rating agency industry.<sup>3</sup> In particular, we believe that a confidential or private rating should not be considered to be within the scope of the Rule so long as it is not requested by the issuer, sponsor or underwriter (even if paid for by one of those parties) primarily for purposes of selling the rated product.

When such a rating is agreed to remain confidential or private, a decision has been made by the recipient of the rating that it needs only the input of the hired NRSRO, and enabling other NRSROs to provide ratings will be unwanted or at the very least unnecessary. In fact, as the

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<sup>3</sup> Adopting Release, 74 Fed. Reg. 63832, 63832.

recipient presumably will have business or other reasons for wanting the rating to remain confidential or private, the potential publicizing of the fact of the rating by the issuance of one or more competing ratings may be contrary to the best interests of the rating's recipient. For these reasons, so long as the ratings process was not begun at the initiative of the issuer, sponsor or underwriter (even if paid for by one of those parties) primarily for purposes of selling the rated product, we request the Staff to interpret the Rule as not applying to confidential or private ratings.

### **Non-U.S. Issuers and Transactions**

On its face, the Rule does not specifically address securities issued by non-U.S. issuers, or distinguish in any way between U.S. and foreign issuances of structured finance products. We understand that the U.S. NRSROs most commonly retained to rate U.S. structured finance products have offices outside the United States, and that these NRSROs have taken the view that their activities outside the U.S. are covered by the Rule.

While the Rule is geared toward regulating U.S. NRSROs, such a broad interpretation would have significant extra-territorial effects in the form of drastic collateral consequences for non-U.S. issuers, which may in many cases not even yet be aware of the existence of the Rule.

We understand that AFME/ESF will be contacting the Staff to request an exemption from the Rule for transactions that do not involve an offering into the U.S. We join with AFME/ESF in its request.

### **Corporate Recourse Credit Products**

The Rule states that it applies to any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction.<sup>4</sup> We do not believe this should be interpreted as covering any security or money market instrument that may be secured or backed by an asset pool, but which primarily relies on the general credit of another party (*i.e.*, the security or instrument bears recourse to a specific operating company). While we acknowledge that the scope of the Rule is broad, in our view, such securities and instruments are more akin to corporate debt than the structured finance products that the Rule is intended to cover. We request that the Staff issue interpretive guidance to this effect.

#### *Enhanced Equipment Trust Certificates*

One type of security that would be excluded from the coverage of the Rule based on this guiding principle is a certificate issued in an enhanced equipment trust certificate ("EETC") transaction. In an EETC transaction, trust certificates are sold in order to finance the purchase of equipment (usually an aircraft) by an owner trust. The owner trust then leases the aircraft to an airline, and issues notes to a pass-through trust, which then issues the certificates to investors.

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<sup>4</sup> Rule 17g-5(a)(3), (b)(9).

Payments on the lease are routed to the investors through the notes and then the certificates. Upon expiration of the lease and maturity of the notes and certificates, the airline may exercise a purchase option to regain title to the aircraft. In a variant structure, an airline owns the aircraft outright and issues notes secured by a mortgage on the aircraft, and the debt service payments on the notes are routed through the certificates. Upon maturity of the notes and certificates, the airline owns the aircraft free and clear. In both cases, investors rely on the creditworthiness of the airline (*i.e.*, the ability of the airline to make its lease or mortgage payments).

In our view, which we understand to be the consensus view of industry participants, EETC certificates should not be treated as a structured finance product, but rather as a corporate secured bond. We note the approach taken by the Staff in the American Airlines, Inc. no-action letter dated July 28, 1987,<sup>5</sup> where the Staff took a no-action position regarding the conclusion that the sole “issuer” in an EETC transaction for purposes of the Securities Act of 1933, as amended, the Exchange Act, and the Trust Indenture Act of 1939, as amended, is the airline obligor on the underlying equipment lease. We believe that the types of information that generally would be required to be provided pursuant to the Rule typically will be directed to structure and asset performance, which are quantitative and objective kinds of information. EETC certificates, however, are essentially corporate credits, as the underlying lease or notes supporting the securities is wholly dependent on repayment by the company sponsoring the EETC transaction. Therefore, the information to determine an appropriate rating for EETC certificates is more extensive than just structural or asset information, and includes the much more subjective evaluations that go into a corporate credit rating. As a result, the Rule should not apply to EETC certificates. We request that the Staff confirm this conclusion as part of the requested interpretive guidance on the more general principle discussed above.

#### *Covered Bonds*

SIFMA members and certain NRSROs<sup>6</sup> have expressed a view that covered bonds – *i.e.*, full recourse debt instruments secured by a pool of mortgage loans and/or other debt obligations – are not structured finance products subject to the application of the Rule, for various reasons. Among other things, covered bonds are untranching, under Basel II covered bond exposures are not considered to be securitized exposures and, consistent with the more general interpretive principle discussed above, they are full recourse to the issuer and rated in a manner linked to the credit quality of the issuer. We concur with this view.

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SIFMA appreciates the opportunity to share its concerns with the Staff and to request interpretive guidance. Please feel free to contact Christopher Killian, Vice President,

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<sup>5</sup> American Airlines, Inc., SEC No-Action Letter, 1987 WL 108307 (July 28, 1987).

<sup>6</sup> See, e.g., Press Release, Fitch Ratings, Fitch Announces Plan to Address SEC Rule 17g-5 (April 24, 2010) (“Since Fitch does not consider covered bond securities to be structured finance securities, Fitch will not require covered bond arrangers to provide Fitch the Representations.”)

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Securitization Group of SIFMA, by telephone at 212-313-1126, or by email at [ckillian@sifma.org](mailto:ckillian@sifma.org), should you have any questions.

Very truly yours,

A handwritten signature in blue ink that reads "Chris Killian". The signature is written in a cursive, flowing style.

Christopher B. Killian

cc: Mr. Robert W. Cook  
Mr. Michael A. Macchiaroli