SIFMA
Securities Industry and Financial Markets Association

December 8, 2009

**By Electronic Mail (rule-comments@sec.gov)**

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

Re: References to Ratings of Nationally Recognized Statistical Rating Organizations; Release Nos. 33-9069, 34-60790, IA-2932, IC-28940; File Nos. S7-17-08, S7-18-08, S7-19-08

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] Credit Rating Agency Task Force (the "Task Force")[2] is pleased to again have the opportunity to comment, on behalf of SIFMA, on the proposed amendments by the Securities and Exchange Commission ("SEC" or "the Commission") to Rules 101 and 102 of Regulation M of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), as well as Rules 10b-10 and 15c3-1 under the Exchange Act, as they relate to references to Nationally Recognized Statistical Ratings Organizations ("NRSROs").

The Task Force last year provided a substantive, in-depth response to the Commission's request for comment to proposed amendments to the above-referenced rules as well as other

1 SIFMA brings together the shared interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while reserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington, DC, and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. More information about SIFMA is available on its website at *www.sifma.org*.

2 The Task Force is a global, investor-led industry member task force formed to examine key issues related to credit ratings and the credit rating agencies. It is comprised of 37 individuals from the US, Europe, and Asia and includes asset managers, underwriters, and issuers. The Task Force members include experts on structured finance, corporate debt, municipal debt, and risk. It has been noted by the President's Working Group on Financial Markets (the "PWG") as the private-sector group to provide the PWG with industry recommendations on credit rating matters. More information on the Task Force, including a roster of Task Force members, can be found at *www.sifma.org/capital_markets/cra-taskforce.shtml*.

rules and forms.[3] Since that time, the Commission has adopted amendments that eliminated references to NRSRO ratings in Rules 5b-3 and 10f-3 of the Investment Company Act of 1940 and eliminated the investment grade and non-investment grade references in the rules relating to registration of alternative trading systems (Rule 3a-1 of the Exchange Act and Rules 300, 301(b)(5), and 301(b)(6) of Regulation ATS).

While the Task Force supports the Commission's efforts to increase investors' understanding of the scope and meaning of credit ratings that are used to market various securities, we do not believe that the proposed amendments to Regulation M, Rule 15c3-1, or Rule 10b-10 will accomplish that goal. In particular, the Task Force does not believe the deletion of references to, and use of, credit ratings in these rules will affect investor reliance on ratings. Indeed, the use of credit ratings in connection with compliance with Regulation M and Rule 15c3-1 is invisible to investors and thus we do not see how the deletion of credit rating references in those rules will reduce undue investor reliance upon them. As for Rule 10b-10, the Task Force believes that eliminating the requirement to disclose that a security is unrated in a Rule 10b-10 trade confirmation will result in investor confusion, especially if some broker-dealers continue to include "unrated" on confirmations while others do not.

Rather than revising rules that reference credit ratings, the Task Force strongly encourages the Commission to focus upon disclosure by NRSROs in a way that allows investors to better understand credit ratings and their limitations. Indeed, the Task Force applauds the Commission's efforts in this regard as set forth in its companion release *Credit Ratings Disclosure*.[4] Although we have a number of comments and suggestions to the *Credit Ratings Disclosure Release*, we firmly support its aim to provide investors with meaningful information to assist them in making investment decisions. The Task Force will respond to the *Credit Ratings Disclosure Release* as well as the Commission's *Concept Release on Possible Rescission of Rule 436(g) Under the Securities Act of 1933*[5] separately.

In our comments below, the Task Force addresses the proposed changes to Regulation M, Rule 10b-10, and Rule 15c3-1.

## I. Regulation M

The Task Force does not believe that eliminating references to NRSRO ratings in Rules 101(c)(2) and 102(d)(2) of Regulation M will reduce undue investor reliance on credit ratings. As stated in our September 4, 2008 letter and as quoted in the Release "Regulation M is primarily directed at the actions of the issuers of securities and the investment banks who underwrite them; in contrast, the investors with whom the Commission is concerned are not

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3 Letter from Deborah A. Cunningham and Boyce I. Greer, Co-Chairs of the SIFMA Credit Rating Agency Task Force, to Ms. Florence E. Harmon, Acting Secretary of the SEC (Sept. 4, 2008), which is attached hereto.

4 Release Nos. 33-9070, 34-60797, IC-28942; File No. S7-24-09 (Oct. 7, 2009).

5 Releases 33-9071, 34-60798, IC-28943; File No. S7-21-09 (Oct. 7, 2009).

users of Regulation M." In other words, investors generally are unaware that investment grade nonconvertible debt securities, nonconvertible preferred securities, and asset-backed securities are excepted from Regulation M's requirements for trading in connection with certain securities offerings. If investors are unaware of this, then it follows that they are not unduly relying upon the references to NRSROs in Rules 101(c)(2) and 102(d)(2) of Regulation M.

We further believe that replacing the NRSRO rating exception with a "well known seasoned issuer" ("WKSI") exception will create anomalous results. The WKSI exception only would apply to issuers that have issued at least $1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary registered offerings. This dollar threshold would impose Regulation M restrictions upon issuers that previously qualified for the Regulation M exception (many seasoned issuers of investment grade securities with less than $1 billion of registered debt securities) and would exempt issuers that previously could not qualify for the exception (a number of high yield securities issuers). We note that the investment grade securities that would be excluded from the exception -- and that would now have to comply with the Regulation M restrictions -- historically have traded on the basis of yield and spread to comparable securities and generally are fungible with other similarly rated securities. Based upon those characteristics, the Commission itself has found that the subject investment grade securities are less susceptible to manipulation.[6] Accordingly, the Task Force believes that the proposed WKSI alternative would cause uneven and erratic results.

II. Net Capital Rule

The Task Force strongly urges the Commission to retain the references to NRSROs in Rule 15c3-1 under the Exchange Act (the "Net Capital Rule"). Among other things, we do not believe that references to NRSROs in the Net Capital Rule in any way causes investors to place undue reliance on credit ratings and, in addition, deleting such references might cause uneven application of the rule because some firms do not have the in-house capability to analyze credit risk to the degree necessary.

While we understand that the Commission's primary concern is to discourage investors from placing "undue reliance on NRSRO ratings", investors are unaware that broker-dealers use NRSRO ratings in complying with the Net Capital Rule. Indeed, a firm's compliance with the Net Capital Rule is not a matter of public record so the Commission's investor reliance concerns are not implicated. The Task Force further believes that the use of NRSRO ratings in complying with the Net Capital Rule is a cost-effective means of enlisting a third party in the determination of the credit risk of various financial instruments. Moreover, while broker-dealers are

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[6] *See References to Ratings of Nationally Recognized Statistical Rating Organizations*, Securities Exchange Release No. 34-58070 (July 1, 2008), 73 FR 40088, 40095 (July 11, 2008) ("The current exceptions for certain investment grade debt and preferred securities rated by a NRSRO were originally based on the premise that these securities are traded on the basis of their yields and credit ratings, are largely fungible and, thus, are less likely to be subject to manipulation."); *Anti-Manipulation Rules Concerning Securities Offerings*, Final Rule, Securities Exchange Release No. 38067 (December 20, 1996), 62 FR 520, 527 (January 3, 1997).

appropriately regarded as generally sophisticated with respect to financial matters, not all have the resources necessary to evaluate the credit risk inherent in fixed income obligations. Accordingly, if NRSRO references were deleted from the Net Capital Rule, some broker-dealers might need to hire outside consultants -- at a potentially high cost -- to analyze credit risk. This might result in different broker-dealers all analyzing the same bond coming up with a range of conclusions about the credit risk of that bond. In addition, costs may be raised for broker-dealers who make markets, as they may need to undertake an independent review of the issuers of the securities in which they make markets. Indeed, the general impact of the elimination of NRSRO references in the Net Capital Rule would be the creation of what economists term "barriers to entry", which will have a disproportionate impact upon smaller and/or less well capitalized broker-dealers.

In further support of our argument for maintaining references to NRSRO ratings in the Net Capital Rule, we note that we are unaware of a situation in which reliance upon an NRSRO's ratings has resulted in the failure of a broker-dealer. Given that investors are unaware of the use of NRSRO ratings in broker-dealer compliance with the Net Capital Rule and given that use of those ratings has, in the Task Force's opinion, worked reasonably, we strongly urge the Commission to reconsider its view and maintain the references to NRSRO ratings in the Net Capital Rule.

The following are responses to the Commission's request for responses to particular questions.

*Q. Are there factors other than creditworthiness and liquidity that should be required to be considered in determining the appropriate haircut for a proprietary securities position?*

A. The Task Force believes that, because the purpose of the Net Capital Rule is to ensure that a broker-dealer has sufficient liquid assets to cover customer claims, only creditworthiness and liquidity need to be considered in determining the appropriate haircut for a proprietary securities position.

*Q. What would be the cost to broker-dealers to develop, document, and enforce internal procedures to evaluating the creditworthiness and liquidity of proprietary securities positions?*

A. Given the broad spectrum of broker-dealers in the Unites States,[7] it is impossible to quantify the cost to each firm, or even the average cost, to develop, document, and enforce internal procedures to evaluate the creditworthiness and liquidity of proprietary securities positions. Some broker-dealers may have the necessary in-house capabilities to perform these analyses while others may have to retain consultants, and consultant fees could range considerably based upon the number of fixed income positions being held as well as their complexity. It is possible that the cost to comply may be prohibitively high for small or boutique broker-dealers.

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[7] The Financial Industry Authority ("FINRA") states on its webpage that it oversees almost 4800 brokerage firms. *See* http://www.finra.org/AboutFINRA/.

*Q. Do certain broker-dealers lack sufficient resources or expertise to independently assess the creditworthiness of securities?*

A. Yes. As indicated above, not all broker-dealers are alike and many may lack sufficient resources or expertise to independently assess the creditworthiness of securities. Indeed, expertise in areas such as advising on M&A transactions, investing in real estate, and valuing private equity -- all of which involve complex considerations -- does not translate into an ability to determine the creditworthiness of fixed income obligations. Even major trading firms who have a capacity to evaluate the creditworthiness of their *counterparties* may not have a capacity to evaluate the creditworthiness of all issuers of fixed income obligations.

*Q. How could the concern that a broker-dealer would have an incentive to downplay the credit risk associated with a particular security to minimize capital charges be addressed? Would reviews of internal procedures by examiners be sufficient to address this concern? Are there other methods, such as reviews by internal or external auditors, that could effectively address this concern? Do other objective measures of credit risk exist, and could they be used in place of NRSRO ratings to address this concern?*

A. If time and resources were no object, examiners might be able to address any conflicts of interest that might arise by examining a firm's internal procedures. As a practical matter, however, in a world of approximately 4800 broker-dealers, we believe that regulators could be overwhelmed by this responsibility. As for using outside auditors to accomplish this, the cost to broker-dealers could be significant and may, in some cases, be prohibitive. The Task Force therefore submits that the use of NRSROs -- third parties that can establish a "bright line -- is the most effective means to perform this function. We note that we are unaware of a widely accepted objective alternative to them that can be used in assessing credit risk.

*Q. If the Commission decides to adopt the proposal to replace the current NRSRO ratings-based criterion with a requirement that the instrument be subject to a minimal amount of credit risk and have sufficient liquidity, and permits broker-dealers to continue to rely on credit ratings of NRSROs as one means of complying with the proposed amendments, should the Commission nevertheless require that the standard that results in a higher determination of credit risk be used for each individual instrument?*

A. We do not believe that this would be effective. Under such an approach, every broker-dealer would be required to conduct its own credit assessment of every financial instrument before it could know whether that assessment resulted in a higher charge than using the NRSRO rating. This would undercut the point of having the NRSRO rating in the Net Capital Rule because, among other things, there would be no consistency among firms.

*Q. If the Commission replaces the current NRSRO ratings-based criterion with a requirement that the instrument be subject to a minimal amount of credit risk and have sufficient liquidity such that it can be sold at or near its carrying value within a reasonably short period of time, should the Commission also require that broker-dealers consult credit ratings of NRSROs* *for that instrument, comparing which method requires the higher capital charge, and require that the broker-dealer take the higher capital charge?*

A. If reference to NRSROs ratings are removed from the Net Capital Rule, it would be counter-intuitive to nonetheless require their use.

*Q. Conversely, if broker-dealers continue to rely on credit ratings of NRSROs, either because the Commission does not remove the reference to NRSROs from the Net Capital Rule or as one means of complying with the proposed amendments, should the Commission require an analysis of the debt instrument that is independent of the NRSRO credit rating (e.g., an internal risk assessment or one performed by a third-party vendor) to support the use of the credit rating of NRSROs, and if the analysis does not support the credit rating, require that the broker-dealer take the higher capital charge?*

A. As indicated in a previous answer, the Task Force believes that requiring an independent analysis of each debt instrument in question would defeat the purpose of having the NRSRO references in the Net Capital Rule.

III. Rule 10b-10

Unlike the proposed amendments to Regulation M and the Net Capital Rule, investors will see any changes in disclosures on trade confirmations and, as a result, the Commission should proceed cautiously when making any changes to Rule 10b-10 of the Exchange Act. The Task Force believes that the deletion of Paragraph (a)(8) of Rule 10b-10 will lead to investor confusion, especially if some broker-dealers decide to continue to disclose that a debt security is unrated by an NRSRO while others do not. For almost 15 years, broker-dealers have been required to disclose on trade confirmations whether debt securities, other than government securities, are unrated by an NRSRO. This has led customers to expect to see "unrated" on their confirmations if the securities are, in fact, unrated. The disappearance of this disclosure could be confusing to customers because they might, among other things, presume that a security was rated even if it was not. In addition, leaving the decision of whether to include "unrated" in confirmations to each broker-dealer will end uniformity, likely leading to additional confusion for an investor who uses more than one broker-dealer, where one broker-dealer continues to place "unrated" on its confirmations while another broker-dealer does not do so.

If the Commission were to amend Rule 10b-10, it should do it in a way that has uniform results. The Commission further would need to give broker-dealers a transition period of at least one year so that broker-dealers could make any necessary system changes and, if the proposal is adopted as it now stands, so that they could determine whether to adopt an alternative method of disclosing unrated status in order to meet their sales practice obligations to customers. If Rule 10b-10 were amended as currently proposed, the Task Force strongly encourages the Commission to allow broker-dealers to determine if they have any obligation to disclose the unrated status of a security and how to make any such disclosure.

IV. Other Proposed Amendments

Although the Commission is deferring consideration of action on additional rules and forms (Rule 415 and Forms S-3 and F-3 under the Securities Act of 1933, Rules 2a-7, 3a-7, 5b-3, and 10f-3 under the Investment Company Act of 1940, and Rule 206(3)-3T under the Investment Advisers Act of 1940), the Task Force notes that it remains concerned that deletion to references to credit ratings in those rules and forms will not achieve the Commission's stated goal of reducing undue investor reliance on credit ratings and could, in fact, have unintended negative consequences. As discussed in this letter as well as in the Task Force's letter of September 4, 2008 (attached), the use of credit ratings in securities regulations in many cases provides an appropriate independent minimum threshold and also provides an important data point for investors. We intend to provide more detailed comments on any changes to these rules and forms at the appropriate time but, for now, we encourage the Commission to consider the comments set forth in our September 4, 2008 as it considers any future action.

V. Conclusion

The Task Force appreciates the opportunity to comment on the Commission's proposed amendments. We support the efforts by the SEC to promote independent investment and credit risk analysis by market participants and recognize the SEC's concern regarding the appropriate role of credit ratings in these analyses. The Task Force believes, however, that the deletion of references to, and use of, credit ratings in connection with Rules 101 and 102 of Regulation M of the Exchange Act as well as Rules 10b-10 and 15c3-1 under the Exchange Act would not further the SEC's objective of reducing undue reliance on credit ratings and instead would have a number of negative consequences. We believe that the Commission's concerns would be more effectively addressed through disclosure that would assist investors in understanding the scope, limitations, and context of ratings by NRSROs.

The Task Force appreciates your consideration of our views.

Very truly yours,

Sean C. Davy
Securities Industry and Financial Markets Association
Managing Director, Corporate Credit Markets Division

Enclosure

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SIFMA

Securities Industry and Financial Markets Association

September 4, 2008

**VIA ELECTRONIC MAIL (rule-comments@sec.gov)**

Ms. Florence E. Harmon
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re:
- **References to Ratings of Nationally Recognized Statistical Rating Organizations; Release No. 34-58070; File No. S7-17-08;**
- **Security Ratings; Release Nos. 33-8940, 34-58071; File No. S7-18-08; and**
- **References to Ratings of Nationally Recognized Statistical Rating Organizations; Release Nos. IC-28327, IA-2751; File No. S7-19-08**

Dear Ms. Harmon:

The Securities Industry and Financial Markets Association ("SIFMA")[1] Credit Rating Agency Task Force (the "Task Force")[2] is pleased to have the opportunity to comment, on behalf of SIFMA, on the Securities and Exchange Commission's ("SEC") recently proposed amendments to various rules and forms under the Securities Act of 1933 (the "Securities Act"), the Securities Exchange Act of 1934 (the "Exchange Act"), the Investment Company Act of 1940 (the "Investment Company Act"), and the Investment Advisers Act of 1940 (the "Investment Advisers Act") that incorporate ratings of nationally recognized statistical rating organizations ("NRSROs").

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[1] SIFMA brings together the shared interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington, DC, and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. More information about SIFMA is available on its website at *www.sifma.org*.

[2] The Task Force is a global, investor-led industry member task force formed to examine key issues related to credit ratings and the credit rating agencies. It is comprised of 37 individuals from the US, Europe, and Asia and includes asset managers, underwriters, and issuers. The Task Force members include experts on structured finance, corporate debt, municipal debt, and risk. It has been noted by the President's Working Group on Financial Markets (the "PWG") as the private-sector group to provide the PWG with industry recommendations on credit rating matters. More information on the Task Force, including a roster of Task Force members, can be found at *www.sifma.org/capital_markets/cra-taskforce.shtml*.

The Task Force recognizes the concerns the SEC is seeking to address with its proposed rule amendments, and appreciates the SEC's emphasis on the importance of due diligence and independent investment analysis by market participants.

However, the Task Force has not found that the possibility of undue reliance on credit ratings supports the deletion of references to, and use of, credit ratings in regulations. The incorporation of credit ratings in securities regulations in many cases provides an appropriate independent minimum threshold, and is an important data point that should be retained as part of an investor's overall credit analysis. The Task Force believes that the appropriate degree of use by market participants of ratings is less of a regulatory issue, and more one of best practices within the marketplace. In addition, in many cases the rules which the SEC proposes to amend are internal regulatory requirements that are completely invisible to investors. In these situations, the risk of undue reliance on credit ratings is remote.

In our comments below, the Task Force seeks to address those proposed amendments of particular concern to SIFMA's members, and, specifically, proposed amendments affecting areas outside of the securitization market. With regard to proposed amendments not addressed in this letter, the Task Force joins in the views expressed by the American Securitization Forum ("ASF"), an affiliate of SIFMA, in its comment letter submitted to the SEC on September 5, 2008 (the "ASF Letter").

## I. General Comments on the Removal of References to NRSRO Ratings

Our recommendations on specific rule amendments are addressed in detail below. Initially, however, the Task Force would like to express some general concerns that are applicable to all of the proposed amendments, particularly in light of the SEC's objectives of: (i) reducing undue reliance by investors on ratings and, consequently, bringing about improvements in the analysis underlying investment decisions; and (ii) shielding market participants from potential failures in the rating process.[3]

### A. *Effect of Removal of References to Ratings on Investment Analysis*

The Task Force believes that market participants should understand and use credit ratings as just one of many inputs and considerations in their own independent risk analyses of different classes of instruments. In particular, the Task Force recognizes that investors should augment their use of NRSRO risk assessments by conducting their own analyses of the risks involved. Thus, the Task Force echoes the SEC's point that investors should not be encouraged to rely uncritically on credit ratings as a substitute for their own independent evaluation.

[3] *See, e.g.*, References to Ratings of Nationally Recognized Statistical Rating Organizations, Securities Exchange Release No. 34-58070 (July 1, 2008), 73 FR 40088, 40088-89 (July 11, 2008).

The Task Force recognizes that as we have seen increased complexity in structured finance products, certain non-traditional investors may have come to rely on credit ratings to the detriment of a more complete, independent risk analysis.[4] The Task Force believes, however, that removing references to ratings of NRSROs, and effectively eliminating this objective minimum floor in many cases, will actually be to the detriment of all investors. Credit ratings have served, and continue to serve, as a single, helpful component in an overall risk analysis. Incorporation of the opinion of an independent third party — the NRSRO — in fact benefits the overall market by injecting into investors' deliberations an objective minimum floor. This objective check on the subjective deliberations of various investors creates a level of conformity among standards in the marketplace, and has an overall stabilizing effect. The Task Force believes that removing the objective minimum threshold provided by NRSRO ratings would hinder, rather than help, investors in their investment decision-making.

*B. Consideration of Proposed Amendments to the Rating Process*

Further, the Task Force believes that these proposed amendments should be considered in light of the first part of the SEC's rulemaking initiatives relating to credit ratings ("Part 1"), which addresses concerns regarding the integrity and transparency of the rating process.[5] As expressed in the Task Force's recently issued recommendations for credit rating agency reform[6] and in its comment letter in response to Part 1,[7] the Task Force believes that the lack of transparency concerning the rating process has hindered investors in their ability to utilize credit ratings as part of an independent, comprehensive approach to risk assessment. The Task Force believes that the proposed rule amendments of Part 1, if revised and enhanced along the lines discussed in the Task Force's comment letter, will, when implemented, both allow investors to use NRSRO ratings with a fuller understanding of the bases and limitations of such ratings, and encourage NRSROs to improve their rating processes. Consequently, investors will incorporate into their investment analyses more transparent ratings.

[4] The Task Force believes, however, that the perception of this undue reliance on credit ratings far exceeds the reality. The Task Force believes that the vast majority of investors in the marketplace have not interpreted the use of credit ratings in securities laws and regulations as an endorsement of the quality of the credit ratings issued by NRSROs, or relied solely on such credit ratings and excluded all other considerations.

[5] *See* Statement on Proposal to Increase Investor Protection by Reducing Reliance on Credit Ratings (June 25, 2008); Press Release No. 2008-110 (June 11, 2008); Proposed Rules for Nationally Recognized Statistical Rating Organizations, Securities Exchange Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008).

[6] Recommendations of the Securities Industry and Financial Markets Association Credit Rating Agency Task Force (dated July 2008); attached as Annex A.

[7] Comment letter from Securities Industry and Financial Markets Association Credit Rating Agency Task Force to Proposed Rules for Nationally Recognized Statistical Rating Organizations, Securities Exchange Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008) (dated July 24, 2008).

In light of the proposed rule amendments of Part 1, and the considerable ongoing efforts of the SEC, the credit rating agencies, and other market participants to improve ratings and the rating process, the Task Force believes that the SEC's current focus should be on the aforementioned efforts, rather than on the SEC's proposed removal of references to ratings of NRSROs in the SEC's rules and forms. The Task Force recognizes the SEC's concern that "market participants operating pursuant to [the SEC's rules referencing ratings] may be vulnerable to failures in the rating process."[8] The appropriate response to this risk, however, is to address directly the weaknesses in the rating process that would make the process susceptible to failure, which the SEC is doing via the proposed rule amendments in Part 1. If the proposed rule amendments of Part 1, finalized and implemented, achieve their stated objectives, the elimination of references to ratings of NRSROs out of concern for their fallibility would be unnecessary and inappropriate. Inasmuch as the transparency of the credit rating process to market participants will, we expect, be improved, market participants should continue to benefit from the incorporation of credit ratings in SEC rules and forms as a useful guidepost in the overall independent decision-making process, and an objective floor contributing to stability and consistency in the marketplace.

Given the extent of the changes proposed to be incorporated in the rating process by Part 1, and the expectation that these changes will result in increasingly accurate and transparent ratings, the Task Force believes that there would be substantial benefit in a "wait and see" approach, whereby the SEC assesses the impact of the proposed amendments of Part 1 on the rating process prior to engaging in any final rulemaking based on the assumption that references to ratings are not appropriate in certain of its rules and forms.

### *C. Lack of Coordination with Other Areas of Regulation, and Increased Market Uncertainty*

In addition, the Task Force believes that the proposed amendments may conflict with other areas of regulation that also incorporate references to ratings of NRSROs. In some cases, these other areas of regulation mandate rating-based standards that currently overlap with many of the SEC's rating-based standards proposed to be removed or amended. For example, numerous FINRA rules incorporate references to credit ratings. Specifically, FINRA rules governing reduced COBRADesk filings, exemptions from FINRA corporate finance review, exemptions related to market-making prohibitions, and other matters make reference to "investment grade" securities, which are defined with respect to the rating received from an NRSRO. Further, credit ratings are incorporated within the financial system in Basel II guidelines, FDIC rules, and localized capital governance regulations.

The Task Force stresses the need for coordination across these areas of regulation. Given the references to ratings in these other areas of regulation, the removal of references to ratings in

[8] References to Ratings of Nationally Recognized Statistical Rating Organizations, Securities Exchange Release No. 34-58070 (July 1, 2008), 73 FR 40088, 40089 (July 11, 2008).

the SEC's rules and forms would be a purely cosmetic solution to the issue of over-reliance. In addition, if the SEC's proposed amendments are inconsistent with other existing rules to which market participants are subject, as the Task Force believes they are in some cases, a substantial amount of confusion and uncertainty would result. Financial institutions may become subject to two competing frameworks — one objective, rating-based rule and a second subjective, discretionary standard.

This resulting market uncertainty would be further exacerbated by general apprehension regarding the new subjective tests. Upon the removal of objective, bright-line safe harbors, market participants would face the challenge of complying with vague, discretionary standards. Further, these market participants would have no way of knowing whether their methodology for making the subjective determinations required by many of the proposed amendments would be deemed to comply with the new rules until they faced action for failure to comply.

A different kind of uncertainty would result for investors who relied on the protection that the bright-line, rating-based rules afford. In the absence of objective standards that offer both consistent application of the rules and the assurance of a stable minimum floor, investors would be subject to the danger that less risk-averse funds, broker-dealers, or others might use their increased discretion to make riskier decisions — thereby increasing investors' risk of loss, and decreasing investor confidence.

*D. Disconnect between Proposed Rules and Stated Objective*

Finally, the Task Force notes that many of the proposed rule amendments remove references to NRSRO ratings in circumstances that do not address directly the issue of over-reliance. Rather, the proposed rule amendments impact a broad array of areas in which the present rules dictate some level of reliance on credit ratings as an objective floor by any market participant, including investment funds, investment advisers, issuers, and broker-dealers.

In certain cases, the Task Force believes the proposed removal of references to ratings is not directly related to the SEC's stated objective of "having investors make an independent judgment of the risks associated with a particular security."[9] While various commentators have highlighted over-reliance on credit ratings by certain non-traditional investors in their risk assessments (which, as noted above, the Task Force believes has been over-stated) the Task Force is not aware of a similar concern regarding over-reliance by other market participants, such as mutual funds, issuers, or broker-dealers. For example, the Task Force is not clear how the proposed amendments to the Forms S-3 and F-3 eligibility provisions under the Securities Act, or the proposed amendments to the securities haircut provisions of Rule 15c3-1 under the Exchange Act (the "Net Capital Rule"), relate to the perceived issue of investors' over-reliance on ratings in their investment decisions.

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[9] Statement on Proposal to Increase Investor Protection by Reducing Reliance on Credit Ratings by Chairman Christopher Cox (June 25, 2008).

## II. Proposed Amendments under the Investment Company Act and the Investment Advisers Act, Release Nos. IC-28327, IA-2751

### *A. Rule 2a-7 under the Investment Company Act*

#### 1. Minimal Credit Risk Determination

In Rule 2a-7 under the Investment Company Act, governing permissible investments by a money market fund, the SEC proposes to eliminate references to ratings and, in doing so, remove an objective, rating-based standard and retain only a discretionary subjective standard. Existing Rule 2a-7 limits a money market fund's portfolio investments to only those securities that have: (i) received certain NRSRO ratings (or been determined to be a comparable unrated security); and (ii) been determined by the fund's board of directors (or its delegate) to present minimal credit risks, based on factors pertaining to credit quality. The proposed amendments to Rule 2a-7 would eliminate the first requirement and rely on the determination of a fund's board of directors that a security presents minimal credit risks, which determination must be based on factors pertaining to credit quality and the issuer's ability to meet its short-term financial obligations. In addition, in place of a rating-based test, a security would be defined as a "First Tier Security" or "Second Tier Security" based on the determination by the fund's board of directors of whether or not the issuer has "the highest capacity to meet its short-term financial obligations."

Rule 2a-7 has worked remarkably well since its adoption by the SEC in 1983. Investors have expressed confidence in the protections afforded by Rule 2a-7 by investing over $3.5 trillion in money market funds.[10] Arguably, the current turbulent markets are the worst possible time to consider changes to this rule. The Task Force believes the proposed amendments would create market uncertainty, decrease investor confidence, reduce transparency, and ultimately result in a decreased level of protection for investors in money market funds — in direct opposition to the stated objectives of the SEC's rulemaking initiatives related to credit ratings.

The Task Force notes that the proposed amendments do not supplement or alter the existing requirement that a money market fund's board of directors conduct an independent assessment of the credit risk of proposed investments. Today, the rule requires both an independent assessment of credit risk by the fund board (or its delegate) and a minimum rating by an NRSRO.

Further, the Task Force believes that the increased subjectivity resulting from the proposed amendments will create uncertainty among investors and other market participants who rely upon the bright-line rule to provide consistent minimum standards. The proposed amendments would weaken, not strengthen, Rule 2a-7 and result in less protection for investors

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[10] Investment Company Institute, *Money Market Mutual Fund Assets* (August 28, 2008), *available at http://www.ici.org/stats/mf/mm_08_28_08.html#TopOfPage.*

— seemingly in contradiction of the SEC's mission of protecting investors. Under existing Rule 2a-7, having a particular NRSRO rating is a necessary, but not sufficient, condition for investment in a security. By eliminating the rating requirement, the proposed amendments eliminate a valuable minimum threshold that serves as one component in the overall eligibility analysis conducted. The Task Force believes the removal of this minimum floor may lead to different funds applying far wider ranges of standards than is currently the case. Without the incorporation of an independent third-party risk assessment, there is significant risk that less risk-averse money market funds would purchase lower quality, higher risk securities in search of higher returns, without any objective base limiting their subjective discretion.

This proposed subjective standard not only increases the risk of loss for money market fund shareholders in a particular fund, but also may generally decrease the confidence investors have placed in money market funds. Given that the resulting investment discretion of money market funds will not have any objective boundaries, the investment decision-making process of money market funds could become increasingly less transparent to investors. In addition, the increasing lack of conformity among standards at money market funds resulting from the removal of the minimum rating-based standard might create uncertainty and thus damage investor confidence. Overall, the potential negative repercussions of this proposed amendment to Rule 2a-7 militates in favor of retaining the rule as it currently exists, while increasing rating quality and enabling investors to incorporate ratings appropriately into their own risk analyses through the proposed rules of Part 1.

2. <u>Portfolio Liquidity</u>

The SEC proposes to amend Rule 2a-7 further to codify the current standard for portfolio liquidity. The proposed amendments specify that a money market fund must hold securities sufficiently liquid to meet reasonably foreseeable redemptions in light of the fund's obligations under Section 22(e) of the Investment Company Act and the commitments made to its shareholders, and expressly limit a money market fund's investments in securities that are not "Liquid Securities" to not more than ten percent of its assets. A "Liquid Security" is one that can be sold or disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the money market fund.

As the SEC notes in its proposing release, the portfolio liquidity standard the SEC seeks to codify in Rule 2a-7 already exists as the current mandated standard, based on SEC guidance incorporated in prior SEC releases relating to Rule 2a-7.[11] Given that money market funds already adhere to this standard and have existing procedures to ensure compliance with this standard, the Task Force believes that this proposed amendment of Rule 2a-7 is simply unnecessary. The Task Force does not support amending existing Rule 2a-7 to codify what is already a requirement.

[11] *See* References to Ratings of Nationally Recognized Statistical Rating Organizations, Release Nos. IC-28327, IA-2751 (July 1, 2008), 73 FR 40124, 40126 (July 11, 2008).

3. Monitoring Minimal Credit Risks

Rule 2a-7 generally requires a money market fund board (or its delegate) to reassess promptly whether a security continues to present minimal credit risks when it has been downgraded by an NRSRO. The SEC proposes to amend this requirement so that money market fund boards (or their delegates) would be required to reassess whether a security continues to present minimal credit risks any time the fund's investment adviser becomes aware of any information about the security or its issuer that might suggest that the security might not continue to present minimal credit risks. The SEC indicates that investment advisers will be expected to "exercise reasonable diligence in keeping abreast of new information about a portfolio security that is reported in the national financial press or in publications to which the investment adviser subscribes."[12]

The Task Force believes that money market fund boards have an existing obligation to continually reassess, or have their delegates continually reassess, whether a security presents minimal credit risks under Rule 2a-7 as it currently stands. A security is eligible to be held by a money market fund only so long as the security continues to present minimal credit risks. Given that this is a standard that must be maintained on an ongoing basis, compliance with the current standard requires continuous monitoring and surveillance. Although existing Rule 2a-7 requires fund boards (or their delegates) to reassess a security's credit risks upon the occurrence of specific rating downgrades, the Task Force believes that the practice of most money market funds is to go above and beyond this standard for reassessment. Thus, the Task Force does not believe the proposed amendment of Rule 2a-7 will increase the existing scrutiny practiced by most money market funds.

The Task Force, however, is concerned that the removal of a rating-based, objective trigger for reassessment of a portfolio security's credit risks would create market uncertainty by removing a valuable minimum compliance floor. By substituting a rating-based standard with a subjective standard dependent on the diligence of the relevant investment adviser, the proposed amendment decreases the level of transparency regarding when and under what circumstances a money market fund reassesses the credit risks of its portfolio securities. This both decreases investor confidence and decreases the level of protection for investors in money market funds. In particular, the level of diligence among investment advisers may vary widely — an investor has no way of knowing a particular investment adviser's definition of "reasonable diligence," nor to what publications such adviser subscribes. In contrast, the current rule allows for market certainty that, at a minimum, a fund's board (or its delegate) will reassess whether a portfolio security continues to present minimal credit risks upon specified rating downgrades by an NRSRO. The proposed amendment requires investors to rely on the ability of the fund's investment adviser to stay abreast of new information regarding each portfolio security invested in by the fund. The Task Force believes that Rule 2a-7's existing requirements, and the protection they afford investors, should be maintained.

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[12] *Id.* at 40127.

4. Notice of Rule 17a-9 Transactions

The SEC proposes to require that money market funds provide the SEC with prompt notice any time an affiliate, promoter, or principal underwriter of the fund purchases from the fund a security that is no longer an Eligible Security in reliance on Rule 17a-9 under the Investment Company Act. The Task Force believes that this notification requirement would be more appropriately incorporated in an amendment to Rule 17a-9, particularly in light of the concerns the Task Force has expressed herein regarding the dangers of revising Rule 2a-7.

*B. Rule 5b-3 under the Investment Company Act*

Rule 5b-3 conditions permission to treat a repurchase agreement as an acquisition of the securities collateralizing the repurchase agreement for purposes of Sections 5(b)(1) and 12(d)(3) of the Investment Company Act on whether the obligation of the seller to repurchase the securities from the fund is "collateralized fully." Rule 5b-3(c)(1) provides that a repurchase agreement is "collateralized fully" if, among other things, the collateral consists entirely of: (i) cash items; (ii) government securities; (iii) securities that are rated in the highest rating category by the "Requisite NRSROs";[13] or (iv) unrated securities that are determined by the fund's board of directors or its delegate to be of a comparable quality to securities rated in the highest rating category by the "Requisite NRSROs." The SEC proposes to remove the requirement that collateral other than cash or government securities be rated by an NRSRO and instead require that the fund's board (or its delegate) determine that the securities are: (i) sufficiently liquid that they can be sold at or near their carrying value within a reasonably short period of time; (ii) subject to no greater than minimal credit risk; and (iii) issued by a person that has the highest capacity to meet its financial obligations.

Initially, the Task Force would like to emphasize that the repo market is quite sizable and provides enormous liquidity to the markets. Therefore, any rule amendment that is likely to increase uncertainty or cause confusion in this market especially should be avoided. The Task Force believes that this proposed amendment to Rule 5b-3 would do just that — increase uncertainty among market participants by eliminating an objective, rating-based test and substituting a subjective, discretionary test with no consistent, reliable standard for compliance. Sections 5(b)(1) and 12(d)(3) place limitations on a fund's ability to invest in repurchase agreements, and existing Rule 5b-3 provides an objective test upon which funds can rely in determining compliance with these limitations. This objective, bright-line rule allows for conformity among funds and confidence among investors, who are assured of a consistent standard across the board. To replace this bright-line rule with a discretionary standard that relies on three different subjective determinations of a fund board would create uncertainty both for the fund, which would need to question constantly whether it is in compliance with this

[13] The term "Requisite NRSROs" means any two NRSROs that have issued a rating with respect to a security or class of debt obligations of any issuer or, if only one NRSRO has issued a rating with respect to such security or class of debt obligations of an issuer, that NRSRO. Rule 5b-3(c)(6).

vague standard, and for the fund's investors, who would have a decreased level of transparency into the fund's investment decisions.

### *C. Rule 10f-3 under the Investment Company Act*

Rule 10f-3 allows a registered investment company to purchase "eligible municipal securities" for which its affiliate served as principal underwriter during the existence of an underwriting or selling syndicate. Rule 10f-3(a)(3) defines an "eligible municipal security" as a security that has: (i) an investment grade rating from at least one NRSRO; or (ii) if the issuer or entity supplying the revenues or other payments from which the issue is to be paid has been in continuous operation for less than three years (a "less seasoned security"), one of the three highest ratings from an NRSRO. The SEC proposes to amend Rule 10f-3(a)(3)'s definition of "eligible municipal security" to mean a security that: (i) can be sold at or near its carrying value within a reasonably short period of time; and (ii) is either (a) subject to no greater than moderate credit risk, or (b) if a less seasoned security, subject to a minimal or low amount of credit risk. The SEC suggests that in making these determinations, a fund board would be able to incorporate outside quality determinations, including NRSRO ratings and reports.

As with the proposed amendment to Rule 5b-3, the Task Force believes that the replacement of an objective, rating-based standard with a subjective, discretionary assessment provides little added benefit while creating substantial market uncertainty. As discussed in Section I.D above, the Task Force believes that a number of the proposed rule amendments, including the proposed amendment to Rule 10f-3, do not speak directly to the issue of over-reliance that the SEC seeks to address. Further, the SEC's indication that fund boards may continue to incorporate NRSRO ratings in their determinations suggests that the SEC continues to view NRSRO ratings as an applicable reference point. Therefore, the Task Force recommends retaining the existing rating-based standard to ensure application of a consistent definition by different funds, rather than opening up the possibility of a wide range of determinations of what is, or is not, an eligible municipal security. The resulting lack of consistency among funds, and the lack of transparency into these subjective determinations, would be to the detriment of investors.

### *D. Rule 206(3)-3T under the Investment Advisers Act*

Rule 206(3)-3T allows investment advisers who are registered with the SEC as broker-dealers to meet the requirements of Section 206(3) of the Investment Advisers Act when they engage in principal transactions with their advisory clients by complying with certain conditions. Generally, an adviser may not rely on Rule 206(3)-3T if the adviser or its "control person"[14] issues or underwrites the security that is the subject of the principal transaction. There is an exception to this general rule for trades in which the adviser or control person is an underwriter

[14] "Control person" is defined as "any person controlling, controlled by, or under common control with the investment adviser." Rule 206(3)-3T(a).

of non-convertible investment grade debt securities. Rule 206(3)-3T(c) defines "investment grade debt security" as a non-convertible debt security that is rated in one of the four highest rating categories of at least two NRSROs. The SEC proposes to eliminate the current definition of "investment grade debt security" in Rule 206(3)-3T and instead require the adviser to determine, among other things, that the security: (i) has no greater than moderate credit risk; and (ii) is sufficiently liquid that it can be sold at or near its carrying value within a reasonably short period of time. The new rule would require advisers relying on Rule 206(3)-3T to adopt and implement policies and procedures covering the adviser's process for determining whether a security is "investment grade" quality.

The proposed amendment delegates to advisers seeking to rely upon the exception for non-convertible investment grade debt securities the task of determining whether the securities are, in fact, "investment grade" quality. Investment advisers would make this determination in the absence of any objective standard, based on their assessments of credit risk and liquidity. Given the SEC's concern that an investment adviser who acts as underwriter for securities may "dump" such securities on its clients, removing the objective, rating-based standard from the exception provided in Rule 206(3)-3T for non-convertible investment grade debt decreases the protection provided by that rule to investors. As with the proposed rule amendments under the Investment Company Act, this proposal creates uncertainty for both parties involved. The investment adviser would face increased uncertainty and apprehension about whether or not its subjective determinations were in compliance with the new rule, and the adviser's clients would lose the certainty that the NRSRO rating acts as an independent check on the internal evaluations of the adviser.

## III. Proposed Amendments under the Exchange Act, Release No. 34-58070

### A. *Rule 15c3-1 (Net Capital Rule) under the Exchange Act*

The SEC proposes to substitute two new subjective standards for the rating-based standards currently relied upon under the Net Capital Rule. Rather than a rating-based standard for determining the haircut on commercial paper, the SEC proposes the requirement that the instrument be subject to a minimal amount of credit risk and have sufficient liquidity such that it can be sold at or near its carrying value almost immediately. Similarly, to determine the haircut on non-convertible debt securities or preferred stock, the rating-based standard is proposed to be replaced with a requirement that the instrument be subject to no greater than moderate credit risk and have sufficient liquidity such that it can be sold at or near its carrying value within a reasonably short period of time.

In both instances, the SEC indicates that broker-dealers will need to be able to explain how the securities they use for net capital purposes meet these new subjective standards. The SEC, however, also indicates that it would be appropriate for broker-dealers to refer to NRSRO ratings as one means of complying with the new subjective standards. This suggests that the SEC continues to consider credit ratings a reliable measure of risk. Given that reliance on the rating-based standards would continue to be one means of complying with the proposed new subjective standards, the Task Force believes that there is no substantial added benefit to the proposed amendments — broker-dealers have dependably relied on credit ratings under the existing Net Capital Rule, and many would continue to do so under the proposed amendments.

The Task Force believes, however, that certain negative consequences may potentially result from the imposition of these new subjective standards. It further believes that these consequences are indicative of a general problem with replacing objective rating-based standards that provide a bright-line test with new subjective standards that rely solely on the discretion of an interested decision-maker — increased uncertainty, decreased transparency, and decreased market confidence.

Although the SEC indicates that NRSRO ratings may continue to be available as a tool for broker-dealers to make the subjective determinations required by the proposed rule amendments, removing the rating-based standard eliminates an effective, consistent minimum threshold. Without the assurance of this minimum threshold and with the increased level of subjective discretion among broker-dealers, uncertainty would be created. Market participants would no longer be able to depend upon a transparent and predictable standard for all broker-dealers, and, as a result, market confidence might well suffer. In addition, market participants could not rely on the third-party input of an NRSRO to act as an independent check on the internal evaluations of a broker-dealer and counteract any incentive of the broker-dealer to undervalue the credit risk associated with a security.

Further, the Task Force finds that the use of identical subjective credit risk standards and liquidity requirements to replace different rating-based requirements currently in the rules would create confusion for market participants seeking to comply, and alter elements of the present regulatory scheme that have proven effective. In its three concurrent releases proposing amendments to remove references to NRSROs, the SEC uses the terms "minimal credit risk" and "moderate credit risk" to replace different NRSRO rating-based standards. For example, under the proposed amendments to the Net Capital rule, a determination of "minimal credit risk" would replace the requirement that a commercial paper instrument be rated in one of the <u>three</u> highest rating categories. In contrast, under the proposed amendments to Rule 2a-7, a determination of "minimal credit risk" would be substituted for a requirement that a security be rated by the "Requisite NRSROs" in one of the <u>two</u> highest short-term rating categories. The replacement of distinct, objective, rating-based requirements with a single subjective standard would lead to confusion and uncertainty in the market in light of the inconsistencies that arise between different areas of regulation, and would result in unintended changes to the existing regulatory framework. The existence of these inconsistencies in the proposed amendments suggests that the SEC should take additional time to review its proposals. In the meantime, the SEC could assess the effects of the proposed amendments of Part 1 to the rating process, as recommended in Section I.B.

*B. Rule 101 of Regulation M under the Exchange Act*

Regulation M prohibits activities that could artificially influence the market for an offered security. Specifically, it prohibits issuers, selling security holders, underwriters, broker-dealers, other distribution participants, and any of their affiliated purchasers from directly or indirectly bidding for, purchasing, or attempting to induce another person to bid for or purchase a covered security until the applicable restricted period has ended. Rule 101 of Regulation M contains exemptions for non-convertible debt and preferred securities that are investment grade based on the required NRSRO ratings.

The SEC proposes to remove the reference in Rule 101 to NRSROs, and thus the investment grade requirement for exemption from Regulation M for non-convertible debt and preferred securities. Instead, non-convertible debt and non-convertible preferred securities would be exempt if their issuer qualifies as a "well-known seasoned issuer" ("WKSI") as defined in Rule 405 under the Securities Act. The issuer also must have issued at least $1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary registered offerings.

The investment grade securities currently exempted under Regulation M historically have traded on the basis of yield and spread to comparable securities, and are generally fungible with other similarly rated securities. Because of these qualities, the SEC previously found, and the Task Force believes it is still the case, that such securities are less susceptible to manipulation.[15] The SEC has offered no evidence to suggest that this conclusion is no longer true.

The Task Force believes, however, that the requirements for WKSI status fail to track these qualities as effectively as the current NRSRO rating-based standard. The proposed amendment would impose the restrictions of Regulation M on issuers of previously exempt investment grade securities that are less vulnerable to manipulation, while resulting in exemptions for issuers of high-yield securities that are more vulnerable. Specifically, there is a significant number of issuers of high-yield securities who have issued over $1 billion of debt securities and thus achieved WKSI status. Under the proposed amendment, the securities of these issuers would be exempt from Regulation M. At the same time, many seasoned issuers of investment grade securities would lose their exemption only because they have issued less than $1 billion of registered debt securities. For example, certain categories of issuers of investment grade securities, such as yankee banks, do not generally issue securities on a registered basis. Thus, such issuers would never meet the requirement that they issue $1 billion of registered debt

[15] *See* References to Ratings of Nationally Recognized Statistical Rating Organizations, Securities Exchange Release No. 34-58070 (July 1, 2008), 73 FR 40088, 40095 (July 11, 2008) ("The current exceptions for certain investment grade debt and preferred securities rated by a NRSRO were originally based on the premise that these securities are traded on the basis of their yields and credit ratings, are largely fungible and, thus, are less likely to be subject to manipulation."); Anti-manipulation Rules Concerning Securities Offerings; Final Rule, Securities Exchange Release No. 38067 (December 20, 1996), 62 FR 520, 527 (January 3, 1997).

securities, even though such issuers may issue greater than $1 billion of debt securities on a non-registered basis.

The Task Force believes that the proposed amendment of Rule 101 not only would create perverse results but also would fail to address the issue of investor over-reliance that the SEC seeks to impact with these amendments. Regulation M is primarily directed at the actions of the issuers of securities and the investment banks who underwrite them; in contrast, the investors that the SEC is concerned with are not users of Regulation M at all.

*C. Rule 10b-10 under the Exchange Act*

Rule 10b-10 requires broker dealers that effect transactions for customers in securities, other than U.S. savings bonds or municipal securities, to provide customers with written notification of certain basic transaction information. Paragraph (a)(8) requires transaction confirmations for debt securities, other than government securities, to inform the customer if the security is unrated by an NRSRO. The SEC proposes to delete the requirement in paragraph (a)(8), making the provision of such information voluntary.

Experience has shown that customers expect to see "unrated" on the transaction confirmation for debt securities that are in fact unrated. The proposed rule change could be confusing and misleading if customers were to believe that the debt security was rated because "unrated" no longer appears on the transaction confirmation. In addition, leaving the decision up to each broker-dealer will end uniformity, likely leading to additional confusion for an investor who uses more than one broker-dealer, where one broker-dealer continues to place "unrated" on its confirmations while another broker-dealer does not do so.

**IV. Proposed Amendments under the Securities Act and the Exchange Act, Release Nos. 33-8940, 34-58071**

*A. Forms S-3 and F-3 (Primary Offerings of Non-convertible Securities) under the Securities Act*

Eligibility to register securities offerings on Form S-3 or Form F-3 depends on an issuer's reporting history under the Exchange Act and compliance with at least one of the forms' transaction requirements. One requirement for the registration of an offering of non-convertible securities is that the securities be rated "investment grade" by at least one NRSRO. The SEC proposes to replace the reference to NRSRO ratings in General Instruction I.B.2 with the requirement that the issuer has issued (within 60 days prior to filing the registration) for cash at least $1 billion in non-convertible securities, other than common equity, through registered primary offerings over the prior three years.

The Task Force believes that the current rating-based eligibility requirement for offerings of non-convertible securities on Forms S-3 and F-3 should be maintained. In addition, the Task

Force echoes the views expressed in the ASF Letter regarding the proposed amendments to Form S-3 eligibility requirements for asset backed securities. As discussed in Section I.B, the Task Force believes that if the proposed rule amendments of Part 1 achieve their stated objectives, references to ratings of NRSROs would continue to serve a valuable purpose. In this case, the current rating-based eligibility requirement would continue to serve as a reasonable and effective way to identify low risk issuers who should qualify for short form registration.

By making short form registration generally less available to high quality, investment grade issuers, the proposed amendments would hamper such issuers in their attempts to raise funds efficiently in the public market. Unable to meet the new standard as proposed, these issuers would be subject to a full SEC review for each public issuance. On the other hand, the new standard would open up short form registration to currently non-investment grade, and potentially riskier, issuers. Neither outcome is desirable given the current turbulence of the market.

Should the SEC proceed with these amendments as proposed, the Task Force notes that particular consideration should be paid to those issuers with currently effective Form S-3 or Form F-3 registration statements. The Task Force believes such issuers should be permitted to continue to use their Form S-3 or Form F-3 registration statements for a period of at least two years from any final rule amendment, given the substantial investments already made by such issuers.

## V. Conclusion

The Task Force appreciates the opportunity to comment. We support the efforts by the SEC to promote independent investment and credit risk analysis by market participants and recognize the SEC's concern regarding the appropriate role of credit ratings in these analyses. The Task Force believes, however, that the deletion of references to, and use of, credit ratings in securities regulations would not further the SEC's objective of reducing undue reliance on credit ratings and instead would have a number of negative consequences.

NRSRO ratings benefit both investors and the market as a whole by injecting into the subjective deliberations and analyses of investors an objective minimum threshold. Removing this objective minimum threshold and bright-line, rating-based compliance standards for market participants would create uncertainty on three fronts: (i) the increased apprehension of market participants faced with the challenges of complying with vague, discretionary standards in place of bright-line, rating-based standards; (ii) the increased uncertainty of investors who currently rely on the protection and transparency these bright-line standards provide; and (iii) the increased confusion of market participants subject to competing regulatory frameworks — one objective and rating-based and the other subjective and discretionary.

Rather than undertake a sweeping revision of its rules and forms, which would have a destabilizing effect and may ultimately lead to less protection for investors, the Task Force believes that the SEC should focus its efforts on Part 1 of its rulemaking initiatives relating to credit ratings, thereby increasing the integrity and transparency of the rating process. If the proposed rule amendments of Part 1 achieve their stated objectives, there is no purpose to removing references to credit ratings from the SEC's rules and forms and generating the concomitant market uncertainty and instability.

The Task Force appreciates your consideration of our views.

Sincerely yours,

Deborah A. Cunningham
SIFMA Credit Rating Agency Task Force Co-Chair
Federated Investors; Chief Investment Officer

Boyce I. Greer
SIFMA Credit Rating Agency Task Force Co-Chair
Fidelity Management & Research Company; President, Fixed Income & Asset Allocation

Attachment

cc: Christopher Cox, Chairman
Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
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Elisse B. Walter, Commissioner
Andrew J. Donahue, Director, Division of Investment Management
Erik R. Sirri, Director, Division of Trading and Markets
John W. White, Director, Division of Corporation Finance
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# ANNEX A

SIFMA®

Securities Industry and
Financial Markets Association

# Recommendations of the Securities Industry and Financial Markets Association Credit Rating Agency Task Force

July 2008

## Table of Contents

## Preamble

*The Securities Industry and Financial Markets Association (SIFMA) Credit Rating Agency Task Force (the Task Force) is a global, investor-led, industry task force formed to examine key issues related to credit ratings and credit rating agencies (CRAs).*

*The 37-person Task Force is comprised of members drawn from a cross-section of the financial services industry, including asset managers, underwriters, and issuers. It includes senior-level experts in structured finance, corporate bonds, municipal bonds, and risk. The Task Force is also global, with members from the US, Europe, and Asia.[1] In addition to providing industry input to lawmakers and regulators in Europe and Asia, the Task Force has been designated by the U.S. President's Working Group on Financial Markets (the PWG) as the private-sector group to provide the PWG with industry recommendations on credit rating matters.*

*To determine priority areas of focus, the Task Force first sought to identify what—in the view of its industry experts—were the credit-rating-related causal variables that played a significant role in triggering the current crisis. Sixteen key issues were identified, and then stack-ranked in order of importance by the Task Force members. Those issues that headed the list are the issues that the Task Force has addressed in its below recommendations.[2]*

*The Task Force engaged in discussions with, and solicited input from, a number of lawmakers, regulators, and CRAs across the globe. The below recommendations have been crafted with the dual goals of: a) avoiding a repetition of the credit-rating-related turmoil of the past year; and b) strengthening the investor confidence that is vital to robust and liquid global financial markets.*

*The Task Force recognizes the important role played by CRAs and the ratings they provide in the overall functioning of our financial markets. In light of recent market turmoil, however, particularly in markets relating to residential mortgage-backed securities (RMBS) collateralized by subprime mortgages and collateralized debt obligations (CDOs), questions have arisen regarding the quality of CRA ratings and the integrity of the rating process. The resulting decline in investor confidence has been a key factor among those that have led to investor reluctance to invest in RMBS and CDOs, and to liquidity issues generally in our global markets.*

*The Task Force believes that if the recommendations are followed, we will enhance the ability of market participants to understand credit ratings and to incorporate ratings properly into their own independent risk assessments. While some of the recommendations relate to issues particular to the rating of structured products, the recommendations often apply to the ratings process generally.*

1 *A roster of Task Force members can be found in Appendix A.*

2 *A summary of the stack-ranking results can be found at http://www.sifma.org/capital_markets/cra-taskforce-issues.shtml*

*The recommendations include the following:*

- *CRAs should provide enhanced, clear, concise, and standardized disclosure of CRA rating methodologies* (see *p. 3);*
- *CRAs should disclose results of due diligence and examination of underlying asset data examinations, and limitations on available data, as well as certain other information relied upon by the CRAs in the ratings process* (see *p. 5);*
- *CRAs should provide disclosure of CRA surveillance procedures; this will foster transparency, and allow market users of ratings to understand their bases and limitations* (see *p. 8);*
- *CRAs should provide access to data regarding CRA performance; this will allow investors to assess how CRAs differ both in the performance of their initial ratings, and in their ongoing surveillance of existing ratings* (see *p. 9);*
- *Conflicts of interest should be addressed with a sensitivity towards the difference between "core" CRA services and CRA consulting and advisory services* (see *p. 10);*
- *A global SIFMA advisory board of industry participants should be established to advise regulators and lawmakers on ratings issues; this will give regulators access to industry expertise, and encourage the more fully harmonized global regulatory framework the Task Force views as essential* (see *p. 11);*
- *Lawmakers, regulators, and law enforcers across the globe should coordinate more closely in addressing this global problem, in order to avoid counter-productive, piecemeal, inconsistent attempts at remediation* (see *p. 12);*
- *CRA fee structures, and identities of top payors, should be disclosed by CRAs to their regulators* (see *p. 12);*
- *CRAs should ensure that ratings performance of structured products is consistently in line with ratings performance of other asset classes; this will increase investor confidence in the reliability of ratings* (see *p. 13);*
- *Rating "modifiers" should not be the means adopted to create transparency; they would lead to significant unnecessary costs, while at the same time likely triggering unintended negative consequences* (see *p. 14);*
- *Investors should understand the limits of ratings, and use them as just one of many inputs and considerations as they conduct their own independent analyses* (see *p. 16); and*
- *All members of the financial industry involved in the generation and use of ratings, including issuers and underwriters, should examine their processes with an eye towards improvement, including working towards standardizing reporting and disclosure on underlying assets* (see *p. 17).*

## 1. Enhanced Disclosure of CRA Rating Methodologies

Ratings of structured securities have been a particular source of controversy during the past year's market turmoil. The Task Force found that ratings of structured securities were generally based largely on CRA statistical models that predicted future performance of the assets that collateralized the rated securities, based on the past performance of apparently similar assets.

The Task Force determined that these quantitative, model-driven analyses assisted arrangers, underwriters, and securitization issuers by facilitating pricing consistency and predictability between the primary/origination market and the secondary/securitization market. Certain models, particularly many relating to RMBS, proved to be based on overly optimistic assumptions about asset performance, however. This was likely due to their reliance on a data set of past performance that looked back only to the relatively recent years for which performance data was available, without sufficiently accounting for the possibility of shifts in the economy and significantly changed market conditions, and which analogized the future performance of new assets to past assets, without sufficiently accounting for qualitative differences between the assets.

The Task Force found that CRAs publish general descriptions of their structured security rating methodologies, and in some instances license their statistical models to paying subscribers. The Task Force determined, however, that even when CRAs licensed these models, this information was generally insufficient for investors to understand CRA rating methodology with respect to particular structured securities. For example, even if an investor licensed the CRAs' models and obtained all the data inputs to run the model for a particular security, the investor still could not determine what assumptions and adjustments the CRAs employed in determining their final assigned rating. Therefore, investors generally did not understand the method by which CRAs determined ratings for particular structured securities, could not on their own determine any potential flaws in the CRAs' analyses, and were unable to monitor the performance of the securities (some of which proved to be more susceptible to ratings volatility than traditional rated corporate debt) in comparison to the assumptions underlying the CRAs' ratings.

The Task Force finds that, prior to the recent subprime mortgage crisis, investors were generally not sufficiently aware of the particular limitations associated with the CRAs' statistical models, when the CRAs deviated from those models in rating securities (particularly structured products), the key assumptions underlying those ratings, and the potential impact of changes in such assumptions.

The Task Force recognizes that ratings are not solely model-driven, and that other factors impact ratings. Models are, however, clearly an integral part of the ratings process.

The Task Force believes that this limited transparency in the ratings process, and the resulting inability of the market to understand clearly the bases of ratings of certain structured products, were primary causes of misunderstandings of the ratings. These misunderstandings, in turn, were central to the ratings-related market turmoil of the past year.

The Task Force finds that greater disclosure by CRAs with regard to aspects of the rating process, including statistical models, would enhance transparency in the structured products market by providing market participants with greater understanding of the ratings analysis.

The Task Force therefore recommends that CRAs provide greater disclosure with regard to the method by which they determine ratings for securities, and mortgage- and asset-backed structured securities in particular. This will enable investors to better understand and evaluate the CRA analysis, and monitor the performance of the rated securities in comparison to the rating analysis over time.

The Task Force concluded that it would be preferable for CRAs to adopt the practice of providing clear and concise disclosure, preferably in the form of a "pre-sale report," rather than disclose additional large quantities of raw information pertaining to the model. This disclosure, above and beyond current practice and sufficient to enable the market to understand what a rating means and how it was derived, should include:

a. A description of the CRA model and model outputs (including cumulative collateral loss assumptions and assumptions relative to the pre-securitized assets and loss curve over time, timing of losses, default frequency and severity expectations, the amount of loss coverage required at each rating level, and credit enhancement requirements);

b. Inasmuch as ratings are not purely model-driven, and deviations from the model are common, a description of any material deviations from the rating or credit enhancement analysis called for by the CRA model, any material adjustments to the model for the purpose of the subject rating, and the reasons for such deviations/adjustments;

c. A description of qualitative factors relied upon by the CRA in its analysis; and

d. A description of the key risks and sensitivities of the rating to key variables (as well as compensating factors) considered by the CRA in determining its rating, such as external changes that could cause a rating to change (*e.g.*, a decline in home prices), including any stress test results.

Each rating should be developed from a general model or criteria that have been published by the CRA. To the extent that general model information is already published by a CRA, the CRA should, in its pre-sale report for a rated security or in such other place as is reasonable, reference such information and indicate where this information can be found.

The provision of this kind of additional specific information by CRAs could be used by investors for investment decision analytics and for enhanced, better-informed risk control decisions. In addition, such greater disclosure would highlight the key distinctions between, and different risk characteristics of, certain structured products and corporate bonds. This additional transparency would at the same time obviate the need for rating "modifiers" to distinguish between broad categories of issue types.

While this disclosure should be appropriately concise, a level of helpful detail is called for. Simply sharing numerical scores that weigh and aggregate information, such as "volatility scores" or "stress test scores," would by itself be of limited use to investors conducting their own risk analyses.

In order to ensure the provision of this information on a clear and comparable basis, the Task Force recommends that CRAs consider developing guidelines for pre-sale reports that would encompass the disclosures recommended in (a)-(d) above, and that would appropriately reflect the differences among different types of securities. These guidelines would serve as a framework for disclosure, without mandating a strict homogeneity across the CRAs to the detriment of each CRA's unique methodologies.

This increased transparency, adopted as a permanent ongoing practice of the CRAs, would enhance the ability of investors and other market participants to understand and use a rating as just one of many inputs and considerations in their own independent risk analyses, with a clear understanding of the basis and limitations of the rating.

## 2. Enhanced Disclosure of Due Diligence Information, and Other Information Relied upon by CRAs in the Rating Process

**A. Disclosure of Due Diligence/Reviews of Data Accuracy.** The Task Force finds that CRAs have in recent periods generally performed only limited (and, in some instances, did not perform any) independent review or due diligence to confirm the accuracy of data provided to them in connection with the assets underlying structured securities, and performed limited independent confirmation of asset origination standards. Instead, perhaps in part because some CRAs have not seen it as their role to do more, they have substantially relied on publicly available information and/or the representations of other parties to the transaction with regard to the reliability of the data presented to the CRAs.

The post-mortems of the recent subprime mortgage crisis suggests that this reliance by CRAs on other parties to verify the quality of assets underlying certain structured securities being rated by the CRAs, which was combined with only a limited understanding by some market participants as to the level of this reliance, may have led to ratings that were inaccurate reflections of the default risk of such structured securities (for example, some such ratings neglected to take into account the higher incidence of mortgage fraud). In addition, there are indications that some CRAs at times relied on information that may have been questionable or suspect on its face, taking into account market changes at the time.

The Task Force therefore recommends that CRAs disclose in their pre-sale reports, at a minimum:

a. Whether and to what extent the CRA has conducted or reviewed any independent examination and/or review to confirm the accuracy of underlying data and asset origination standards relating to a security;

b. If the CRA relied on the due diligence or examination of another (such as an issuer, underwriter, or third party) with respect to the rating of a security: who conducted the due diligence or examination, what their relation is to the transaction, and the extent to which such due diligence or examination was relied upon;

c. What the due diligence analysis entailed (*e.g.*, data accuracy, origination standards and processes, loan level due diligence, credit, or value);

d. With regard to asset-backed securities, what due diligence was conducted on the individual securities or assets in the collateral pool underlying the structured deal, and what if any individual components did not receive any due diligence review; and

e. The results of the due diligence review, including the exceptions that were noted.

If a CRA does not undertake an independent examination of the underlying data and asset origination standards, the Task Force believes the CRA should satisfy itself that some reasonable minimum level of examination has been undertaken by other parties to the transaction to ensure that the information underlying each CRA rating and opinion is of sufficient quality to support a credible rating. For example, CRAs should question issuers to satisfy themselves that thorough underwriting due diligence, including data verification, has been performed by reputable parties.

Where the diligence disclosure reflects that a given security has a limited amount of historical data upon which to base a rating, as may be the case with newer structured finance securities, the CRA should prominently disclose the limitations on available data and the resulting rating's limitations and augmented risks. The Task Force anticipates that such limitations would be reflected in higher credit enhancement requirements.

The Task Force does not, however, recommend a blanket prohibition on the issuance of a rating on a structured product where there is limited information available on the underlying assets. In the instance of new structured products, for example, there may be little or no historical information relating to the underlying assets, but the underlying assets may be comparable to, or a variation on, assets previously incorporated into structured products as to which there is an adequate amount of data available. A broad prohibition on the ability of CRAs to rate new kinds of issues would stifle innovation, both in the creation of new kinds of issues and in the ratings process. To ensure transparency of the unique considerations and risks related to the rating of a new kind of security, the Task Force recommends that CRAs prominently and with an appropriate level of detail disclose: (i) that there is limited information available regarding the assets underlying the security being rated; (ii) the methodology used by the CRA to rate the new structured product in the absence of extensive information; and (iii) the attendant risks involved.

This disclosure would not only provide additional information to investors regarding the level of examination underlying a given rating, but also serve as an impetus to CRAs to make substantive improvements to their examination processes.

**B. Disclosure of Other Information Relied upon by the CRA in the Rating Process.** The SEC has suggested disclosure of not only the due diligence and model information described above, which the Task Force views as the most important disclosure, but also of all other information used by a CRA to determine credit ratings of structured finance issues. This could, for example, include asset tapes representing the composition of the asset pool, representations and warranties provided by the securitization sponsor, originator, or seller, and selection criteria for asset pools.

The Task Force recognizes that, as the SEC suggests, this disclosure may also enable CRAs to provide "unsolicited" ratings by CRAs that were not engaged to rate the issues. The primary goal of the SEC in making this proposal is to promote greater competition among CRAs.

If such disclosures can be made in a manner that is sensitive to the following important issues, the Task Force recognizes that this further disclosure and enhanced transparency may be beneficial. One important issue is that some information is proprietary and/or confidential (*e.g.*, information regarding underlying obligors in the context of asset-backed commercial paper); and limitations on the ability to disclose such information would have to be addressed. Also, it is important that such disclosure requirement not chill appropriate business communications (for example, by requiring that all oral communications between an issuer and CRA be reflected in writing) or stifle innovation. In addition, the Task Force's view is that such disclosure should not serve to expand the liability of an issuer or underwriter.

Finally, the Task Force cautions that if unsolicited ratings are published, they should be published in a manner that makes quite clear to the market the unsolicited nature of the ratings. That is because unsolicited ratings will necessarily be issued on the basis of less information, and lack the robust iterative communications with the issuer's management and onsite visits that attend solicited ratings. Investors should therefore be made aware of the unsolicited nature of the ratings, so that they can properly consider the weight that they wish to give such ratings.

**C. Comprehensive Disclosure; CRAs Best-Positioned to be Comprehensive Disclosing Party.** The Task Force strongly supports enhanced ratings transparency, and views it as essential to restoring confidence in ratings and their quality.

As to the question of who should disclose due diligence and examination information, and other information, that the CRA relied upon in issuing its rating, the Task Force recognizes that there are various views. The Task Force understands that a number of the CRAs are of the view that they should not be the parties tasked with disclosing such information. Rather, they suggest, others, as the "owners" of much of the information, should take on that responsibility.

The Task Force believes, however, that the CRA is the party best suited to disclose the due diligence and examination information that the CRA used in issuing its rating. This is for three primary reasons. First, the CRA is the party that actually relied upon the information, and determined that the information was both used by the CRA in arriving at its rating and of sufficient quality to support the CRA's rating. Second, the CRA's view as to what information is necessary to determine an initial credit rating or to maintain surveillance on an existing credit rating can be applied in a consistent manner by the CRA across various issues rated by the CRA. Finally, while such information may come from multiple sources (including the issuer, underwriter, sponsor, depositor, and trustee), the CRA is the centrally situated repository of all information relied upon by the CRA (in the formation of its opinion leading to the CRA's rating), and therefore uniquely situated to provide "one-stop-shopping" and disclose the information most efficiently.

## 3. Disclosure of CRA Surveillance Procedures

The Task Force finds that more timely and diligent CRA surveillance of rated structured securities would decrease the incidence of significant delays between deteriorating asset performance and related ratings downgrades, alleviate uncertainty regarding potentially impending downgrades, and contribute to stabilization of the credit markets. Uncertainty regarding the continued accuracy and reliability of ratings of certain structured securities has, the Task Force believes, been a primary factor leading to investors' increased reluctance to invest in structured securities. This, in turn, has exacerbated the recent liquidity crunch experienced by the markets.

The Task Force therefore recommends that CRAs disclose in their pre-sale reports how a rating will be handled on a going-forward basis following issuance of the rating, and the nature and extent of surveillance that will be performed by the CRAs to ensure that the rating remains current and reliable. CRAs should also regularly disclose when this process has been completed with regard to individual transactions and ratings. The Task Force anticipates that this increased disclosure will incentivize CRAs to implement improved targeted procedures, and allocate sufficient resources to surveillance of existing ratings.

This disclosure should at a minimum include:

a. How frequently the CRA will review the rated security (*e.g.*, on a certain periodic or event-driven basis), and how often the rating will be updated, if the circumstances warrant an update;

b. Whether the timing and nature of a surveillance review will depend on external factors (*e.g.*, the frequency and quality of updated data received from the issuer or servicer of the security);

c. How soon after the CRA receives updated data it will review the data and, if appropriate, act upon the new information by updating or confirming a rating;

d. The extent of the surveillance review (*e.g.*, review of a particular security, a particular sector, or a type of transaction);

e. What the surveillance review will entail (*e.g.*, a quarterly assessment comparison of security performance to initial collateral loss expectations and assumptions; periodic or event-driven sector analyses);

f. If the issue is a structured finance security, whether its rating will be periodically updated based on a re-analysis of the underlying assets or securities; if so, how often this re-analysis will be conducted; and how this will affect the surveillance of the structured finance security;

g. Whether the team or analyst conducting the surveillance is different from the party who was involved in assigning the initial rating, and if so why;

h. Whether different models are used for rating surveillance than for initial ratings, and whether changes made to rating models and methodologies, including their criteria and assumptions, are retroactively applied to existing ratings; and

i. The status of current surveillance for each rating.

Surveillance should be conducted with sufficient frequency to allow market participants to take into account on a real-time basis the underlying market changes and issue- or issuer-specific events having an effect on rated securities. This ongoing analytical process should also work to incorporate qualitative marketplace factors into the ratings (*e.g.*, shifts in the housing market).

In instances in which the frequency and quality of surveillance is dependent on information received from issuers of securities, or servicers of the assets underlying such securities, CRAs should disclose that they lack the information necessary to update a rating, or may not be able to update a rating in a timely fashion. Similarly, if the frequency and quality of surveillance for the rating of a CDO or RMBS depends on the CRA's re-analysis of the underlying assets or updating of the rating of the underlying ABS, the CRA should disclose this factor and describe in detail the potential effects and delays on surveillance of the structured product.

The Task Force believes that increased surveillance, and investor awareness of the nature and extent of the surveillance being conducted, is central to investor confidence in the reliability of ratings over time.

## 4. Disclosure of Comparable CRA Performance

The Task Force finds that CRAs have not routinely published historical performance data regarding their ratings that is easily verifiable and comparable. Consequently, performance data that has been disclosed has been of limited utility to market participants seeking to compare the performance of different CRAs.

The Task Force recommends that CRAs publish verifiable, quantifiable historical information about the performance of their ratings in a format that facilitates the ability of investors and others to compare the performance of different CRAs directly. The Task Force has encouraged the CRAs to contribute their thoughts and suggestions for specific common performance metrics. For example, one such potential performance metric for structured products might be a comparison of the collateral loss curve used to determine an initial rating, and the actual performance of the collateral over time for the relevant sector. The global Credit Ratings Advisory Board described below may facilitate the creation of such a common metric, thereby promoting competition and superior performance.

Specifically, CRAs should disclose a minimum level of transparent historical ratings migration and default performance by asset class on a directly comparable basis (*i.e.*, a common approach regarding cohort treatment, treatment of withdrawn ratings, and structured finance sector definitions, etc.).

The common performance metrics chosen should not interfere with the unique rating process of each individual CRA. They should, however, encourage increased surveillance by the CRAs and allow for ease of comparability by investors and other market participants.

## 5. Differentiation between CRA Core Services and CRA Consulting Services

The Task Force finds that there is a perception by some that the degree and nature of interaction between CRAs and issuers during the ratings process may result in conflicts of interest. This perception undermines investor confidence in the accuracy and reliability of ratings. These perceived conflicts can arise both from the interaction between CRAs and issuers in the course of a CRA assigning a rating to a particular security, and from the CRAs' provision of consulting or advisory services.

The Task Force notes that each of five major CRAs (A.M. Best, DBRS, Fitch, Moody's, and Standard & Poor's) committed in their Joint Response to the IOSCO Consultation Report on the Role of Credit Rating Agencies in Structured Finance Markets to "plainly indicate" that it does "not and will not provide consulting or advisory services to the issuers the [CRA] rates."

In order to provide clarity to market participants, the Task Force recommends that "core" rating services be clearly defined by the CRAs and distinguished from such "consulting or advisory" services. The Task Force further recommends that CRAs clarify that "consulting or advisory" services exclude other "ancillary" services provided to issuers and intermediaries in the ordinary course of business.

The Task Force views the CRAs' permissible "core" services as including:

a. the assignment and monitoring of public, private, and private placement ratings;

b. issuance of credit estimates and hypothetical ratings, including requested Rating Evaluation Service and Rating Advisory Service (RES/RAS) services regarding issuer-proposed structures of hypothetical securities, indicative, or preliminary ratings, and impact assessments;

c. hybrid securities assessment services;

d. internal assessments;

e. ratings coverage of project and infrastructure finance transactions and hybrid securities;

f. dissemination of press releases and rating reports (that include the rating opinion);

g. research reports and other publications, including methodologies, models, newsletters, commentaries, and industry studies;

h. regular oral and written dialogue with issuers, intermediaries, investors, sponsors, regulators, legislators, trade organizations, and the media; and

i. conducting and participating in conferences, speaking engagements, and educational seminars.

In particular, the Task Force believes that these "core" services include the iterative process that occurs between an issuer, arranger, underwriter, and CRA during the rating of structured finance, project and infrastructure finance, and hybrid securities.

The Task Force believes there is a misperception by some that this type of "core" interaction is essentially a consultation service by CRAs that gives rise to an insuperable conflict of interest, and which undermines the integrity and reliability of the resulting rating. As described above, however, the process of rating structured finance, project and infrastructure finance, and hybrid securities necessarily involves an iterative give-and-take between the issuer, arranger, underwriter, and CRA as part of the "core" services performed by the CRA.

In light of this, the Task Force does not recommend placing limitations on this iterative process. Rather, the Task Force recommends that CRAs maintain an adequate governance structure that includes policies, procedures, mechanisms, and firewalls designed to minimize the likelihood that conflicts of interest will arise, and to manage the conflicts of interest that do arise.

Similarly, "ancillary" services, in the view of the Task Force, are permissible rating-related services that are generally segregated by the CRA into separate business groups. The Task Force views examples of "ancillary" services as including, among others, market implied ratings (MIRS), KMV credit risk management, data services, credit risk solutions, and indices.

## 6. Creation of SIFMA Global Credit Ratings Advisory Board

The Task Force finds that there is a need for market participants globally to, in a direct, impactful, and coordinated fashion, provide expert input and advice on issues related to credit ratings to relevant regulators, lawmakers, and market participants globally. This would foster a globally consistent and convergent approach to ratings issues.

The Task Force therefore recommends the creation of a global, independent, industry Credit Ratings Advisory Board, under the auspices of SIFMA.

The Advisory Board would perform strictly advisory functions, and serve as a consultative resource. The Advisory Board would not engage in any regulatory oversight of CRAs. Furthermore, the Advisory Board would not have any regulatory, quasi-regulatory, judiciary, enforcement, or auditing powers.

The Advisory Board would be composed of a broad representation of investors, underwriters, and issuers. Inasmuch as the Advisory Board would largely be continuing the efforts of this Task Force, the initial Advisory Board members would be drawn primarily from the membership of the SIFMA CRA Task Force. In performing its activities, the Advisory Board would confer with the CRAs from time to time.

More specifically, the Advisory Board would:

a. Serve as a resource on issues relating to credit ratings, both by: (i) identifying and exploring potential issues; and (ii) advising, providing informed input to, and responding to specific requests for expert consultation from regulators (such as the European Commission, the SEC, and IOSCO), lawmakers, and market participants;

b. Facilitate the global convergence of regulatory approaches by seeking regular dialogue with local, national, and global regulatory and lawmaking bodies working in this area;

c. Promote the development of objective performance criteria, guidelines, and best practices for CRAs across a spectrum of areas, including CRA rating performance, surveillance, disclosure, and transparency; and

d. Disclose on a public website, and through other public media, CRA performance information made available to the Advisory Board by the CRAs themselves and by governmental bodies, though the Advisory Board would not itself make any independent performance assessments.

## 7. Convergent Global Regulatory Framework

The Task Force is highly sensitive to the fact that the credit rating issues are global in nature. The Task Force believes, therefore, that it is essential that solutions to the issues raised by ratings be globally coordinated to a greater extent than is the case today. This is necessary for the solutions to be effective, and also to avoid adverse complications that can otherwise be caused by the application of inconsistent prescriptive solutions.

The Task Force therefore recommends that all governmental and regulatory bodies that contemplate addressing the roles and activities of CRAs, and the issues that arise from the credit ratings CRAs publish, recognize and act in accordance with the need for a more fully harmonized and convergent global regulatory framework. Our goal is to avoid piecemeal, fragmented, non-coordinated regulatory or other remedial actions.

A more fully harmonized, convergent global approach is particularly essential in the instance of laws, regulations, best practices, and settlement agreements and other legal requirements that set forth responsibilities and divisions of responsibilities among CRAs, investors, issuers, underwriters, and others, in order to maintain an orderly, transparent, properly functioning global financial marketplace.

## 8. Disclosure of CRA Fees

The Task Force finds that there is a perception among some that an inherent conflict of interest exists in the credit rating process because many CRAs receive the majority of their revenue from the issuers they rate. This perception is particularly acute in the structured finance area, given that in recent years an increasing amount of the CRAs' revenue stream has been related to structured finance ratings. This, it is suggested, increases the incentive of CRAs to maintain the transaction flow leading to this revenue. With regard to complex structured finance transactions, concerns have been voiced about client dependency and the risk that CRAs may overrate structured products to ensure continued client relationships.

The Task Force therefore recommends that CRAs be required to submit disclosure regarding their fee structures to the applicable regulators for review of the overall fees received by each CRA from issuers, investors, and other parties in the ratings process. The Task Force also recommends that CRAs disclose to the applicable regulators on an annual basis: (a) the percent of fees each CRA receives from issuers versus investors; (b) fees by sector; and (c) the identities of the payors of the largest fees that the CRA has received (on both a sector and a total basis).

The Task Force further recommends that CRAs and issuers of structured securities agree that rating fees associated with surveillance be paid to CRAs directly from the related transaction structures on a periodic basis, in order to align the rating fee structure and timing with the timing of the services the market understands to be, and desires to be, provided. The Task Force recognizes that this may have to be addressed differently in situations in which surveillance fees are not deal-specific, as in revolving master trusts.

As to a related issue, that of who pays the fees to the CRAs, the Task Force recognizes that in today's marketplace CRA services are offered based on both investor-pay and issuer-pay models, and that this affords market participants the ability to choose freely whichever model they prefer.

## 9. Consistent Ratings

The Task Force finds that the confidence of market participants in ratings of structured products has been undermined in part by the recent pace, precipitousness, and extent of rating downgrades of certain structured products (primarily subprime RMBS, and CDOs backed by subprime RMBS), and by the inconsistency between these rating migration levels and the migration levels of other classes of structured securities and other asset classes, such as standard corporate bonds. The Task Force believes that each rating symbol should be clearly defined and consistently applied for all types of products to which that symbol is assigned.

In order to obtain this consistency, the Task Force recommends that each CRA undertake a review of its ratings process with regard to structured products to ensure that going forward the ratings performance of structured products will be consistently in line with the ratings performance of ratings in other asset classes. This would include consistency in the projected probability of default and/or expected loss for a given rating category, depending on the policy of the respective CRA. In certain cases, if permissible under off-balance sheet rules and regulatory recourse rules, this may mean that credit enhancement levels on certain structured products may need to be raised in order to reduce differences in potential ratings volatility between various structured products and corporate issues of the same ratings category.

While the Task Force does not believe that blunt "volatility" ratings by themselves would enhance clarity as to the nature of the risks associated with particular issues, the Task Force is supportive of CRAs enhancing transparency by disclosing in pre-sale reports information regarding the historical performance, data adequacy, complexity, and market value and change in loss rate (on the collateral backing a pool) sensitivity of a transaction, governance, and sensitivity to change in the expected loss rate on the collateral that might in turn impact the volatility of a particular issue. Similarly, the Task Force does not believe that summary "stress testing" scores would by themselves increase transparency, but the Task Force is supportive of disclosure with regard to the results of stress test "what if" analyses on structured products issues.

This recommendation dovetails with the increased disclosure and transparency recommendations included herein, in that both are intended to restore investor confidence in the reliability of structured product ratings and increase the level of investor understanding of the meaning and appropriate use of these ratings.

## 10. Rating Modifiers

Certain regulators and organizations, including IOSCO and the SEC, have recently raised the possibility of appending a suffix or credit rating "modifier" to ratings of certain issues, such as structured finance issues, to better identify the nature of those issues. Thus, a "AAA" structured finance issue would now be designated "AAA.SF." The goal, as we understand it, is greater transparency.

The Task Force strongly supports enhanced transparency and disclosure, but suggests that the transparency goal here can be best met instead by adoption of the transparency recommendations that the Task Force proposes elsewhere in these recommendations.

The Task Force is concerned that this proposed change could further damage our already unsettled capital markets, impair capital raising (for student loans, auto loans, credit cards, mortgages, and the like), and lead to the sudden sale of structured finance securities at fire-sale prices, into an already highly illiquid market, at a time when our financial markets can ill afford such an unnecessary shock to their system. The Task Force recommends therefore that CRAs not use ratings modifiers, but instead provide greater transparency and disclosure regarding the models, inputs, and assumptions underlying any given rating, as described elsewhere in these recommendations.

The Task Force believes that the use of credit rating modifiers to distinguish structured finance securities would at best be a cosmetic solution to the credit rating problems. Given that most investors in structured finance issues are highly sophisticated Qualified Institutional Buyers, with $100 million or more of assets under management, they are unlikely to gain any new information from an appended "SF."

In addition, the Task Force believes that this proposal could have several negative unintended consequences.

First, the existing rating categories are embedded in investment guidelines for asset managers. Under the modifier approach, those same "AAA" securities would now be referred to by a new symbol (*e.g.*, AAA.SF) that does not explicitly appear in any existing guidelines.

The addition of a modifier to existing ratings might force asset managers working within existing carefully worded investment guidelines that mandate that purchases consist of particularly rated securities, such as "AAA" securities, to sell off structured finance securities now rated under a new symbol into an already illiquid market (depending, of course, on the specific wording of the guidelines). It may well also restrict future purchases of such securities, while the asset manager undertakes a lengthy guideline-revision process.

This problem is not restricted to investment guidelines. Asset managers and other parties would face also considerable difficulties given what the Task Force believes are easily tens of thousands of laws, regulations, corporate documents, and bilateral contracts embedded with existing rating symbols. They include state insurance and other regulations, pension legislation, SEC rules, ERISA, Basel II, compliance programs, board of directors minutes, and other US and non-US laws and regulations.

The time it can take to change even State laws in the 50 States of the US is considerable. For example, while the investor-protection Uniform Securities Act has enjoyed widespread consensus support by the National Conference of Commissioners on Uniform State Laws and others, only 14 of the States in the US have adopted it since it was introduced 6 years ago. Similarly, it took the better part of a decade for all 50 of the States in the US to adopt the broadly supported revisions to Article 8 of the Uniform Commercial Code. In light of this, it is unlikely that this problem would be addressed during even a reasonably lengthy "burn-in" period for implementation of the modifier proposal, if the proposal were adopted.

Second, attaching a modifier to all structured products ratings might lead to the impairment of structured products that have thus far performed well and avoided the precipitous rating downgrades experienced by sub-prime RMBS and CDOs of asset-backed securities, such as credit card, auto loan, and prime mortgage asset-backed debt. By applying a blanket modifier to securities with a variety of types of underlying collateral, the proposal would hinder the ability of investors to differentiate between such structured finance securities, and might even increase the possibility that investment boards of institutions such as pension plans and foundations might group these types of securities together as "problem" securities, and react by instituting a blanket policy to not own any securities with an SF modifier. The result could be a substantial reduction in liquidity for credit card, auto loan, prime mortgage, and other asset-backed debt–resulting in higher borrowing rates to consumers.

Third, the modifier proposal raises systems and cost issues. Financial firms rely on extensive compliance and other systems that have been set up to handle the existing ratings. The firms' computer fields can accommodate the current ratings. Firms involved in securities issuance, underwriting, investment, and custody may, however, not have systems capable of accepting and interpreting the new ratings that are being considered, with fields wide enough to handle the extra characters that such a new, expanded rating scheme would require. Similar major industry systems concerns, such as Y2K systems disruptions, have of course been averted, but only at considerable expense.

To quantify the cost of the modifier proposal, in terms of the otherwise unnecessary refitting of current systems that implementation of the proposal would require, SIFMA polled industry firms of various sizes. SIFMA found that the cost to engage in such refitting to avoid systems disruptions would be significant, and in a number of instances would be millions of dollars per financial firm.

Given that there is little benefit to be realized from this proposal, and that we can anticipate significant negative consequences and needless costs, the Task Force strongly suggests that the modifier proposal not be adopted – even in the alternative.

## 11. Independent Risk Analysis by Investors

The Task Force recognizes that as we have seen increased complexity in structured finance products, and ever-increasing embedded regulatory dependence on ratings, certain investors have come to rely on credit ratings to the detriment of a more complete independent risk analysis. The complexity of structured products, due to complex legal structures and financial devices, and the multitude of individual underlying assets for which little or no information is publicly available, creates great difficulties for investors seeking to analyze risk. This, in turn, encourages increased reliance on the ratings of CRAs. This increased reliance on CRAs' ratings, to the detriment of investors' own valuations, risk analyses, and continuing review of structured products, has resulted in credit ratings having an inordinate impact on the valuation and liquidity of, in particular, RMBSs and CDOs of ABS.

The Task Force believes that market participants should understand and use credit ratings as just one of many inputs and considerations in their own independent risk analyses of different classes of instruments. Investors should augment their use of CRA risk assessments by conducting their own analysis of the risks involved. As discussed elsewhere in these recommendations, the Task Force believes that investors would be best aided in performing such analysis by the provision of additional transparency in the credit rating process, the data review and due diligence conducted in the ratings process, and the surveillance procedures undertaken by CRAs to foster a better understanding of and scrutiny of the basis of the ratings.

In addition, to encourage investors to conduct an independent determination of security credit quality, the Task Force recommends that CRAs prominently disclose and emphasize on each rating pre-sale report that: (a) a credit rating is a CRA's opinion of the loss characteristics of a given security, not a seal of approval or a recommendation to buy, sell, or hold a given security; (b) investors should read the entire report issued with a rating as one element of their own risk assessment process; and (c) investors should not rely solely on the credit rating itself.

Also, CRAs should assist investors in developing a greater understanding of the nature and limitations of a credit rating in particular asset classes. The Task Force believes investor education by CRAs is integral to preventing investor over-reliance on ratings.

Although the Task Force recognizes that the use of credit ratings embedded in regulation may foster reliance on ratings, the Task Force has not found that this suggests that we should delete all references to, and use of, credit ratings in regulation. The incorporation of credit ratings in securities regulation in many cases continues to provide an appropriate minimum, though not sufficient, threshold, and is an important data point that should be part of a larger analysis. The Task Force believes that investor over-reliance is less a regulatory issue, and more one of best practices within the marketplace.

## 12. Disclosure by Issuers & Underwriters

The Task Force believes that it is important for all members of the financial industry involved in the generation or use of ratings, including not only CRAs and investors – but also issuers and underwriters – to examine what measures they can take to improve their processes so as to enhance ratings and the proper understanding and use of ratings.

The Task Force recommends that issuers and underwriters work towards improving transparency and disclosure with regard to structured finance issues by standardizing reporting and disclosure on underlying assets. At the same time, the Task Force recognizes that it is important to be sensitive to the differences between private and public issues, and to the fact that information may at times be proprietary or confidential.

The Task Force notes that SIFMA and two of its affiliates (the American Securitization Forum and the European Securitisation Forum) have formed a global, joint working group that will work towards developing and publishing actionable industry-developed recommendations with regard to, among other things, disclosure practices of issuers and securitization sponsors, underwriter due diligence practices and reporting standardization, and similar issues. The Task Force endorses this effort and recognizes it as an important natural progression from this Task Force's initiative, one that will further detail what can be done by parties other than the CRAs to re-start our markets, and that can help revitalize the securitization and structured credit markets and bolster investor and public confidence in those markets.

The Task Force recommends that consideration be given in this effort to greater disclosure to investors from issuers and underwriters, which may include the following (subject to appropriate legal analysis in the relevant jurisdictions):

a. Standardization of disclosure of the due diligence process undertaken by the issuer, underwriter, and/or third party due diligence provider on each securitization, including:

   i. Who performed the due diligence;

   ii. What the due diligence analysis entailed (*e.g.*, with respect to RMBS, rules defining the sample selection, sample size as a percentage of the pool, percentage of sample loans removed from the securitization for non-conformity to stated characteristics in offering documents, and the reasons for removal from the pool); and

   iii. The results of this due diligence, including what exceptions were noted;

b. Standardization of initial or periodic disclosure of collateral characteristics, on an asset-class basis, in line with SIFMA/ASF/ESF-generated templates;

c. Historical performance of similarly underwritten pools, if relevant;

d. Disclosure of additional data elements in standardized periodic remittance reports (such as FICO or other consumer credit scores, loan to value ratios, and others), to enhance transparency and risk assessment of structured finance securities on an ongoing basis;

e. Standardization of remittance reports by asset class, to facilitate greater transparency in the market; and

f. Standardization of commonly used definitions, to the extent feasible.

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*Chief Investment Officer*
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**Boyce I. Greer**
*President; Fixed Income & Asset Allocation*
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## Appendix A: Roster of SIFMA Credit Rating Agency Task Force Members

### CO-CHAIRS

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