March 28, 2011

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

Regarding: Security Ratings, File No. S7-18-08

Dear Ms. Murphy:

The Mortgage Bankers Association[1] (MBA) welcomes the opportunity to comment on the Securities and Exchange Commission's (Commission) proposed rule for the replacement of rule and form requirements with references to credit ratings with alternative requirements (the Proposal).[2] Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provides Federal agencies with one year to review regulations that require the use of an assessment of the credit-worthiness of a security or money market instrument and any references to, or requirements in, such regulations regarding credit ratings, and to remove such references or requirements.[3] MBA supports the legislative intent of the Dodd-Frank Act of eliminating the overreliance on ratings for security purchase decisions. However, MBA recognizes the extensive analysis that rating agencies conduct in the ratings process. MBA also recognizes the extensive analysis of asset-backed securities (ABS) performed by non-rating agency third-party due diligence providers (third-party providers). Accordingly, the legislative intent of the Dodd-Frank Act can be achieved by appropriately utilizing ratings or the analysis of qualified third-party due diligence providers in the Commission's rule and forms.

Background

Section 939A of the recently enacted Dodd-Frank Act requires Federal agencies within one year to: (i) Review regulations that require the use of an assessment of the credit-worthiness of a security or money market instrument; and (ii) to the extent those regulations contain any references to, or

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

[2] 17 CFR Parts 200, 229, 230, 232, 239, 240, and 249 [Release No. 33-9186; 34-63874; File No. S7-18-08]

[3] See section 939A, Public Law 111–203, 124 Stat. 1887 (July 21, 2010).

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requirements regarding credit ratings, remove such references or requirements. In place of such credit-rating based requirements, agencies are instructed to substitute appropriate standards for determining credit-worthiness. The new law further provides that, to the extent feasible, an agency should adopt a uniform standard of credit-worthiness for use in its regulations, taking into account the entities regulated by it and the purposes for which such regulated entities would rely on the credit-worthiness standard. At the conclusion of the review, each agency is required to transmit a report to Congress describing the modifications to its regulations that were made.

The Proposal amends rules and forms under the Securities Act of 1933[4] (Securities Act), and the Securities Exchange Act of 1934[5] (Exchange Act). Under the Securities Act, the Proposal amends Rules 134, 138, 139, 168, Form S-3, Form S-4, Form F-3, and Form F-4. The Proposal rescinds Form F-9 and amends the Securities Act and Exchange Act forms and rules that refer to Form F-9 to eliminate those references. The Proposal also amends Schedule 14A under the Exchange Act.

Forms S-3 and F-3 are the "short forms" used by eligible issuers to register securities offerings under the Securities Act. These forms allow eligible issuers to rely on reports they have filed under the Exchange Act to satisfy many of the disclosure requirements under the Securities Act. Form S-3 and Form F-3 eligibility for primary offerings also enables form eligible issuers to conduct primary offerings "off the shelf" under Securities Act Rule 415. Issuers that are eligible to register these primary "shelf" offerings under Rule 415 are permitted to register securities offerings prior to planning any specific offering and, once the registration statement is effective, offer securities in one or more tranches without waiting for further Commission action. To be eligible to use Form S-3 or F-3, an issuer must meet the form's eligibility requirements as to registrants, which generally pertain to reporting history under the Exchange Act, and at least one of the form's transaction requirements. One such transaction requirement permits offerings of non-convertible securities if they are rated investment grade (top four rating categories) by at least one nationally recognized statistical rating organization (NRSRO). Instruction I.B.2. provides that a security is "investment grade" if, at the time of sale, at least one NRSRO has rated the security in one of its generic rating categories, typically the four highest, which signifies investment grade.

The Proposal revises Instruction I.B.2. of Form S-3 and Form F-3 to provide that an offering of non-convertible securities is eligible to be registered on Form S-3 and Form F-3 if the issuer has issued at least $1 billion of non-convertible securities in transactions registered under the Securities Act, other than equity securities, for cash during the past three years (as measured from a date within 60 days of the filing of the registration statement) and satisfies the other relevant requirements of Form S-3 or Form F-3.

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[4] 15 U.S.C. 77a et seq.

[5] 15 U.S.C. 78a et seq.

MBA Position

MBA Supports a Robust Private Securitization Market

MBA strongly supports the return of robust market conditions for private market residential and commercial mortgage-backed securities (RMBS and CMBS, respectively). However, MBA cautions that changes in Forms S-3 and F-3 to limit shelf registration eligibility to issuers having issued at least $1billion in non-convertible securities over the past three years could have a detrimental impact on both the RMBS and CMBS markets. Our concerns are as follows:

- MBA believes that healthy RMBS and CMBS markets are represented by a large and diverse group of issuers. The proposed shelf registration rule would, as the Commission expressed in the Proposal, reduce the number of issuers that are eligible for shelf registration. Because the vast majority of both CMBS and RMBS are shelf registered, the exclusion of issuers of CMBS and RMBS not meeting the issuance threshold would have a two-fold effect: (1) it would reduce the current number of issuers; and, (2) it would limit future participants in the shelf registered market to those that meet the issuance qualification threshold. Unfortunately, this would have a “lock-in” effect for current issuers of CMBS and RMBS meeting the issuance threshold and reduce on both a contemporaneous and future basis the number and diversity of issuers. In addition to the recommendations provided in the next section, the Commission should also consider a path for inclusion of smaller issuers or issuers that may plan to issue securities in the future.

- Guiding the reliance of the Commission’s existing shelf registration regulations to investment grade ratings was their effort to limit shelf eligibility to higher quality securities. However, by replacing credit ratings with issuer volume to determine shelf eligibility, the Commission departs from linking shelf registration eligibility with securitization quality. Such a departure could have negative consequences on CMBS and RMBS investors.

- The proposed shelf registration qualification threshold would be especially problematic for the CMBS market. Over the past three years (2008-2010) only $28.1 billion in CMBS has been issued. Limiting shelf registration to issuers of at least $1billion over the past three years would severely limit the number of issuers that would be eligible for shelf registration. The timing of the Proposal could not be worse for the CMBS market because issuance activity and the number of issuers of CMBS have increased recently. The nascent improvement of the CMBS market could be brought to a halt if new and existing issuers of CMBS were barred from shelf registration because they did not meet the prescribed issuance threshold.

Consider Taking an Approach Similar to a Previously Proposed SEC Rule

MBA notes that reliance on NRSRO ratings in the federal regulations has been an area of active interest of the Commission and other federal regulatory agencies. In 2008, the Commission exposed for comment a proposed rule (the 2008 proposal) that would prohibit money market funds from relying on NRSRO ratings for securities purchase eligibility. Instead, the 2008 proposal would require that the money market fund’s board of directors determine that each portfolio investment present minimum credit risk and verify that the security is a “First Tier Security” or “Second Tier Security” for the purposes of the 2008 proposal. The board could then rely on its internal analysis or

that of an outside source, including an NRSRO rating, if it determines the rating to be credible, to make the determination if the security was in the First or Second Tier. The 2008 proposal would require the management of money market funds to make their own determination relating to the credibility of the NRSRO ratings and if they should be used in the analysis process for identifying First and Second Tier Securities. This would require management to affirm an NRSRO rating versus using it as a qualification test. The 2008 proposal was intended to address the lack of due diligence and the heavy reliance on NRSRO ratings by some purchasers.

This 2008 proposal strikes the appropriate balance between securities purchasers performing independent due diligence without eliminating the substantial amount of due diligence and analysis that went into developing NRSRO ratings. MBA believes that such an approach would be consistent with the intent of the Dodd-Frank Act of eliminating overreliance on NRSRO ratings in securities purchase decisions, while at the same time providing a securitization quality qualification for shelf registration eligibility. In addition, this function could also be served by qualified non-NRSRO CMBS and RMBS due diligence providers.

Increased NRSRO Ratings Transparency

MBA strongly supports efforts to increase transparency and reliability in credit ratings of securities backed by real estate. MBA is mindful that the financial services system has witnessed a tremendous increase in the level of complexity and sophistication in financing options, investment products and liquidity channels. Consequently, MBA has strongly supported efforts to increase the transparency of the ratings process and ratings data.

In terms of increased ratings transparency, the new Rule 17g dramatically increases the amount of public information and information made available to NRSROs in the following ways:

(1) Underlying data used to issue a rating must be disclosed to other NRSROS;
(2) Multiple non- solicited ratings opinions can develop for each RMBS and CMBS issue;
(3) 100 percent of ratings history will have to be disclosed within 12 months after its release for issuer-paid ratings for securities issued after June 25, 2007, and a random sample of 10 percent of all issuer-paid ratings;
(4) NRSROS will have to provide enhanced rating transitions reporting;
(5) NRSROS will have to provide enhanced record keeping of ratings performance;
(6) NRSROS will have to provide reduced rating agency staff conflicts; and,
(7) NRSROS will have to provide annual NRSRO reporting on rating activity.

While MBA supports the increased pre-issuance data disclosure of RMBS and CMBS, we are working with MBA members and the Commission to identify and reverse unintended consequences and market inefficiencies that certain RMBS and CMBS post-issuance disclosure requirements have caused. MBA notes that NRSRO ratings methodologies and terminology are both publicly available on NRSROs' websites and/or in publicly available published materials. In the case of CMBS and RMBS, NRSROs publish a detailed explanation of their evaluation criteria. The publicly available data on NRSRO ratings methodology, coupled with increased NRSRO reporting requirements will materially improve the transparency of the ratings process and facilitate analytic assessment of ratings.

Before moving forward with eliminating reliance on NRSRO ratings for shelf registration eligibility, the Commission should carefully evaluate Rule 17g to determine if the increased NRSRO ratings transparency coupled with CMBS and RMBS purchasers having to affirm NRSRO ratings would address the intent of Dodd-Frank Act of reducing the overreliance of rating in the RMBS and CMBS purchase decision process. In addition, MBA also supports qualified non-NRSRO CMBS and RMBS due diligence organizations providing analysis for determining shelf eligibility qualification.

MBA appreciates the opportunity to comment and request that you consider our concerns. Any questions about MBA's comments should be directed to George Green, Associate Vice President, Commercial Multifamily at (202) 571-234-7202 or ggreen@mortgagebankers.org or Michael Carrier, Associate Vice President, Secondary and Capital Markets at (202) 557-2870 or mcarrier@mortgagebankers.org.

Sincerely,

John A. Courson
President and Chief Executive Officer