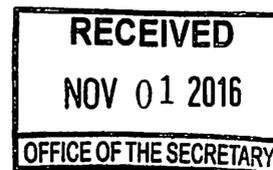


**HARD COPY**



**UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING  
File No. 3-16349**

----- X  
In the Matter of :  
 :  
 :  
       BARBARA DUKA :  
 :  
 Respondent. :  
 :  
----- X

**MEMORANDUM OF LAW OF RESPONDENT BARBARA DUKA IN OPPOSITION TO  
THE DIVISION'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY AND EXHIBITS  
REFERENCING THE FINDINGS AND CONCLUSIONS OF STANDARD & POOR'S  
INTERNAL INVESTIGATIONS AND IN RESPONSE TO THE DIVISION OF  
ENFORCEMENT'S OBJECTIONS TO RESPONDENT'S EXHIBITS**

**PETRILLO KLEIN & BOXER LLP**

655 Third Avenue, 22nd Floor  
New York, New York 10017  
Telephone: (212) 370-0330  
Facsimile: (212) 370-0391

*Attorneys for Barbara Duka*

Dated: New York, New York  
October 31, 2016

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT .....1

FACTUAL BACKGROUND .....3

    1. January 2011 Inquiry .....3

    2. July 2011 Inquiry .....6

ARGUMENT .....6

    I. The Broad Relief That the Division Seeks is Premature .....6

    II. The Barnes Email Should not be Excluded .....8

        A. The Barnes Email is Relevant, Material, and Reliable  
            Under Rule 320 .....8

        B. The Barnes Email is Admissible as a Business Record .....10

        C. The Barnes Email is Admissible for Non-Hearsay Purposes .....12

    III. The Division’s Motion to Exclude the “Byrnes Report”  
            Attacks a Mirage and Should be Summarily Dismissed.....13

    IV. The Division’s Objections .....14

CONCLUSION.....15

## TABLE OF AUTHORITIES

### Cases

<i>Coker v. Dallas Cty. Jail</i> , No. 05 Civ. 005 (MBH), 2009 WL 1953038 (N.D. Tex. Feb. 25, 2009).....	11
<i>Crimm v. Missouri Pac. R. Co.</i> , 750 F.2d 703 (8th Cir. 1984).....	10
<i>Del Mar Fin. Servs., Inc.</i> , Release No. 48691, 2003 WL 22425516 (Oct. 24, 2003) .....	6
<i>Grogg v. Mo. Pac. R.R. Co.</i> , 841 F.2d 210 (8th Cir. 1988).....	11
<i>In re Calais Res. Inc.</i> , Release No. 67312, 2012 WL 2499349 (June 29, 2012).....	6
<i>Insignia Sys. Inc. v. News Am. Mktg. In-Store, Inc.</i> , 04 Civ. 4213 (JRT), 2011 WL 382964 (D. Minn. Feb. 3, 2011) .....	11
<i>J. H. Rutter Rex Mfg. Co. v. NLRB</i> , 473 F.2d 223 (5th Cir. 1973).....	11
<i>Kobie v. Fifthian</i> , 12 Civ. 98 (SPC), 2014 WL 1652421 (M.D. Fla. Apr. 23, 2014) .....	8
<i>Lego v. Stratos Int’l, Inc.</i> , 02 Civ. 03743 (JW), 2004 WL 5518162 (N.D. Cal. Nov. 4, 2004).....	8
<i>Luce v. United States</i> , 469 U.S. 38 (1984).....	7
<i>Rogers v. City of Baton Rouge</i> , 14 Civ. 170 (RLB), 2016 WL 4035328 (M.D. La. July 25, 2016).....	10
<i>United States v. Baker</i> , 693 F.2d 183 (D.C. Cir. 1982) .....	11
<i>United States v. Etienne</i> , 772 F.3d 907 (1st Cir. 2014) .....	12
<i>United States v. King</i> , 613 F.2d 670 (7th Cir. 1980) .....	10
<i>United States v. Parnell</i> , 32 F. Supp. 3d 1300 (M.D. Ga. 2014).....	7
<i>Wechsler v. Hunt Health Sys., Ltd.</i> , 94 Civ. 8294 (PKL), 2003 WL 21998985 (S.D.N.Y. Aug. 22, 2003).....	7
<i>Wilson v. Zapata Off-Shore Co.</i> , 939 F.2d 260 (5th Cir. 1991).....	11
<i>Yee v. UBS O’Connor, LLC</i> , 07 Civ. 7150, 2010 WL 1640192	

(N.D. Ill. Apr. 22, 2010) ..... 12

**Regulations**

17 C.F.R. § 201.320(a)..... 6

17 C.F.R. § 201.320(b) ..... 6

Respondent Barbara Duka (“Duka”) respectfully submits this memorandum of law in opposition to the Division’s Motion *in Limine* to Exclude Testimony and Exhibits Referencing the Findings and Conclusions of Standard & Poor’s Internal Investigations<sup>1</sup> and in Response to the Division of Enforcement’s Objections to Respondent’s Exhibits.<sup>2</sup>

### PRELIMINARY STATEMENT

The Division’s submission reflects amnesia and oversight that is, at a minimum, perplexing.

- Respondent identified approximately 500 emails produced by S&P on Respondent’s Exhibit List. The Division writes that “[v]irtually all of the emails listed as Respondent’s Exhibits 120 through 642 may constitute inadmissible hearsay if offered for the truth of the matters asserted,” *see* Divisions Objections at 2. **But Division Exhibit 337, attached as Exhibit 1 hereto, is a declaration that the Division obtained from S&P, which certifies that all of the documents produced by S&P constitute business records under Federal Rule of Evidence 803(6). Ex. 1 (Division’s Exhibit 337), Declaration of Michael Chung Certifying Records of Regularly Conducted Business Activity, dated August 10, 2015 (documents “bearing production numbers SP-CMBS 00000001 through SP-CMBS 02472313” were: “(a) kept in the course of regularly conducted business activity; (b) made by the regularly conducted business activity as a regular practice; and (c) with respect to e-mail correspondence, were made at or near the time of the occurrence of the matters set forth therein, by, or from information transmitted by, a person with knowledge of those matters.”).** The emails, accordingly, are all admissible for the truth.
- The Division states that “neither Barnes nor Byrnes was a percipient witness to any of the events that are at issue in this hearing.” Division MIL at 6. **But, both Barnes and Byrnes are identified on the Division’s Witness List.**
- The Division states that “Byrnes is not on either party’s witness list.” Division MIL at 6 n. 3. **Byrnes is identified on the Division’s Witness List.**
- The Division moves to exclude the “Byrnes Report,” defined as a “memorandum on May 24, 2012” that was authored by Bernard Byrnes, as “irrelevant.” *See* Division MIL at 6. **But, the Byrnes Report does not appear on Respondent’s Exhibit List and, even more bizarre, was cited by the Division in the OIP.** Is the Division litigating against itself? Did it cite material in the OIP that it does not view as relevant to prejudice Respondent?

---

<sup>1</sup> The Division’s Motion *in Limine* to Exclude Testimony and Exhibits Referencing the Findings and Conclusions of Standard & Poor’s Internal Investigations is cited as “Division MIL.”

<sup>2</sup> The Division of Enforcement’s Objections to Respondent’s Exhibits are cited as “Division’s Objections.”

Needless to say, and with respect, it is very late in this proceeding for the Division to waste the time of counsel and the Court on motion practice and objections of this self-contradictory, vacuous variety. At present, we merely ask the Court to caution the Division, reserving any sanctions motion for the future should similar conduct repeat.

Next, the Division seeks broadly to exclude “[t]estimony and [e]xhibits [r]eferencing the [f]indings and [c]onclusions” of S&P’s internal investigations, *see* Division MIL at 1, and “any characterizations of witness’s prior statements,” Division MIL at 4, even though the documents that “reference” S&P’s “findings and conclusions” might be admissible in parts for purposes other than the truth, as is the case with respect to Respondent’s Exhibit 355. *See* Ex. 2 (Respondent’s Exhibit 355), January 8, 2011 Email from Neri Bukspan to Susan Barnes re. FW: Communication (“Barnes Email”). The Division’s motion is, therefore, premature.

Respondent agrees that lay or expert opinion as to Duka’s state of mind (by anyone other than Duka) is not relevant, and that S&P’s findings and conclusions as to state of mind are not probative on the ultimate issue of scienter, although parts of reports that contain such conclusions may be relevant for other purposes (such as the standards of S&P control functions against which a negligence claim may be assessed).

More generally, concerning the broad relief sought by the Division, this Court should decline the Division’s invitation to exclude blindly broad categories of documents and testimony in the absence of any context. Through focus on the Barnes Email, we illustrate below why such an unrefined approach would be unwarranted. In context, contrary to the Division’s position, this email is relevant, admissible as a business record, and admissible for non-hearsay purposes.

Accordingly, the Division's motion to exclude "[t]estimony and [e]xhibits [r]eferring the [f]indings and [c]onclusions" of S&P's internal investigations, *see* Division MIL at 1, and "any characterizations of witness's prior statements," Division MIL at 4, should be denied as premature, the Division's motion to exclude the Barnes Email should be denied, and the Division's motion to exclude the Byrnes Report should be denied because it seeks relief concerning an issue that is not presented.

### **FACTUAL BACKGROUND**

S&P conducted two internal inquiries concerning the CMBS Group's use of the higher of the actual constant and the 50/50 average of the actual constant and the constant listed in Table 1 of the 2009 Criteria ("Blended Constant") in the DSCR term-default test.

#### **1. January 2011 Inquiry**

On January 6, 2011, Kim Diamond, a former S&P employee, sent an email to Patrick Milano, then S&P's Executive Vice President of Operations, forwarding a complaint she received from a current S&P employee, alleging, among other things, that Duka was "using an average of the in-place interest [sic] rate and the criteria constants" because S&P was not obtaining a sufficient number of CMBS conduit-fusion rating engagements. Division's Exhibit 321. The same day, Milano forwarded the same to Neri Bukspan, the Chief Quality Officer of S&P, David Vignola, the Chief Compliance Officer for Rating Services, and David Leibowitz, Global Chief Compliance Officer of S&P. Division's Exhibit 157.

Shortly thereafter, Bukspan assigned Susan Barnes, the Quality Officer for Structured Finance, to investigate whether Blended Constants were being used "for improper commercial purposes." *See* Division MIL at 2.

S&P described the function of the Quality Group as follows:

**The primary responsibility of our quality officers is to support the overall quality of our ratings and the *proper application of criteria in the ratings process*. Quality officers concentrate on specific analytical teams and/or regions and are responsible for the overall quality of the ratings and ratings surveillance. Among other things, quality officers help to assess the reasons behind unexpected ratings performance to determine if these occurrences are individual outliers or if they indicate a potential issue with the criteria or how the criteria were calibrated and applied. They are also responsible for ratings-related policy compliance.**

Ex. 3 (Respondent's Exhibit 102), "Guide to Credit Ratings Criteria: Why Criteria are important and how they are applied," Standard & Poor's Publication, at SP-CMBS 02339911 (emphasis added); *see also* Ex. 4 (Respondent's Exhibit 687), "Structured Finance: North America CMBS New Issue Rating Procedures, Standard & Poor's Publication, dated January 14, 2011, at SP-CMBS 01476690 (CMBS Quality Officer is "[t]he person responsible for monitoring consistent *application of rating criteria* and methodologies with the CMBS area.") (emphasis added).

On January 7, 2011, in the Barnes Email, Barnes, acting within the scope of her duties as Quality Officer, reported the findings of her investigation to Bukspan. Barnes explained that she "had separate discussions with" Majid Geramian, the CMBS Criteria Officer, and Frank Parisi, the Chief Criteria Officer for Structured Finance, and further stated as follows:

**Frank stated that he had a couple of conversations with Barbara and Eric Thompson on the use of the criteria constants versus the in-place interest rates. Frank recalled first discussing with them the need to document and substantiate any request for criteria exceptions. Upon further review Barbara presented and discussed with Frank the analytic results of the analysis when applying both methods. In addition, they discussed the differences of the market and property characteristics to those of the archetypical loan. Frank decided that since the characteristics differed from the archetypical pool, the criteria assumptions used could be tailored to the property characteristics and no criteria needed to be modified or created. In essence this is a question of criteria application not a criteria change. In that same meeting they decided it was appropriate to use the average of the in-place interest rate and the criteria constant where the property characteristics differed from the archetypical pool as those discussed in that meeting. This is the practice referenced by the author of the email.**

Ex. 2 at SP-CMBS 01654474. Barnes concluded her email by stating, "I do think the CMBS AMs should explicitly communicate the application of the criteria assumptions referenced . . . above to the analytic staff. I will follow up with Barbara Duka on this point." *Id.* at SP-CMBS 01654474-75.

On January 18, 2011, Barnes, consistent with her email, had a discussion with Duka.

See Respondent Exhibits 363-64. On January 23, 2011, Duka sent the following email to

Barnes:

**Susan**

**As a followup to our conversation, for the following deals we provided feedback which incorporated looking at both the actual constant and S&P constants. Of these deals, we were asked to rate FREMF K701, JPM 2011-C3 and MSC 2011-C1. For most of the others, we lost the transactions due to criteria. For FREMF K11, we are still waiting to hear whether we will be asked to rate the transaction.**

**DBUBS 2001-C2  
FREMF K701  
JPM 2011-C3  
FREMF K11  
WF-RBS Commercial Mortgage Trust 2011-C2  
COMM 2011-C2  
MSC 2011-C1**

**If you would like, I can forward you the presales when we have conducted our rating process and published our rationale (which my analysts typically do anyway).**

Ex. 5 (Respondent's Exhibit 371), January 23, 2011 Email from Susan Barnes to Barbara Duka re: Re: Followup. Barnes responded later that morning:

**Thanks, I'll look for the analysis in RDR for the application of the criteria and may need to follow up with the analysts if Oi [sic] have questions. Thanks, Susan**

*Id.*

## 2. July 2011 Inquiry

The second inquiry occurred following S&P's publication of preliminary ratings on GSMS 2011-GC4. The Division's misleading characterizations aside,<sup>3</sup> this second inquiry led to the issuance of, among other reports and memoranda, a Targeted Post Event Review ("TPER") published by the Quality Department, and certain memoranda, including the Byrnes Report, published by the Compliance Department.

### ARGUMENT

Rule 320(a) of the SEC's Rules of Practice provides that "the hearing officer . . . shall exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unreliable." 17 C.F.R. § 201.320(a). Rule 320(b) provides that "evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." 17 C.F.R. § 201.320(b); *see also In re Calais Res. Inc.*, Release No. 67312, 2012 WL 2499349, at \*4 n. 19 (June 29, 2012) (hearsay is admissible in SEC administrative proceedings, and is evaluated "based on its probative value, its reliability and the fairness of its use."). The Commission has "stated on numerous occasions that the Federal Rules of Evidence . . . are not applicable to our administrative proceedings which favor liberality in the admission of evidence." *Del Mar Fin. Servs., Inc.*, Release No. 48691, 2003 WL 22425516, at \*8 (Oct. 24, 2003).

#### I. The Broad Relief That the Division Seeks is Premature

But for the identification of two documents, which are discussed further below, the Division asks this Court, in the abstract, to exclude "[t]estimony and [e]xhibits [r]eferencing the [f]indings and [c]onclusions" of S&P's internal investigations, *see* Division MIL at 1, and "any

---

<sup>3</sup> The Division's assertion that the inquiry took place "after the use of blended constants in the ratings for CMBS was finally discovered by senior management at S&P," *see* Division MIL at 3, is misleading because the hearing evidence will show that Parisi approved the use of Blended Constants, and Barnes, who reported to senior management, knew about them before they were used as part of the analysis of the transactions in issue.

characterizations of witness's prior statements," Division MIL at 4, on the offered grounds that it would be irrelevant "improper lay testimony," contain "double hearsay," and lack probative value sufficient to outweigh its prejudice. The Division's request should be denied as premature.

The Court does not now know, for example, for what purpose or purposes the Respondent will move documents in evidence that would be subject to the Division's broad request for exclusion. *See Wechsler v. Hunt Health Sys., Ltd.*, 94 Civ. 8294 (PKL), 2003 WL 21998985, at \*3 (S.D.N.Y. Aug. 22, 2003) (denying a motion *in limine* as premature because "[n]ot only has plaintiff not indicated whether he will indeed seek to move these documents into evidence, but perhaps more importantly, the Court is unaware of the purpose for which plaintiff would move these documents into evidence if he elected to do so, i.e. whether plaintiff will seek to offer these documents for the truths of the matters asserted therein."). Accordingly, it is not practicable for the Court to judge whether any evidence that the Division seeks now to exclude is admissible under Rule 320 (or for that matter, whether such evidence is admissible under the Federal Rules of Evidence because of a hearsay exception or because the evidence is being offered for a non-hearsay purpose).<sup>4</sup> *See Luce v. United States*, 469 U.S. 38, 41 (1984) (courts are "handicapped in any effort to rule on subtle evidentiary questions outside a factual context"); *see also United States v. Parnell*, 32 F. Supp. 3d 1300, 1304 (M.D. Ga. 2014) ("Without testimony and evidence to provide factual context, a ruling on the Government's motion would be premature."). Here, for example, the grounds in support of admission of the Barnes Email --- see below -- demonstrate the pitfalls of any ruling to exclude broad categories of evidence without context.

---

<sup>4</sup> The Division's claim that "statements by witnesses who are expected to testify at the hearing" are "second-level hearsay" is belied by Division's Exhibit 337. *See* Division MIL at 1-2

Accordingly, the Division's motion should be denied as premature. *See Kobie v. Fifthian*, 12 Civ. 98 (SPC), 2014 WL 1652421, at \*2 (M.D. Fla. Apr. 23, 2014) ("Without knowing which statement(s) Plaintiff challenges, the Court cannot rule on its admissibility before trial . . . In essence, Plaintiff invites the Court to blindly rule that all statements Mr. Lee made to Defendant Fifthian are inadmissible hearsay. The Court declines his invitation."); *Lego v. Stratos Int'l, Inc.*, 02 Civ. 03743 (JW), 2004 WL 5518162, at \*1 (N.D. Cal. Nov. 4, 2004) ("Plaintiffs' motion in limine number 2, to preclude from evidence notes purportedly taken by Jack Raymer is denied as premature. The Court will await Mr. Raymer's testimony at trial to determine whether the notes can be authenticated, are being offered for a non-hearsay purpose, fall within a hearsay-exception, or are admissible as a past recorded recollection.") (internal citations omitted).

## **II. The Barnes Email Should not be Excluded**

The Barnes Email is relevant, material, reliable, admissible as a business record and admissible for non-hearsay purposes.

### **A. The Barnes Email is Relevant, Material, and Reliable Under Rule 320**

The Barnes Email is quite relevant and is not, as the Division asserts, "improper lay opinion testimony."

In the Barnes Email, Barnes wrote that Parisi "decided that since the characteristics differed from the archetypical pool . . . no criteria needed to be modified or created," because "[i]n essence[,] this is a question of criteria application not a criteria change." Barnes further notes that "[i]n that same meeting [among Parisi, Duka, and Thompson] they decided it was appropriate to use the average of the in-place interest rate and the criteria constant where the property characteristics differed from the archetypical pool as those discussed in that meeting."

The Barnes Email thus directly contradicts the Division's claim that "Duka unilaterally concluded that she had obtained [Parisi's] approval for use of the blended constants," because Parisi "denies that he gave any approval to Duka for the CMBS Group to broadly use blended constants." OIP ¶¶ 30-31. It is also contrary to the Division's claim that "even if" Parisi provided such approval, that Duka was negligent in believe that would satisfy "the Criteria Process Guidelines." OIP at ¶ 30. Barnes was a senior member of the Quality Department, a control function that was specifically assigned the task to ensure "the proper application of criteria in the ratings," and, as the Barnes Email manifests, was persuaded by her interviews that Parisi's approval was sufficient to use Blended Constants. In short, portions of the Barnes Email are directly relevant and material to Duka's defense.

Finally, the Barnes Email is reliable, as it reflects the nearly contemporaneous notes of Barnes, a senior member of the Quality Group, regarding her interview of Parisi. And, the evidence will show that, after she sent the Barnes Email, Barnes spoke with Parisi a second time about the CMBS Group's use of the Blended Constant. *See* Division MIL at 2 ("In connection with her inquiry, Barnes spoke at least twice with Dr. Frank Parisi"). That Barnes, following this second interview, did not correct any of the representations that she had made to Bukspan further evidences the reliability of the Barnes Email.<sup>5</sup>

---

<sup>5</sup> The Division's contention that the Barnes Email is unreliable contradicts its reliance on the Barnes Email as support for the allegations in its settled OIP with S&P that "[t]he Criteria Group knew that the CMBS Group was considering changes to the methodology for calculating DSCRs, and that the Quality Group was investigating such possible changes." *See* Order at ¶ 33(c), *In re Standard & Poor's Rating Services*, Admin. File No. 3-16348, Release No. 9705 (Jan. 21, 2015) available at <https://www.sec.gov/litigation/admin/2015/33-9705.pdf>. In addition, a *Brady* letter from the Staff confirms that CMBS Criteria Officer Geramian has reported to the Division that he spoke with Parisi in December 2010, and that Parisi told Geramian that Parisi had approved use of the Blended Constants as a general application of Criteria.

## **B. The Barnes Email is Admissible as a Business Record**

Division's Exhibit 337 establishes the elements of the business records exception for the Barnes Email under FRE 803(6), which is in accord with the many courts that have held that reports of internal compliance investigations are admissible as business records when carried out according to established processes. *See Rogers v. City of Baton Rouge*, 14 Civ. 170 (RLB), 2016 WL 4035328, at \*8 n. 4 (M.D. La. July 25, 2016); *Crimm v. Missouri Pac. R. Co.*, 750 F.2d 703, 709 (8th Cir. 1984) ("Even if we accept appellant's argument that the records are hearsay, they are admissible under the business records exception. MoPac had a written policy requiring that in an investigation of sexual harassment the conversations of those interviewed 'should be documented through written memoranda.' Shoener was directed to conduct an investigation and to prepare such memoranda. Shoener took handwritten notes during the interviews and added to them shortly after the interviews. The typewritten report was prepared from the notes. Only six or seven days elapsed from the beginning of the investigation to the completion of the report. The notes and report were prepared nine months before any complaint or suit had been filed and the notes and report were maintained at the MoPac office."); *United States v. King*, 613 F.2d 670, 673 (7th Cir. 1980) (finding social security investigative reports admissible under Rule 803(6)).

Under this principle, the business records exception allows for the admission of Parisi's statements to Barnes as described in the Barnes Email. As the Fifth Circuit has explained:

Double hearsay in the context of a business record exists when the record is prepared by an employee with information supplied by another person. If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused. However, if the source of the information is an outsider, as in the facts before us, Rule 803(6) does not, by itself, permit the admission of the business record.

*Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 271 (5th Cir. 1991) (internal citation omitted); see also *Grogg v. Mo. Pac. R.R. Co.*, 841 F.2d 210, 213 (8th Cir. 1988) (same); *United States v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982) (same). Because both Barnes and Parisi were acting as S&P employees “in the regular course of business” when their conversation occurred, the portions of the Barnes Email that recounts what Parisi told Barnes are admissible for the truth of the matter asserted.<sup>6</sup> See *Insignia Sys. Inc. v. News Am. Mktg. In-Store, Inc.*, 04 Civ. 4213 (JRT), 2011 WL 382964, at \*7 (D. Minn. Feb. 3, 2011) (“Lucidi testified that the email documenting the phone conversation reflected ‘what I was being told as the person was talking to me.’ The conversation and notes appear to have been created in connection with a business conversation, and it is reasonable that those in business meetings often keep notes of those meetings in the regular course of business. Further, both parties to the conversation were discussing issues relevant to their work, and nothing in the notes or testimony indicates that the conversation strayed in any way beyond a strictly business discussion. The Court finds the document admissible as a business record under Rule 803(6).”) (internal citations omitted); *Coker v. Dallas Cty. Jail*, No. 05 Civ. 005 (MBH), 2009 WL 1953038, at \*5-\*6 (N.D. Tex. Feb. 25, 2009) (“The portions of the Sweet Affidavit and jail records to which Plaintiff objects consist of incident reports, disciplinary board proceedings, a note from the jail infirmary, and statements by the records custodian based on the information therein . . . The jail records recount investigations

---

<sup>6</sup> The cases cited by the Division do not call this authority into question. Instead, with the exception of *J. H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223 (5th Cir. 1973) (“*J.H. Rutter*”), the cases cited by the Division address whether a “third party’s characterization” of a witness’ statement may be used for impeachment under FRE 613. See Division MIL at 7-8. *J.H. Rutter*, which the Division claims generally “address[es] the dangers of unreliability from double hearsay in investigative interview notes,” see *id.* at 7 (emphasis added), is also inapposite. Here, there is no first level of hearsay because the Barnes Email is a business record. See Ex. 1. And, Barnes will testify at the hearing, rendering the concern expressed in *JH Rutter* regarding “second level hearsay” inapplicable. See *J.H. Rutter*, 473 F.2d at 240 (“Not only would we be allowing the interviewer’s notes of what the claimant said to be used for disputing the truth of what the claimant was alleging (one level of hearsay), we would be ascending to the second level of hearsay because there is no guarantee that the author of the rough interview notes in each file would be available to testify as to the accuracy of his own recorded impression.”) (emphasis added).

performed by the Jail staff or incident reports by jail staff or medical personnel. Although the impetus for some of the investigations were reports from unidentified inmates, Jail staff investigated the anonymous reports and summarized their own findings in the jail records. Since employees of the Dallas County Sheriff's Department and its medical staff acted in the regular course of business in preparing the jail records, instances of multiple hearsay are excused by the business records exception.”) (internal citations omitted).<sup>7</sup>

**C. The Barnes Email is Admissible for Non-Hearsay Purposes**

The Barnes Email is also admissible for two non-hearsay purposes.

First, the Barnes Email is admissible for the non-hearsay purpose of providing background to Respondent's Exhibit 371, *see, e.g., United States v. Etienne*, 772 F.3d 907, 915 (1st Cir. 2014) (“providing background” as sufficient non-hearsay purpose); *Yee v. UBS O'Connor, LLC*, 07 Civ. 7150, 2010 WL 1640192, at \*2 (N.D. Ill. Apr. 22, 2010) (“Defendants offer the Rode portion of the email for the legitimate non-hearsay purpose of showing context for plaintiff's response.”). Respondent's Exhibit 371 evidences Duka's good faith, in that Duka offered to send Barnes the presale reports when they were drafted. It also demonstrates that Duka was aware that Barnes was reviewing the CMBS Group's use of the Blended Constant before S&P published any of the Presale Reports for the 2011 Conduit-Fusion Transactions, making it less plausible that Duka harbored *scienter* two weeks later, when the first presale was published on February 4, 2011.<sup>8</sup>

---

<sup>7</sup> Even were the Barnes Email not admissible for the truth as a business record, Respondent would request an opportunity at the hearing to demonstrate that the Barnes Email is admissible under the residual hearsay exception. *See* Fed. R. Evid. 807.

<sup>8</sup> MSC 2011-C1, FREMF 2011-K701, JPMCC 2011-C3, FREMF 2011-K11, FREMF 2011-K13, JPMCC 2011-C4, GSMS 2011-GC4, and FREMF 2011-K14 are collectively referred to as the “2011 Conduit-Fusion Transactions.”

Also, without the Barnes Email, the chronology of the January 2011 inquiry would be incomplete. If the Division's approach were improvidently followed, the Division would be free to offer the anonymous complaint into evidence, *see* Division's Exhibit 321,<sup>9</sup> and the Respondent would be unfairly prevented from completing the chronology concerning the resolution of that complaint.

Next, the Barnes Email bears on Barnes' awareness that the CMBS Group was using the "average of the in-place interest rate and the criteria constant" in January 2011, *see* Barnes Email, thus contradicting the Division's claim that "Barnes' inquiry did not uncover the fact that Duka's CMBS group had switched from using an S&P stressed loan constant to a 50/50 blend of the stressed loan constant and the actual loan constant." Division MIL at 3.

Barnes' knowledge also lends support to the reasonableness of Duka's belief that use of the Blended Constant was consistent with criteria. Barnes, after all, was specifically charged with ensuring that the CMBS Group rated transactions consistent with criteria, knew that the CMBS Group was not using Table 1 Constants exclusively, and did not lodge an objection, either in the Barnes Email or anywhere else.

### **III. The Division's Motion to Exclude the "Byrnes Report" Attacks a Mirage and Should be Summarily Dismissed**

The Division's motion to exclude the document identified as the "Byrnes Report" is peculiar. The Byrnes Report is **not** on the Respondent's Exhibit List. Adding insult to injury, the Division now calls the Byrnes Report "irrelevant," *see* Division MIL at 6, even after citing its findings in Paragraph 47 of the OIP. Even stranger, the Division states that "Byrnes is not on

---

<sup>9</sup> Depending on whether and for what purpose the Division offers the complaint into evidence, Respondent may object to its introduction.

either party's witness list, *see* Division MIL at 6 n. 3, when is he identified **on the Division's Witness List**. The Division's motion should be denied.

**IV. The Division's Objections**

Although we will not burden the Court with responses to the hundreds of blanket objections the Division has asserted with respect to Respondent's Exhibits, we note that the Division's claim that "[v]irtually all of the emails listed as Respondent's Exhibits 120 through 642 may constitute inadmissible hearsay if offered for the truth of the matters asserted," Division's Objections at 2, is flatly defeated by Exhibit 2, Division Exhibit 337, a business records declaration procured by the Division from S&P. This declaration establishes the elements of the business records exception for each of these documents. The emails are thus admissible.

## CONCLUSION

For the foregoing reasons, Duka respectfully requests that the Division's motion to exclude "[t]estimony and [e]xhibits [r]eferencing the [f]indings and [c]onclusions" of S&P's internal investigations, *see* Division MIL at 1, and "any characterizations of witness's prior statements," Division MIL at 4, be denied as premature; that the Division's motion to exclude the Barnes Email be denied; and that the Division's motion to exclude the Byrnes Report be denied as demanding relief where no dispute exists.

Dated: October 31, 2016  
New York, New York

Respectfully submitted,

PETRILLO KLEIN & BOXER LLP

By:  \_\_\_\_\_

Guy Petrillo  
(gpetrillo@pkbllp.com)

Daniel Goldman  
(dgoldman@pkbllp.com)

Theresa Gue  
(tgue@pkbllp.com)

655 Third Avenue, 22<sup>nd</sup> Floor  
New York, New York 10017  
Telephone: (212) 370-0330  
Facsimile: (212) 370-0391



3. Attached hereto as Exhibit 2 is a true and correct copy of Respondent's Exhibit 355, an email from Neri Bukspan to Susan Barnes re. FW: Communication, dated January 8, 2011 and bearing bates numbers SP-CMBS 01654473 to SP-CMBS 01654475.

4. Attached hereto as Exhibit 3 is a true and correct copy of an excerpt of Respondent's Exhibit 102, a Standard & Poor's publication entitled "Guide to Credit Ratings Criteria: Why Criteria are important and how they are applied," bearing bates numbers SP-CMBS 02339901 to SP-CMBS 02339913.

5. Attached hereto as Exhibit 4 is a true and correct copy of an excerpt of Respondent's Exhibit 687, a Standard & Poor's publication entitled "Structured Finance: North America CMBS New Issue Rating Procedures, dated January 14, 2011, bearing bates numbers SP-CMBS 01476646 to SP-CMBS 01476692.

6. Attached hereto as Exhibit 5 is a true and correct copy of Respondent's Exhibit 371, an email from Susan Barnes to Barbara Duka re: Re: Followup, dated January 23, 2011 and bearing bates number SP-CMBS 00379948.

7. I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.

Dated: New York, New York  
October 31, 2016

  
\_\_\_\_\_  
Daniel Goldman

Petrillo Klein & Boxer LLP  
655 Third Avenue, 22<sup>nd</sup> Floor  
New York, New York 10017

*Attorneys for Respondent Barbara Duka*

# Exhibit 1

**DECLARATION OF MICHAEL CHUNG CERTIFYING RECORDS  
OF REGULARLY CONDUCTED BUSINESS ACTIVITY**

I, the undersigned, Michael Chung, pursuant to 28 U.S.C. § 1746, declare that:

1. I am employed by Standard and Poor's Ratings Services ("S&P") in the eDiscovery, Compliance & Digital Forensics Department.
2. In connection with my position at S&P, I am responsible for assisting in the preservation and collection of documents in connection with government investigations and litigation, and I am familiar with S&P's recordkeeping practices and systems.
3. By reason of my position I am authorized and qualified to make this declaration.
4. I certify that the documents produced by S&P in connection with the Securities and Exchange Commission's investigation that resulted in the Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act of 1933 and Sections 15E(D) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order dated January 21, 2015 and bearing production numbers SP-CMBS 00000001 through SP-CMBS 02472313 and SP-CMBS 00SUPP1 through SP\_CMBS 00SUPP5 are true copies of records that were:
  - (a) kept in the course of regularly conducted business activity;
  - (b) made by the regularly conducted business activity as a regular practice; and
  - (c) with respect to e-mail correspondence, were made at or near the time of the occurrence of the matters set forth therein, by, or from information transmitted by, a person with knowledge of those matters.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York  
August 10, 2015

By:   
\_\_\_\_\_  
Michael Chung

Sworn to before me this  
10<sup>th</sup> day of August 2015

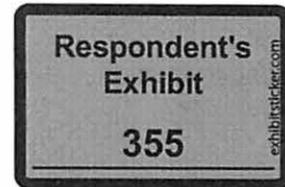
  
\_\_\_\_\_  
HANS PODZUN NOTARY PUBLIC

**HANS PODZUN**  
NOTARY PUBLIC  
630-4400 HAZELBRIDGE WAY  
RICHMOND, BC V8X 3R8  
PHONE: (604) 278-1101  
A Commissioner for taking Affidavits  
for British Columbia  
PERMANENT COMMISSION



# Exhibit 2

**From:** Bukspan, Neri  
**Sent:** Saturday, January 08, 2011 6:28 PM  
**To:** Barnes, Susan  
**Subject:** FW: Communication

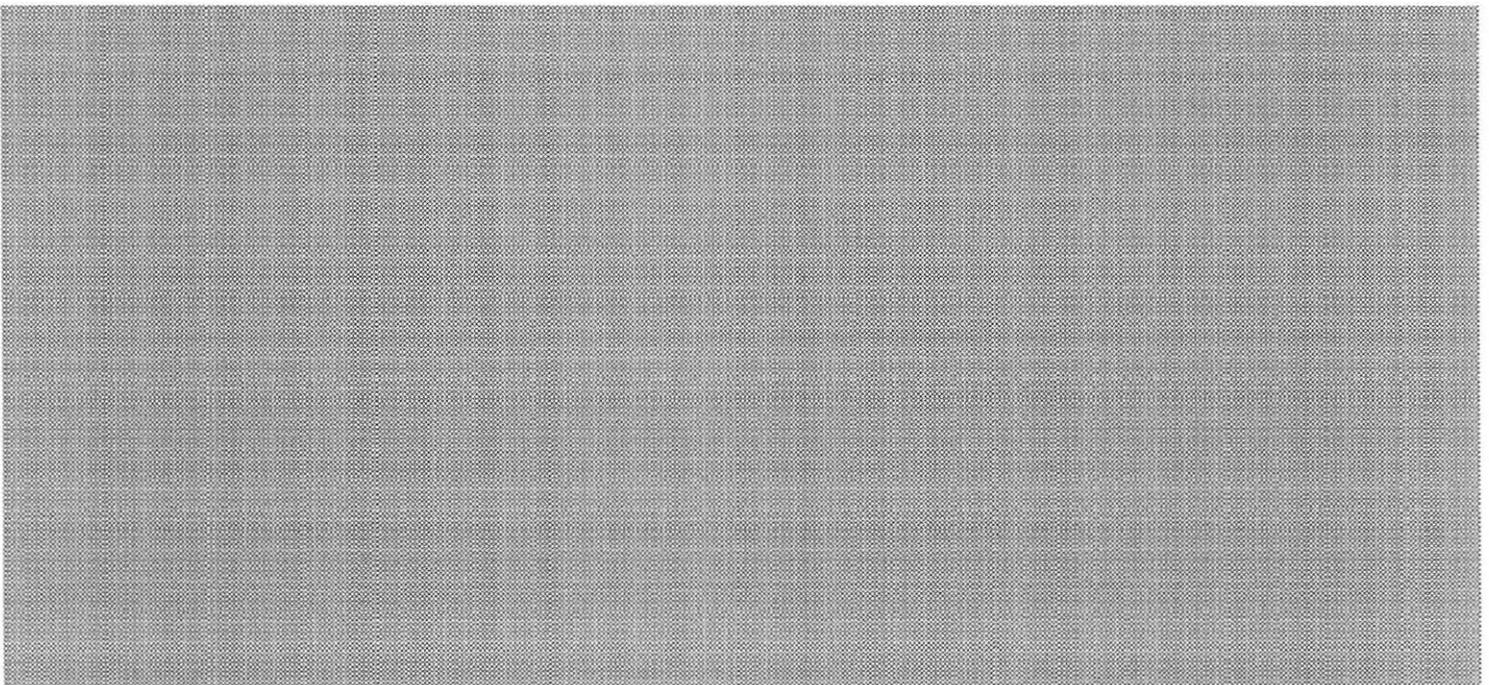


Susan,

Just noted that I neglected to cc you on this.

---

**From:** Bukspan, Neri  
**Sent:** Friday, January 07, 2011 2:14 PM  
**To:** Milano, Patrick; Leibowitz, David; Vignola, David  
**Cc:** Manzi, Rosaleen  
**Subject:** Fw: Communication



---

**From:** Barnes, Susan  
**To:** Bukspan, Neri  
**Sent:** Fri Jan 07 13:53:37 2011  
**Subject:** RE: Communication

This is in the pre-rating process and may be reflected in a preliminary rating if issued post agreed upon criteria application. It may possibly be picked up in a file review this month from November production but most likely next month from December ratings. This would only impact new issue ratings.

I could check to see if the agreed upon criteria application was applied or the criteria constant per the archetypical pool. However to be clear, I believe the 'blended approach' for the application of the criteria was appropriately determined and a rating committee may use either approach depending upon the property characteristics as it deems appropriate.

---

**From:** Bukspan, Neri  
**Sent:** Friday, January 07, 2011 12:49 PM

**To:** Barnes, Susan  
**Subject:** Re: Communication

Susan,

Thanks. One point of clarification re: application of criteria and as discussed yesterday. Is this on issues during the pre rating levels analysis or now can be observed through file reviews. If the answer is yes (I) have we done any for these and if so whether we concluded criteria were properly applied or (II) do you think we should consider going through one or two.

Thx.

---

Neri Bukspan  
neri\_bukspan@standardandpoors.com  
212/438-1792

---

**From:** Barnes, Susan  
**To:** Bukspan, Neri  
**Sent:** Fri Jan 07 10:57:38 2011  
**Subject:** Communication

Neri,  
Following our discussion yesterday, I had separate discussions with Majid Geramian and Frank Parisi. The criteria committee alluded to in the email occurred earlier this week and was attended by both of them. I've determined this was the committee referenced in the email based on my conversation with Frank who stated that in that meeting they discussed the large loan criteria, specifically cashflow stresses addressing business cycle, as well as this is the only CMBS criteria committee thus far attended by Majid, so it seems reasonable to assume this is the meeting referenced in the email.

Based on the email there are 3 main points either sited or alluded to:

- 1) **Appropriateness of criteria assumptions:** The author of the email states that the new criteria officer (Majid) believes the EGI stresses in the cashflow criteria may be too conservative and that Barbara agrees. Based on my discussion with Majid and Frank, there was a discussion in that criteria committee on this point. This appears appropriate and expected of a criteria committee.
- 2) **Potential commercial considerations in the criteria committee:** The author of the email states that 'Barbara' is concerned her criteria is so conservative that she isn't competitive. I asked both Majid and Frank if they recall any commercial aspects being discussed in the criteria committee. Both did not. I further asked both if they recall any discussion in this meeting where they can infer a motive other than analytic. Both did not however, as Majid is relatively new to the organization it is difficult for him to really opine.
- 3) **Potential misapplication of criteria:** The author of the email states 'she (Barbara) is using an average of the in-place interest rate and the criteria constants, ones she voted for, in the c/f model, to get the levels down. I wonder what Quality would say about that. She said today that she's looking to add 6 new issuance analysts because she's so busy.'
  - a. The first sentence may infer that the criteria are not being appropriately applied. I asked Frank if he recalled discussing the use of in-place interest rate versus the criteria constants. Frank stated that he had a couple of conversations with Barbara and Eric Thompson on the use of the criteria constants versus the in-place interest rates. Frank recalled first discussing with them the need to document and substantiate any request for criteria exceptions. Upon further review Barbara presented and discussed with Frank the analytic results of the analysis when applying both methods. In addition, they discussed the differences of the market and property characteristics to those of the archetypical loan. Frank decided that since the characteristics differed from the archetypical pool, the criteria assumptions used could be tailored to the property characteristics and no criteria needed to be modified or created. In essence this is a question of criteria application not a criteria change. In that same meeting they decided it was appropriate to use the average of the in-place interest rate and the criteria constant where the property characteristics differed from the archetypical pool as those discussed in that meeting. This is the practice referenced by the author of the email.
  - b. The author states the criteria application of assumptions being applied were derived to 'get the levels down'. Based on my conversation with Frank, I do not believe commercial aspects influenced the decision to tailor the application of the criteria assumptions for the property characteristics.

Based on the above I do not see the need to look further into this. Please let me know if you disagree. I do think the CMBS AMs should explicitly communicate the application of the criteria assumptions referenced in 3a above to the analytic staff. I will follow up with

Barbara Duka on this point.

Regards, Susan

# Exhibit 3

STANDARD  
& POOR'S

## Guide to Credit Ratings Criteria

Why criteria  
are important  
and how they  
are applied

---

**Criteria produce forward-looking credit ratings**

Our criteria are designed to help identify credit risks that could impact future credit quality. In applying our criteria to assign ratings on issuers and issues, we evaluate creditworthiness based on our view of future scenarios and macro-environmental events, leading to credit rating opinions that are forward looking.

**Criteria incorporate credit stability as a rating factor**

In evaluating creditworthiness, our criteria incorporate credit stability as a ratings factor. When assigning and monitoring ratings, we typically consider whether we believe an issuer or issue has a high likelihood of experiencing what we view to be unusually large adverse changes in credit quality under conditions of moderate stress. In such cases, we may assign the issuer or issue a lower rating than we would have otherwise given.

**Hypothetical scenarios for calibrating criteria and maintaining comparability**

Ratings are designed primarily to provide relative rankings of overall creditworthiness among issuers and obligations. To further the comparability of our ratings across different sectors and over time, we use hypothetical stresses as benchmarks for calibrating our criteria. Each level of stress is associated with a particular ratings category. We consider these hypothetical scenarios in the process of associating quantitative and qualitative factors, such as levels of leverage and business risk, with different rating categories.

We expect that issues or issuers rated in each category, regardless of their asset class, should generally be able to withstand these corresponding conditions of economic stress without defaulting. For example, we typically would not expect a 'AAA' rated issue or issuer to default even under extreme stress conditions such as the Great Depression of 1929, while we generally would not expect a 'BB' rated entity to default under a modest level of stress in line with market conditions in the United States in 2001.

---

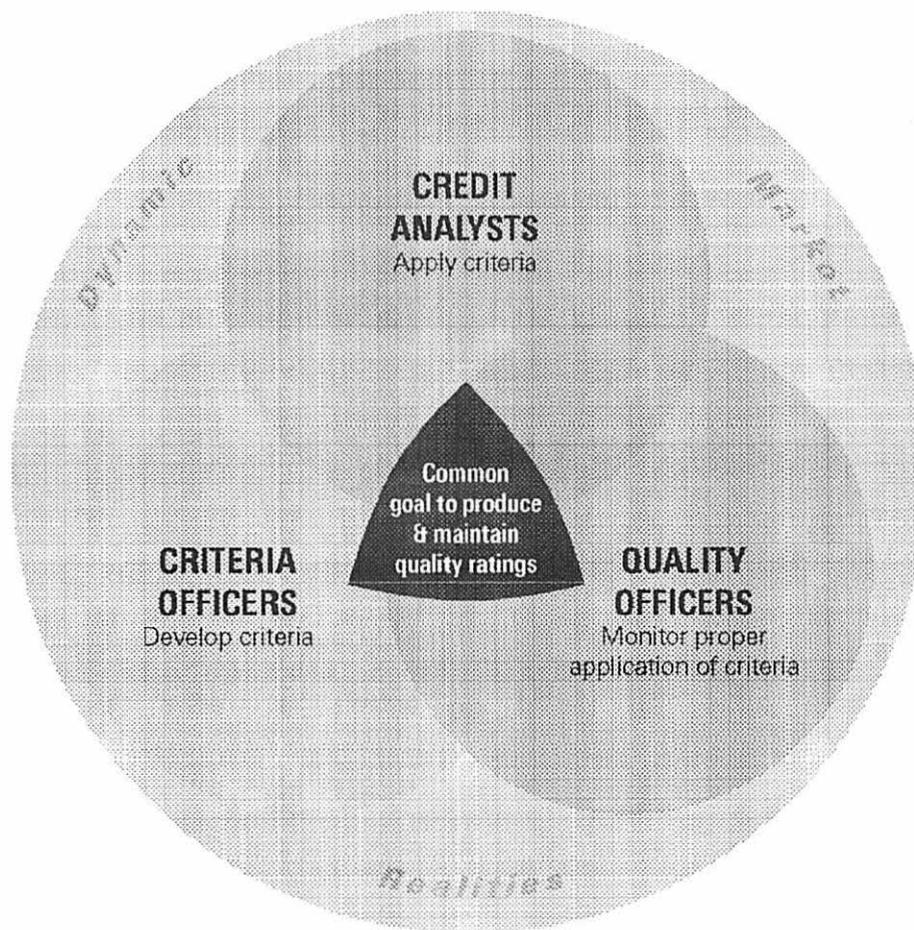
## How criteria are governed

To support the integrity and quality of our ratings criteria, Standard & Poor's has developed an organizational structure and created a process that governs the development, refinement and revision of criteria in addition to the application of these criteria in our ratings process.

At Standard & Poor's there are three primary groups of credit professionals—criteria officers, credit analysts, and quality officers. While working at different levels of our organization and through different reporting structures, these individuals are all focused on a common goal—to produce and maintain quality ratings.

---

## Key roles and responsibilities



---

**Criteria officers**

Criteria officers are primarily responsible for managing the development, approval and periodic review of criteria that are used by our analysts in the ratings process. Criteria officers lead the criteria committees for the ratings practice they are assigned to. The criteria committees are responsible for ongoing reviews of criteria and the approval of new and amended criteria.

Standard & Poor's Chief Credit Officer leads criteria officers globally and chairs the Analytics Policy Board (APB), which has ultimate oversight for all criteria across different sectors, regions and asset classes. The APB also provides periodic briefings to the analytical staff on major criteria, methodologies, and policy changes.

---

**Credit analysts**

The primary responsibility of our credit analysts and the rating committees they participate in is to develop Standard & Poor's ratings opinions through the application of the relevant criteria. Additionally, credit analysts can play an active role, in conjunction with the criteria

officers, in criteria development and in monitoring its applicability. In the course of their work, our analysts participate in ongoing dialogue with the marketplace as markets evolve and new instruments are developed.

---

**Quality officers**

The primary responsibility of our quality officers is to support the overall quality of our ratings and the proper application of criteria in the ratings process. Quality officers concentrate on specific analytical teams and/or regions and are responsible for the overall quality of the ratings and ratings surveillance.

Among other things, quality officers help to assess the reasons behind unexpected ratings performance to determine if these

occurrences are individual outliers or if they indicate a potential issue with the criteria or how the criteria were calibrated and applied. They are also responsible for ratings-related policy compliance.

Quality Officers report into Standard & Poor's Chief Quality Officer, and senior Quality Officers typically chair Quality Review Boards, which meet periodically to review ratings quality across sectors and around the globe.

---

## How analysts apply criteria

The formulation of our ratings opinions is a well-documented process that is based on a thorough analysis according to the relevant criteria, and we believe, is enhanced by the knowledge, experience, and judgment of our credit analysts and other credit professionals.

### Factors in the ratings process

Our analysts apply the relevant ratings criteria to each issuer and issue they rate. In analyzing the creditworthiness of a corporation, analysts typically start with an evaluation of the industry and market in which the company operates, then assess the business and financial risk factors specific to the issuer, both on a stand-alone basis and in comparison to its peers. Our analysts then make assumptions as to the future state of the world in which the issuer could be operating.

In analyzing the creditworthiness of structured finance issues, our analysts typically evaluate, among other things, the potential risks posed by: the instrument's legal structure; the practices, policies, and procedures of the entity that will service and/or manage the underlying assets; the credit profile, quality and anticipated cash flow of these assets; and credit enhancements that may provide added protection against default.

In assessing creditworthiness, our analysts evaluate each ratings factor according to the relevant criteria. In doing so, they use quantitative measures as well as their analytical insights, trends they have observed and their evaluation of an issuer's or issue's potential vulnerability to future risks. During the dot.com boom of 2001 and 2002, for instance, analysts proposed lower ratings for some start-up companies as their liquidity positions and future cash flow prospects were not commensurate with higher rating levels.

### Preparing for the rating committee

In applying criteria during the ratings process, analysts undertake analysis and prepare ratings-related documentation that is then presented to a rating committee. The large amount of analytical work that informs the ratings process is packaged in the form of a Ratings Analysis Methodology Profile (RAMP).

The RAMP covers the rating factors prescribed by the applicable criteria. Based on the outcome of the quantitative and qualitative analyses performed by the analytic team, the lead analyst presents his or her view with respect to each of these ratings factors, which are then considered by the voting members of the rating committee. At the rating committee meeting, the entire RAMP is reviewed and discussed and a vote is taken to arrive at the assigned rating.

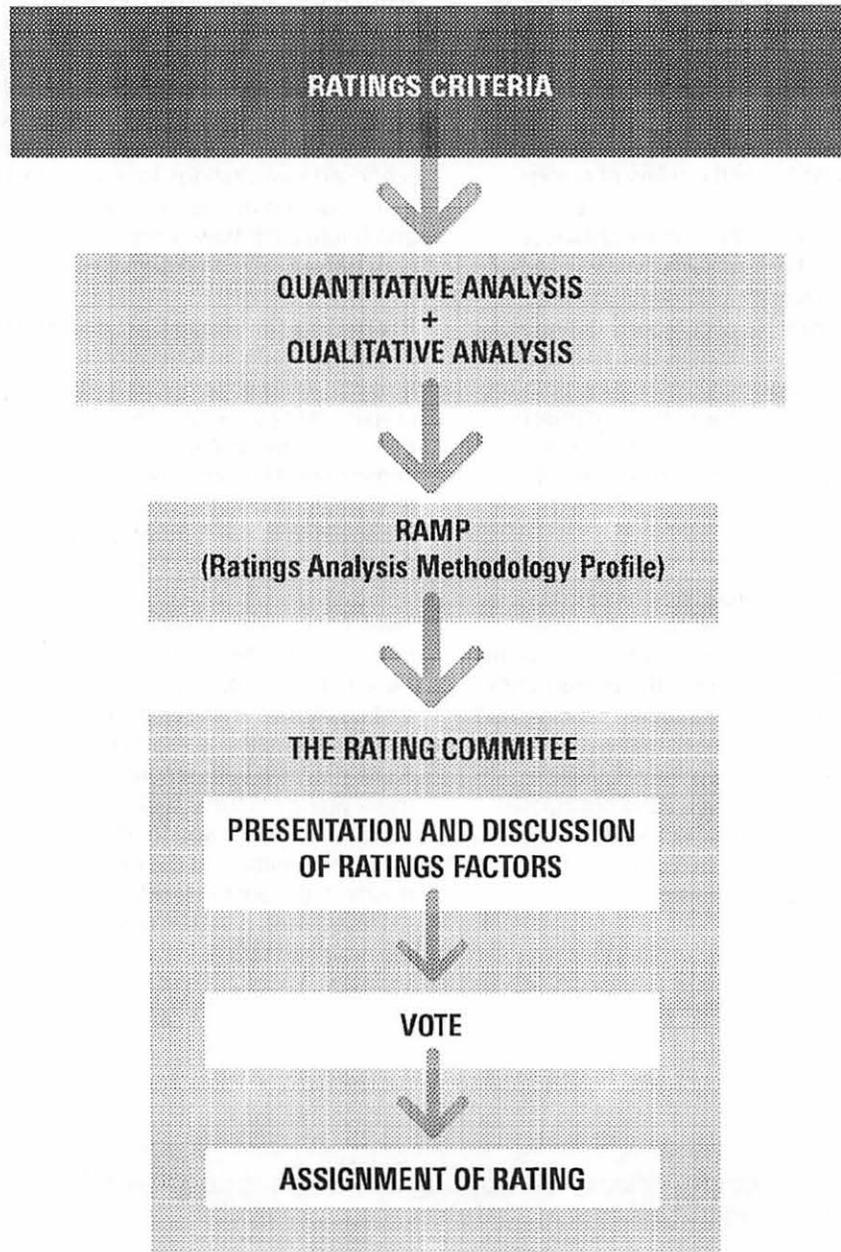
Learn more about Standard & Poor's process for rating issuers & issues at  
[www.AboutCreditRatings.com](http://www.AboutCreditRatings.com)



---

---

**Application of ratings criteria**



---

STANDARD & POOR'S GUIDE TO CREDIT RATINGS CRITERIA | 11

← PREVIOUS

NEXT →

# Exhibit 4

**STANDARD  
& POOR'S**

Structured Finance

Respondent's  
Exhibit

687

exhibitster.com

*North America CMBS  
New Issue Rating Procedures*

**Issued by:**

North America  
CMBS New Issue  
Group

**Applies to:**

North America  
CMBS initial ratings

**Effective date:**

January 14, 2011

**Version:**

4.0

**Description**

This paper describes the process applied by North America CMBS Analysts for the issuance of North America CMBS Ratings.

The paper is designed to provide an overview of the processes undertaken for North America CMBS.

**NORTH AMERICA CMBS PROCEDURES – INITIAL RATINGS  
CONFIDENTIAL – FOR INTERNAL USE ONLY**

**7. b. Surveillance Amendments**

**Purpose**

To give guidance to Primary Analysts when a request is received to make a change to the existing transaction documentation (Rating Agency Notification (RAN)), or when the transaction documentation asks for Rating Agency Confirmation (RAC) before an action may take place.

**Procedures**

Post-closing amendments (RAN) or RAC requests should be forwarded to the North America CMBS Surveillance Group. Surveillance Analysts in the North America CMBS Surveillance Group may reach out to the Primary Analysts for assistance. However, the responsibility for the co-ordination of the RAN and/or RAC process and any Surveillance Rating Committee held must be carried out by the North America CMBS Surveillance Analysts.

**Policies**

- ✓ Codes of Conduct and Ethics
- ✓ Surveillance Policy

**NORTH AMERICA CMBS PROCEDURES – INITIAL RATINGS  
CONFIDENTIAL – FOR INTERNAL USE ONLY**

**8. Definitions**

*Analyst(s)*

Cash Flow Analyst, Primary Analyst, and/or Senior Analyst.

*Analytical Manager (AM)*

The Analytical Manager within a specific business unit. Analytical Managers provide leadership, guidance, and training to Analysts and may participate as senior members of rating and Standard & Poor's criteria committees. Analytical Managers do not participate in commercial activities, fee negotiations, or setting fee strategy.

*Analytical Resource Center (ARC)*

The Analytical Resource Center is an application that provides a central repository for finalized Standard & Poor's criteria, policies and procedures, and training materials. ARC may be accessed either by typing in "arc" in the internet browser, Ratings Gateway or through the Analyst's desktop: Start/Programs/My Applications/Analytical Resource Center.

*Announced*

The time at which the Arranger disseminates the offering materials to the market.

*Arranger*

The Issuer that is overseeing the transaction. In some cases, the Issuer can consist of more than one Originator or Purchaser of the loan collateral.

*Asset Summary Report (ASR)*

A component of the typical loan files provided by the Arranger/Originator to the Primary Analyst on a new issuance CMBS transaction. The ASR includes a narrative describing the loan terms and the collateral, such as the property location, operating history, loan terms, market analysis, and summaries of the relevant third-party due diligence reports.

*Assistant Analyst*

The Assistant Analyst is responsible for ensuring the data provided by the Issuer or Issuer's agent is consistent with the data required to populate the S&P transaction level credit model. The Assistant Analyst is also responsible for collecting and inputting the results of the S&P loan level analysis on select loans into the credit model.

*Business Leader*

The person who oversees the Mortgage Group, which includes the North America CMBS New Issue Group, and also has commercial responsibilities.

*Cash Flow Analyst*

The analyst assigned to perform the cash flow analysis for a CMBS transaction.

*Client Business Manager(s) (CBM)*

A person has the role of Client Business Manager for a specific Issuer or issue, regardless of title, if he or she engages in any of the following commercial activities: (1) external negotiation or transmission of fees and commercial terms for any analytical products or services (including quoting ratings fees or transmitting fee schedules); (2) billing and collection of fees; (3) direct selling of ratings or other products or services to any entity.

**NORTH AMERICA CMBS PROCEDURES – INITIAL RATINGS  
CONFIDENTIAL – FOR INTERNAL USE ONLY**

*CMBS*

Commercial Mortgage-Backed Securities

*CMBS Criteria Officer:*

The person assigned to determine and interpret CMBS sector-specific ratings definitions and in-depth articles that explain how Standard & Poor's determines its ratings.

*CMBS Network Drive*

The N: Drive, M: drive, or similar drive, which can be accessed by Analysts via their computer desktops.

*CMBS New Issue Group*

The internal group whose responsibility it is to rate North America CMBS transactions based upon Standard & Poor's criteria and the North America CMBS New Issue Rating Procedures guide.

*CMBS Quality Officer*

The person responsible for monitoring consistent application of rating criteria and methodologies with the CMBS area.

*CMBS Surveillance Group*

The group of analysts designated to perform the surveillance function on CMBS transactions.

*Collateral Review*

A meeting held by the Collateral Review Team to discuss the Analyst's recommendations on a loan and property, held for select loans in a transaction. Select loans may consist of the most significant loans in a transaction, loans for which a Credit Assessment has been requested, loans with unusual features, and other loans that were selected for statistical sampling purposes.

*Collateral Review File*

The Analyst's file of related collateral materials. The file may include hard copies of Collateral Review presentations, ASRs, third-party reports, rent rolls, correspondence with the Issuer, or other relevant materials. Hard copies of such files are sent to Iron Mountain for storage; electronic files are initially stored on the CMBS Network Drive, and moved to RDR after a transaction closes.

*Collateral Review Team*

The team that analyzes the specific collateral subject to the review should be comprised of at least two Analysts, including a Senior Analyst or an AM.

*Collateral Review Template*

A property level analysis template that facilitates the Analyst's assessment of the collateral's credit quality based upon the property's sustainable cash flow available for debt service, and the resultant value.

*Commercial Real Estate CDO and re-REMIC transaction:*

A transaction secured primarily by either CMBS securities and/or commercial real estate debt. The debt can take the form of senior or subordinate mortgage debt or subordinate debt secured by the equity interests in a senior mortgage loan on transitional commercial real estate.

*Committee Chairperson*

**NORTH AMERICA CMBS PROCEDURES – INITIAL RATINGS  
CONFIDENTIAL – FOR INTERNAL USE ONLY**

As defined in the Ratings Committee Policy, the rating committee chairperson, whose role is to oversee the rating committee, is typically a Senior Analyst, generally at the title of “director” or above, unless otherwise approved by the chief quality officer of the business practice or chief credit officer of the region. The AM should maintain a list of eligible Committee Chairpersons in RDR, per the Ratings Committee Policy.

*Conduit and Fusion transaction:*

A transaction secured by a pool of fixed rate commercial real estate mortgage loans. Each pool typically consists of approximately 100 or more fixed rate loans made to unrelated borrowers. This segment represents the majority of CMBS issuance by transaction count and dollar volume.

**Confidential Credit Ratings**

A subset of Private Credit Ratings. The requesting party must agree not to disclose the ratings to unrelated parties or insiders (ex. agents, advisors, attorneys).

*CORE*

The internal system that stores ratings (current and all previous ratings actions) or its electronic equivalent.

**Credit Assessment**

Credit Assessment is used widely as a generic term in evaluating the creditworthiness of nonrated instruments. It is often used in conjunction with individual loans in CMBS transactions. It is also used as a general term, interchangeable with credit opinion and credit analysis.

*Credit Lease Pool or Dependent transaction:*

A transaction secured by commercial real estate mortgage loans guaranteed by corporate obligations to tenants rated by Standard & Poor’s at issuance of the transaction.

*Data Management*

The internal team that enters the ratings into CORE and releases to the market place.

*Doctrac Form*

An excel spreadsheet that Analysts use, the “Doctrac Form” or “Document Tracking” form lists all of the documents that were received or created and utilized to form the basis of the rating. Analysts should check off the documents that were received, utilized in the Ratings Process, and should be uploaded into RDR under the “Doctrac” document type. This form is either included in the Short File or, if the transaction is processed entirely through RPM, handed to the AA’s on the closing date of the transaction.

*Document Reviews (Collateral or Transaction)*

The Collateral Review and Transaction Review process typically entails legal document reviews of borrower, loan, offering, and other transaction documents.

*Debt Service Coverage (DSC)*

A measure of a mortgaged property’s ability to cover monthly debt service payments, defined as the net operating cash flow divided by the debt service payments. A DSC less than 1.0x means that there is insufficient cash flow by the property to cover debt payments.

*External Model Review Procedures*

As outlined in a December 15, 2008 electronic message to the staff and domiciled in the ARC system.

**NORTH AMERICA CMBS PROCEDURES – INITIAL RATINGS**  
**CONFIDENTIAL – FOR INTERNAL USE ONLY**

*Final Rating*

The rating assigned during a Final Rating Committee and released when the transaction closes.

*Final Rating Committee*

In compliance with the Rating Decision-Making Standards Policy, a meeting held to discuss the credit, structural, and legal aspects of a transaction when determining Final Ratings.

*Final Rating Committee Chairperson*

As defined in the Role of the Rating Committee Chairperson Guidelines, the rating committee chairperson, whose role is to oversee the rating committee, is typically a Senior Analyst, generally at the title of “director” or above, unless otherwise approved by the chief quality officer of the business practice or chief credit officer of the region.

*Fixed Rate Large Loan transaction:*

A transaction secured by two or more fixed rate commercial real estate mortgage loans made to unrelated borrowers.

*Floating Rate Large Loan transaction:*

A transaction secured by one or more large floating rate mortgage loans on transitional commercial real estate properties. Each deal generally consists of approximately 30 or less loans made to unrelated borrowers.

*Iron Mountain*

A third-party vendor to Standard & Poor’s that provides document storage solutions. All hard copies of documents not required to be included in the Short File should be stored here.

*Issuer*

The entity issuing the rated securities, typically a special-purpose entity (SPE). If the Issuer is an SPE, then the Arranger typically acts on the Issuer’s behalf.

*Learning Center*

Internal system that tracks Analyst training hours, courses taken, and permits Analysts to register for upcoming courses. The Learning Center may be accessed via Analysts’ desktops, through Start/Programs/My Applications/S&P Applications/The Learning Center.

*Loan Level Data Template*

Any collateral data template that the Issuer completes and submits in conjunction with a collateral analysis.

*Loan Summary*

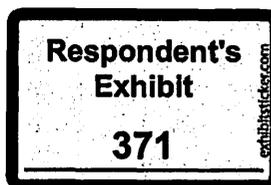
A questionnaire that addresses and summarizes the material terms of the loan documents in an effort to determine compliance with Standard & Poor’s U.S. CMBS Legal and Structured Finance Criteria. Standard & Poor’s typically requests a Loan Summary for large loans.

*Loss Coverage*

The levels of losses that a transaction structure should be able to withstand at a certain rating category. Also referred to as “credit enhancement,” Loss Coverage is typically expressed as a percentage of the original collateral balance. It is determined by multiplying the foreclosure

# Exhibit 5

**From:** Barnes, Susan  
**Sent:** Sunday, January 23, 2011 9:51 AM  
**To:** Duka, Barbara  
**Subject:** Re: Followup



Thanks, I'll look for the analysis in RDR for the application of the criteria and may need to follow up with the analysts if I have questions. Thanks, Susan

---

**From:** Duka, Barbara  
**To:** Barnes, Susan  
**Sent:** Sun Jan 23 08:01:04 2011  
**Subject:** Followup

Susan  
As a followup to our conversation, for the following deals we provided feedback which incorporated looking at both the actual constant and S&P constants. Of these deals, we were asked to rate FREMF K701, JPM 2011-C3 and MSC 2011-C1. For most of the others, we lost the transactions due to criteria. For FREMF K11, we are still waiting to hear whether we will be asked to rate the transaction.  
DBUBS 2001-C2  
FREMF K701  
JPM 2011-C3  
FREMF K11

WF-RBS Commercial Mortgage Trust 2011-C2

COMM 2011-C2

MSC 2011-C1

If you would like, I can forward you the presales when we have conducted our rating process and published our rationale (which my analysts typically do anyway).

---

---

---

---

---

---



Stephen C. McKenna  
Trial Attorney  
U.S. Securities and Exchange Commission  
Denver Regional Office  
1961 Stout St., Suite 1700  
Denver CO 80294  
Email: McKennaS@sec.gov  
(by electronic mail)

Alfred Day  
Trial Attorney  
U.S. Securities and Exchange Commission  
Boston Regional Office  
33 Arch Street, 23rd Floor  
Boston, MA 02110-1424  
(by electronic mail)

Rua Kelly  
Trial Attorney  
U.S. Securities and Exchange Commission  
Boston Regional Office  
33 Arch Street, 23rd Floor  
Boston, MA 02110-1424  
(by electronic mail)

By: 

Theresa H. Gue  
(tgue@pkblp.com)

Petrillo Klein & Boxer LLP  
655 Third Avenue, 22nd Floor  
New York, New York 10017  
Telephone: (646) 930-1065  
Facsimile: (212) 370-0391