



STRUCTURED FINANCE AND SECURITIZATION UPDATE

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New Information-Posting Requirements for Issuers, Sponsors and Underwriters of Rated Structured Finance Securities.

Rules adopted in November 2009 by the Securities and Exchange Commission (the "SEC") under the Credit Rating Agency Reform Act of 2006 will require issuers, sponsors or underwriters (referred to as "arrangers") of structured finance securities to post on a password-protected internet website, the information provided by arrangers to credit rating agencies hired by an arranger to rate or monitor the credit ratings of the securities. The new rules will require the arranger to provide access to the website to other credit rating agencies that provide the arranger with a required certification.¹ The deadline for compliance with these new rules is June 2, 2010.

Rules 17g-5(a) and 17g-5(b) under the Securities Exchange Act (the "Exchange Act") require credit rating agencies registered with the SEC ("NRSROs") to disclose and manage certain specified types of conflicts of interest and prohibit NRSROs from rating securities where other specified conflicts of interest exist. The recently adopted Rule 17g-5(b)(9) identifies as a new conflict (referred to as an "issuer-pay" conflict) the issuance or maintenance by an NRSRO of a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-

¹ The text of the new rules, together with the adopting release, is available at <http://www.sec.gov/rules/final/2009/34-61050fr.pdf>. In contrast to the originally proposed rules, the information provided by the arranger is not required to be made available to the public. See *Recent Developments Related to Credit Ratings on Structured Finance Securities; SEC Proposes New Rules under the Credit Rating Agency Act of 2006*, Sidley Austin LLP, June 26, 2008 available at <http://www.sidley.com/newsresources/newsandpress/Detail.aspx?news=3634> and *SEC Adopts Final Rule Amendments and Proposes New Rules under the Credit Rating Agency Reform Act of 2006*, Sidley Austin LLP, February 23, 2009, available at <http://www.sidley.com/newsresources/newsandpress/Detail.aspx?news=3938> for a summary of the rules as originally proposed and the re-proposed rules, respectively.

backed securities transaction (referred to as a “structured finance product”)² that was paid for by a related arranger.

New Rule 17g-5(a)(3) will require each hired NRSRO to maintain a password-protected internet website listing each structured finance product for which the hired NRSRO is in the process of determining an initial credit rating and for which there is an issuer-pay conflict. The list must be in chronological order and identify the type of structured finance product, the name of the issuer, the date the rating process was initiated and the internet website address where the issuer, sponsor or underwriter of the structured finance product provides the required information described below. Once the hired NRSRO issues the final credit rating or determines that it will not provide a final credit rating on a structured finance product, information on that structured finance product may be removed from the list.

The hired NRSRO will be required to provide free, unlimited access to the website to any other NRSRO that provides the hired NRSRO with the certification specified in Rule 17g-5(e) under the Exchange Act (described below). The SEC’s stated purpose for requiring the hired NRSRO’s listing is to alert other NRSROs to the new transactions and to direct them to the arranger’s website to obtain the information that

² The SEC specifically states in the adopting release, that the reference to a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction is not limited to asset-backed securities as defined in Regulation AB, and also states that “the [SEC] intends this provision . . . to cover the full range of structured finance products, including, but not limited to, securities collateralized by static and actively managed pools of loans or receivables (e.g., commercial and residential mortgages, corporate loans, auto loans, education loans, credit card receivables, and leases), collateralized debt obligations, collateralized loan obligations, collateralized mortgage obligations, structured investment vehicles, synthetic collateralized debt obligations that reference debt securities or indexes, and hybrid collateralized debt obligations.” See adopting release at page 63844.

would enable the non-hired NRSROs to rate and monitor the structured finance products on an unsolicited basis.

A hired NRSRO also will have to obtain from the issuer, sponsor or underwriter of a structured finance product with an issuer-pay conflict a written representation that can reasonably be relied upon that the issuer, sponsor or underwriter:

- will maintain an identified password-protected internet website that includes all information an arranger provides to the hired NRSRO, or contracts with a third party to provide, for the purpose of determining the initial credit rating and for undertaking credit rating surveillance for the structured finance product, in each case at the same time the information is provided to the hired NRSRO; and
- will provide access to the website to any NRSRO that provides a 17g-5(e) certification.

The website maintained by the arranger also must identify the information currently used to determine or monitor the credit ratings.³ Note that the rule applies to all information provided to a hired NRSRO and in the text of the adopting release, the SEC contemplates a transition to a more formalized process through which structured finance products will be rated. “The [SEC] acknowledges that the requirements of paragraph (a)(3) of Rule 17g-5 as a whole likely will formalize the process of information exchange from the arranger to the NRSRO for structured finance products, including the written submission of information that may, in the past, have been provided orally.”⁴

Under Rule 17g-5(e), any NRSRO accessing a password-protected internet website of an arranger or a hired NRSRO listing issuer-pay conflict structured finance products will be required to provide an annual certification to the SEC (with a

³ For example, if the pool collateral changed, the arranger website would need to identify the current pool information and the information used by the hired NRSRO in the final rating.

⁴ See adopting release at page 63847.

copy to the arranger and the hired NRSRO) that, among other things, such non-hired NRSRO:

- is accessing the website solely for purposes of determining or monitoring credit ratings;
- will keep the information it accesses confidential and treat it as material non-public information; and
- will determine and maintain credit ratings for at least 10% of the issued structured finance products for which it accesses information if it accesses information for 10 or more issued structured finance products in the calendar year covered by the certification.

In order to monitor compliance with the Rule 17g-5(e) certifications, Rule 17g-5(a)(3)(ii) limits access to the issuer-pay NRSRO lists and arranger information to NRSROs, which are registered with, and regulated by, the SEC, rather than all credit rating agencies.

Corresponding Amendments to Regulation FD.

Regulation FD contains the SEC's rules addressing selective disclosure and generally requires that an issuer of a security publicly disclose material non-public information if the issuer, or any person acting on its behalf, provides the material non-public information to certain enumerated persons. Information provided to credit rating agencies solely for the purpose of determining a credit rating that is publicly available is excepted from the public disclosure requirements of Regulation FD. As adopted, Rule 100(b)(2)(iii) under Regulation FD expands this exception to cover information provided to NRSROs pursuant to Rule 17g-5(a)(3) regardless of whether the credit rating is publicly available. Therefore, information provided to "subscriber pay" NRSROs, the credit ratings of which are generally private, pursuant to Rule 17g-5(a)(3), would not be subject to the Regulation FD disclosure requirements.

If you have questions about any of these items, please contact your regular Sidley Austin LLP contact.

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