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August 8, 2011

**VIA EMAIL TO RULE-COMMENTS@SEC.GOV**

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

RE: Nationally Recognized Statistical Rating Organizations (File No. S7-18-11)

Dear Ms. Murphy:

On behalf of Morningstar Credit Ratings, LLC, we appreciate the opportunity to comment on the Commission's proposed rules concerning nationally recognized statistical rating organizations ("NRSROs")<sup>1</sup>. Morningstar Credit Ratings, LLC (f/k/a Realpoint LLC) is a NRSRO and wholly owned subsidiary of Morningstar, Inc., a leading provider of independent investment research in North America, Europe, Australia, and Asia with operations in 26 countries.

We generally agree with the spirit of the Commission's release. The rules proposed by the Commission will provide greater oversight of the activities of NRSROs, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), so our responses below are limited to the areas for which we disagree or believe that further clarification or comment is required.

When the Commission undertakes the development of these rules, we respectfully request that the Commission consider the operational size and business model of the NRSRO in its determination of the applicability of certain regulations and the timetables for implementing these regulations. As references to credit ratings have been removed from the federal securities laws<sup>2</sup>, and if additional regulatory burdens are set at a level too burdensome or costly, it is possible certain smaller NRSROs<sup>3</sup> will deregister and competitors will be discouraged from obtaining the NRSRO designation. We believe that the rules or guidance issued should balance the need for greater regulation in the industry with the simultaneous need to create more competition in the credit rating industry. Encouraging competition in this industry has been a policy initiative for the Commission and the Credit Rating Agency Reform Act of 2006, and we continue to agree that

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<sup>1</sup> *Proposed Rules for Nationally Recognized Statistical Rating Organizations*, SEC Release No., 34-64514, File No. S7-18-11 (May 18, 2011); 76 F.R. 33420 (June 8, 2011).

<sup>2</sup> See, e.g., *Final Rules for Security Ratings*, SEC Release No. 34-64975, File No. S7-18-08 (July 27, 2011).

<sup>3</sup> For purposes of this letter, "smaller NRSROs" has the meaning set forth by the Commission's Release in fn. 1346 of 76 F.R. at 33535. We note that the credit ratings reforms mandated by the Dodd-Frank Act were largely driven by the actions of NRSROs, other than these smaller NRSROs.

increased competition remains an important element in improving the quality of credit ratings<sup>4</sup>. Therefore, our comments also highlight some of the areas where we believe the Commission should consider these issues.

## **A. Internal Controls and Section 15E(c)(3)(A) of the Exchange Act**

We support the Commission's preliminary decision to defer prescribing factors to be utilized in the establishment and maintenance of internal controls for the NRSROs until the Commission has the opportunity to determine through the examination process and its review of the NRSROs' annual reports the best practices utilized by NRSROs to comply with the mandate of Section 15E(c)(3)(A). The Commission's examination feedback regarding best practices related to internal controls will be an important element for the adequate design and monitoring of internal controls.

### **1. Establishment of Internal Control Structure**

We generally agree with the internal control structure factors proposed by the Commission. However, we request further clarification on the Commission's proposed guidance to develop internal controls "reasonably designed to ensure that a credit analyst documents the steps taken in developing an initial credit rating or conducting surveillance on existing credit ratings with sufficient detail." As we strive to provide the most detailed and timely surveillance product in the industry on a monthly basis, we ask the Commission in its guidance and evaluation of the sufficiency of detail related to internal controls consider other factors, including the level of transparency and detail provided in the ratings analysis of each the NRSRO's reports. Additionally, we ask the Commission when evaluating the level of detail required to consider the various NRSROs' business models and size, including whether certain recordkeeping practices may become so burdensome that NRSROs may decide to reduce the frequency of their credit rating surveillance.

### **2. Internal Control Report – Rule 17g-3**

We believe that the internal control report provided for in the Commission's proposed Rule 17g-3 should not be required to be submitted to the Commission at least until the Commission publishes its guidance and provides a reasonable time for the implementation of this guidance to be completed and timely exam feedback is provided. Otherwise, management has no framework for its assessment of such internal controls.

The Commission's release requested commentary related to defining an internal control structure. We would recommend that the Commission further define "internal control structure" by providing that the NRSRO utilize an internal control framework governing the implementation of and adherence to policies, procedures, and methodologies for determining credit ratings that:

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<sup>4</sup> See, e.g., the Commission's *Annual Report on Nationally Recognized Statistical Rating Organizations* (January 2011).

- Is free from bias;
- Permits consistent qualitative and quantitative measurements of the NRSRO's internal controls;
- Is sufficiently complete so that those relevant factors that would alter a conclusion about the effectiveness of a NRSRO's internal controls are not omitted; and
- Is relevant to an evaluation of the NRSRO's internal control structure governing the implantation of and adherence to policies, procedures, and methodologies for determining credit ratings.

The forgoing language is similar to the Commission's guidance for establishing internal controls for financial reporting under the Exchange Act.<sup>5</sup> Utilizing similar criteria for NRSROs will allow NRSROs to build upon these established frameworks for guidance, including those of the Committee of Sponsoring Organizations of the Treadway Commission and similar frameworks. However, given the small number of NRSROs and the uniqueness of their business model, we do not believe the NRSROs should be required to rely solely on established frameworks, but should have the flexibility to design their own frameworks within the above guidelines and in conjunction with the Commission's future guidance related to internal controls.

We believe that the creation and maintenance of an internal control structure requires the input and support of the NRSRO's CEO (or equivalent), other management and supervisory personnel, and independent compliance staff. Additionally, the NRSRO may conclude that certain compliance functions may be better served by compliance professionals independent of management. Furthermore, as between the relationship of the CEO (or equivalent) and the board of directors, we believe the board of directors role with regard to the internal controls of the NRSRO is to provide "oversight" as set forth in the Dodd-Frank Act, but the responsibilities for design and implementation are the responsibility of the CEO (or equivalent) and the other management, supervisory and compliance personnel affiliated with the NRSRO.

Therefore, we propose a broad definition of "internal control structure governing the implementation of and adherence to policies, procedures, and methodologies for determining credit ratings", as follows:

A process under the supervision of the chief executive officer or person performing equivalent functions, overseen by the NRSRO's board of directors or persons performing equivalent functions, and effected by the management and other personnel of the NRSRO, to provide reasonable assurance regarding the integrity of its credit ratings and the preparation of a credit rating for external purposes in accordance with its policies, procedures and methodologies that:

- Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the rating analysis;

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<sup>5</sup> *Final Rules for Management's Reports on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, SEC Release No. 34-47986, File No. S7-40-02 (June 5, 2003).

- Provide reasonable assurance that credit ratings are issued in accordance with its policies, procedures and methodologies; and
- Provide reasonable assurance regarding the prevention or timely detection of actions that could have a material effect on the integrity of credit ratings.

Moreover, the types and frequency of reports to be provided to the CEO, upper management and/or the board of directors will be based on a number of factors regarding the business, including the NRSRO's size as it relates to the number of ratings, revenues and/or employees; the types and variety of credit rating products provided; and whether there is a history of the integrity of the NRSRO's ratings process having been compromised. Therefore, we believe that the Commission should refrain from mandating a structure for these reports, at least until it has had the opportunity to provide feedback on best practices through the examination process.

We also request that the Commission provide guidance as to what constitutes a "material weakness". We would propose that a material weakness be defined as a deficiency, or combination of deficiencies, in internal controls, where it is more likely than not that the integrity of the rating process will be compromised by the failure to follow the NRSRO's policies, procedures and methodologies. To the extent the CEO's report requires a discussion of internal control deficiencies; this discussion should be limited to material deficiencies that prevent management from concluding its internal structure is effective, which is consistent with the Commission's requirement for reports related to internal controls over financial reporting.<sup>6</sup>

We believe the Commission should refrain from imposing sanctions, at least until the Commission has had time to issue its guidance on internal controls and best practices through the exam process and the NRSROs have had the opportunity to implement these practices within the next reporting period. The Commission, in the interim, depending on the severity of the material weaknesses identified, could require the NRSRO to submit a confidential action plan to correct these weaknesses. Once rules are established, we would advocate a process that considers the severity of the material deficiencies, the NRSROs history of material deficiencies, the size of the NRSRO, and the public interest. Moreover, the possibility of sanctions and the lack of confidentiality may prevent some NRSROs from giving a more candid evaluation of their controls. Sanctions, if any, should be imposed only in circumstances, where investors have been harmed.

**B. Conflicts of Interest Related to Sales and Marketing and Section 15E(H)(3) of the Exchange Act**

We generally support the Commission's efforts to maintain a separate sales and marketing function from the analytical function in order to protect the integrity of ratings under Rule 17g-5(g).<sup>7</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> 76 F.R. at 33425.

*Smaller NRSRO Exemption.* If the Commission were to consider a self-executing exemption to proposed Rule 17g-5(g) for smaller NRSROs, we respectfully request that the Commission consider defining smaller NRSROs for purposes of the Regulatory Flexibility Act as it does in footnote 1346 of this release.<sup>8</sup> We note that Rule 17g-5 would then be currently limited to those NRSROs previously identified as inappropriately placing sales and marketing concerns and pressures on its analytical function.<sup>9</sup> In defining a smaller NRSRO, the Commission should consider the NRSRO's revenues and market share to determine whether the exemption is appropriate, since asset size and employee counts thresholds could discourage NRSROs from making investments in technology, infrastructure and employees that would benefit the integrity of the ratings process. Because the Commission annually reports on NRSROs, including its market size, it could reevaluate this smaller NRSRO status periodically.<sup>10</sup> If the Commission decides that a NRSRO is no longer a smaller NRSRO, the Commission could notify the NRSRO of the status change and provide it with a transition period (i.e., 120 to 180 days) to comply.

*Suspending or Revoking a Registration.* We agree with the Commission's conclusion that a public interest finding is an appropriate predicate to a suspension or revocation of a NRSRO's registration under Section 21C of the Exchange Act given the severity of the penalty.<sup>11</sup> Additionally, we agree with the Commission's conclusion that Section 15E(h)(3)(B)(ii) should work in conjunction with the proceedings currently available under Sections 15E(d) and 21(c).<sup>12</sup>

Given the severe nature of suspension and revocation for a period that could exceed 12 months under the currently proposed rule under Section 21(c), we believe that the public interest finding should be at least as strong as a Section 15E(d) proceeding would require. The Commission would, therefore, be required to show for Section 21(c) purposes, at a minimum, that the Section 15(h) violation: affected a rating; that suspension or revocation of the NRSRO is necessary for the protection of investors; and that the suspension or revocation is in the public interest.<sup>13</sup> The findings above should be supported by Commission evidence that the undue influence predicated by the Section 15(h) violation resulted in the NRSRO issuing a credit rating without conforming to its documented procedures and methodologies and that the investors who relied on those ratings were harmed. The degree of harm should be an important consideration in determining the length of any suspension.

NRSROs with mandated internal controls should have processes in place that assist them in assuring that their ratings are a result of their properly applied policies, procedures and methodologies, and not a result of undue influence of sales and marketing staff. Under Section 21(c) as currently proposed by the Commission, when a NRSRO sales or marketing employee, for

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<sup>8</sup> *Id.* at 33535.

<sup>9</sup> *Id.* at 33427.

<sup>10</sup> *See, e.g.,* the Commission's *Annual Report on Nationally Recognized Statistical Rating Organizations* (January 2011).

<sup>11</sup> 76 F.R. at 33428.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

example, improperly exerts undue influence over an analyst, and that undue influence is detected and corrected within the NRSRO's internal control processes, such as senior analyst review or committee review, the NRSRO could still have its registration suspended or revoked without the Commission having to show that the improper actions effected a credit rating or that harm was caused to investors. We don't believe that this is consistent with policy reforms envisioned by the Dodd-Frank, since it could create perverse incentives in the documentation and monitoring of internal controls and the willingness of NRSROs to share this information with the Commission to establish industry best practices. Additionally, a broad ability to revoke or suspend licenses for an indefinite amount of time may further reduce competition in an already concentrated market.

For these same reasons, we would propose that suspensions under Section 21(c) be capped. Although we believe that the 12 month time period under Section 15E is a sufficient threat to deter these conflicts, in the alternative, we propose that the Commission could use a multiple of the intended time horizon associated with the rating. For example, if a rating is reviewed once a year or the rating report or the related methodology states that the credit rating or indication of ratings is intended to reflect the probability of default in the next year, and the multiple selected is 2, the maximum suspension would be 2 years.

### **C. "Look-Back Review"**

Although we support the Commission's efforts to reduce conflicts of interest, we do not agree with the process outlined in the look-back review under proposed Rule 17g-8(c). The look-back review proposed by the Commission will require procedures, which at a minimum, require that the NRSRO take the following steps once it is determined that a conflict of interest influenced a credit rating: (1) immediately placing the credit rating on credit watch; (2) promptly determining whether the credit rating must be revised so it is no longer influenced by a conflict of interest and is solely the product of the NRSRO's documented procedures and methodologies; and (3) promptly revising or affirming the credit rating as appropriate.<sup>14</sup>

In some circumstances it may be difficult to determine whether a conflict actually existed unless it is determined first that the credit rating was not solely the product of the NRSRO's documented procedures and methodologies. We note that most NRSROs have committee processes and other policies and procedures in place to ensure that a single analyst is not able to influence a rating, so a conflict may not be apparent without determining first that it is not a product of the NRSRO's documented procedures and methodologies. Therefore, NRSROs may not be able to "immediately" place a credit rating on credit watch prior to determining that the credit rating must be revised as a result of a conflict.

Furthermore, the announcement of placing the credit rating on credit watch could result in potentially unnecessary adverse market reaction, which may end up being ultimately inaccurate. The proposed rules do not incentivize NRSROs to conduct a prompt investigation or revision of the rating, in order to avoid this unnecessary effect on the market. We believe the final rules should

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<sup>14</sup> *Id.* at 33515.

provide a timeframe for the NRSRO to revise and affirm the rating when a conflict arises, and only if the NRSRO cannot meet the prescribed deadline, should it be required to place the security on credit watch. NRSROs have codes of ethics and conduct that prohibit insiders from misusing the information regarding the conflict or trading in the security affected by the conflict, so NRSRO personnel should not be able to benefit from the delay in the credit watch announcement.

Therefore, in lieu of the proposed rule, we request that the Commission, as with the establishment of internal controls, prescribe rules after its review of procedures and best practices through the examination process. We also request that the final rules prescribe a reasonable amount of time that the NRSRO has to investigate the conflict and determine whether the rating must be revised, thereby allowing the NRSRO to avoid the credit watch announcement if the NRSRO can complete its investigation and revise or affirm the credit rating expeditiously. If the NRSRO cannot complete its investigation and determine whether the rating must be revised in the prescribed timeframe, then a credit watch announcement could be required.

#### **D. Fines and Other Penalties**

We agree with the Commission's conclusion that the fines, penalties and other sanctions currently applicable to NRSROs in Sections 15E, 21, 21A, 21B, 21C and 32 of the Exchange Act are sufficient.<sup>15</sup> Therefore, no new penalty provisions applicable to NRSROs have been added to the Exchange Act.

#### **E. Proposed Disclosure of Information About the Performance of Credit Ratings**

##### **1. Proposed Enhancements to Disclosures of Performance Statistics**

We generally agree with the Commission's goal to make transition and default rates more comparable across NRSROs.<sup>16</sup> Additionally, we support the separate reporting of default rates of asset-backed securities (ABS), as set forth in the Commission's release.<sup>17</sup> The comparability of transition and default rates among ABS types may be an important factor for the assignment of NRSROs pursuant to the ABS assignment system that may be established by the "Franken Amendment" or a similar system implemented by the Commission.<sup>18</sup>

Furthermore, we agree with the definitions of "Default" and "Paid Off" proposed by the Commission.<sup>19</sup> However, we also would not object to "any bankruptcy, administration, receivership, winding up, liquidation or other termination of the business of the issuer or obligor" being included as a "Default" event in the instructions to Exhibit 1 of the Form NRSRO, for the

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<sup>15</sup> *Id.* at 33433.

<sup>16</sup> *Id.* at 33435.

<sup>17</sup> *Id.* at 33436.

<sup>18</sup> *See, Request for Comment, Solicitation of Comment to Assist in Study on Assigned Credit Ratings, Securities and Exchange Commission Release No. 34-64456; File No. 4-629 (May 10, 2011), 76 F.R. 28265 (May 16, 2011).*

<sup>19</sup> 76 F.R. at 33441-33442.

avoidance of doubt that these events would be considered a Default under the instructions. Determining relative degrees of default severity should be avoided in order to improve the consistency of reporting. Subsequent changes in default status should be captured in the number of ratings outstanding and the shifts captured by the 1, 3 and 10 year performance scenarios.

Additionally, the Commission has requested comment regarding the “easily accessible” placement of the Form NRSRO and other required disclosures, including the XBRL rating history discussed in Section F below, on each NRSRO’s website.<sup>20</sup> Although a separate direct link from the homepage for each of these items, as suggested by the Commission, would be “easily accessible”<sup>21</sup>, we also believe a link labeled “Regulatory Filings”, or similar language, containing both of these required items (and any additional items required by the Commission in the future) on the NRSRO’s homepage would also be deemed easily accessible to investors.

The proposed enhancements will require substantial technology resources. We request that the Commission when establishing effective dates for these enhancements and other new regulations consider the number of technology-based initiatives that will be required of the NRSROs under the Dodd-Frank Act, and how the resources, specifically for smaller NRSROs, may be strained if sufficient time is not provided to comply with these new rules.

## **2. Proposed Enhancements to Rating Histories Disclosures**

We generally agree with the spirit of the Commission’s proposed enhanced XBRL rating history disclosures under Rule 17g-7(b), which will replace the rating history currently required under Rule 17g-2(d)(3), in an effort to comply with the provisions of the Dodd-Frank Act to improve the comparability of ratings across NRSROs. The comparability of rating histories among ABS types may be an important factor for the selection of NRSROs pursuant to the system established by the “Franken Amendment” or a similar system implemented by the Commission.<sup>22</sup>

Additionally, we also agree with the Commission’s decision to maintain the current bifurcated timetables for the enhanced XBRL disclosure.<sup>23</sup> The 12 months and 24 months for issuer-paid and subscriber-paid ratings, respectively, remain important for NRSROs to maintain a competitive subscriber-paid business. Because subscribers may use subscriber data for annual investment policy decisions and similar actions, a 12 month timeframe for surveillance ratings may be too short to sustain this business. Therefore, the current 24 month timeframe remains appropriate. Investors will still have access to enhanced comparable rating information regarding each NRSRO’s rating history through their Form NRSRO disclosures.

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<sup>20</sup> *Id.* at 33445.

<sup>21</sup> *Id.*

<sup>22</sup> *See, Request for Comment, Solicitation of Comment to Assist in Study on Assigned Credit Ratings, Securities and Exchange Commission Release No. 34-64456; File No. 4-629 (May 10, 2011), 76 F.R. 28265 (May 16, 2011).*

<sup>23</sup> 76 F.R. at 33451.

NRSROs are not currently required under Rule 17g-2(d)(3)(i)(A) to provide XBRL-based ratings history for surveillance ratings actions for which the NRSRO did not provide an initial rating. Under the Commission's proposed rules, the disclosure of these formerly excluded surveillance rating actions in XBRL as of June 26, 2007 will be required.<sup>24</sup> NRSROs may not be able to provide XBRL information as of June 26, 2007, since these surveillance rating actions would be beyond the scope of the current three year record keeping requirement under Rule 17g-2. This date also predates the date we obtained our NRSRO status. Therefore, certain NRSROs may not be able to provide information as of June 26, 2007.

The addition of subscriber-paid ratings to the XBRL disclosure is particularly burdensome for subscription-based NRSROs. Because we strive to provide timely monthly surveillance for the securities we rate, the number of "rating actions" we will have is likely to be significantly larger than issuer-paid NRSROs since each evaluation of the rating must be included in the XBRL disclosure under currently proposed Rule 17(g)-7(b)(2)(v).<sup>25</sup> Therefore, the current rule as proposed may encourage NRSROs to provide less frequent surveillance. We ask the Commission to consider maintaining the current applicability of the XBRL disclosure rules to initial ratings.

When Rule 17g-2(d)(3) was passed, a 60 day transition period was permitted to allow NRSROs to convert their rating history disclosures from other machine readable formats to XBRL. Based upon the Commission's estimation, the changes under Rule 17g-7(b) would require approximately 1,350 hours to implement.<sup>26</sup> Therefore, a substantially longer transition period will be required to implement the Commission's proposed changes, despite the pre-existing XBRL framework.

For example, if two information technology professional or consultants were dedicated on a full-time basis to this effort, they would be required to work 11.25 hour days, 7 days a week to meet a 60 day deadline. We, therefore, propose that a longer time period be permitted, especially in light of the multiple, simultaneous technology supported changes required by the Dodd-Frank Act. This would be especially important for smaller NRSROs, whose resources are historically more constrained. Additionally, we ask the Commission to consider providing subscription-based NRSROs with frequent surveillance additional time to comply with the enhanced XBRL disclosure requirements.

## **F. Credit Rating Methodologies**

We generally agree with the Commission's efforts to protect the integrity of the credit ratings process through the changes proposed by Rule 17g-8(a). However, we note that a "reasonable period of time" to apply procedure and methodology changes may be quite long, if the board of directors (or its equivalent) must "approve" all procedures and methodologies, including qualitative and quantitative data and models. The board of directors may have competing obligations if the NRSRO operates in a diversified organization and may delay necessary model

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<sup>24</sup> *Id.* at 33449.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 33520.

changes from being reflected in the ratings analysis in a timely fashion. Additionally, the board of directors may need time to hire and meet outside advisors and experts in order to assist them in their review, and those advisors and experts will also need additional time to prepare adequate guidance.

Therefore, we would advocate the Commission consider providing guidance as to whether board of directors of NRSROs can meet their approval obligations with regard to methodology or procedures by conducting a periodic review and approval process of the NRSRO's methodology or procedures, rather than through ongoing one-off pre-approval analyses. A periodic approval process is more consistent with the board of directors' oversight role and provides the board of directors a better opportunity to provide well-planned and meaningful guidance that would be better at creating consistency in best practices across the NRSRO.

#### **G. Form and Certifications to Accompany Credit Ratings**

We generally believe that NRSROs should compete based on the transparency and thoroughness of their analysis. We believe that the standardized form certification established by Rule 17g-7(a)(1), may discourage NRSROs from actually providing more transparency and information in order to compete, because the certification provides them with cover to say that the limitations and risks of the rating are sufficiently transparent.

Furthermore, we do not believe that some of the form certifications have much value to investors across all rating classes. The certifications requirements are often duplicative of other information provided in the ratings reports and the related disclaimers and terms of use for these reports.

Additionally, across asset classes, and particularly for CMBS, it may be difficult to comply with the proposed Rule 17g-7(a)(1)(ii)(M) requirement to include an analysis and examples of five assumptions made in the ratings process that, without accounting for any other factor, would have the greatest impact on a rating if the assumptions were proven false or inaccurate.<sup>27</sup> We have not been able to determine whether we have five assumptions when taken alone and without accounting for any other factor, would have any material impact on the rating if proven false or inaccurate.

In addition, we believe it is inappropriate to have a "person responsible for a rating" execute the form certification accompanying the credit rating for purposes of the attestation requirement set forth in Rule 17g-1(a)(iii).<sup>28</sup> NRSROs' conflict of interest policies and rating committee procedures are designed to ensure that no one person is responsible for a rating. Therefore, we believe that having a "person responsible for a rating" execute the form certifications seems misleading to investors and inconsistent with these policies and processes designed to avoid an individual unilaterally making a rating decision in order to avoid conflicts of interest and undue influence.

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<sup>27</sup> *Id.* at 33462.

<sup>28</sup> *Id.* at 33463-33464.

We disagree with the Commission's estimation that the form of these certificates will be largely standardized and take 15 minutes to complete per rating action.<sup>29</sup> We believe that the Commission's estimation is too low since proposed provisions will not be able to be standardized across rating actions or asset class types and will still require an individual analysis of the securities transaction. This is particularly true of proposed Rule 17g-7(a)(1)(ii)(I), which requires the NRSRO assess the quality of information available and considered in producing a rating for the security, in relation to the quality of information available to the NRSRO in rating similar securities.<sup>30</sup>

We believe that the Commission's annual cost and time estimates to comply with this certification process are too low. The estimates do not consider the addition of new products or the possibility of future model changes and unforeseen market conditions, which may require review or changes to the sensitivity analysis or explanations or measures of volatility. We agree with the Commission that the implementation of the Rule 17g-7(a) will result in an enormous technological undertaking that will be costly.<sup>31</sup> Therefore, we recommend that when the final Rule 17g-7(a) is adopted that the NRSROs are provided with sufficient lead time to implement this process of at least one year. Moreover, we believe that a longer lead time for implementation would be beneficial to certain smaller NRSROs who may not have the financial or technological resources or technology resources to implement all Dodd-Frank measures on an expedited basis, while attempting to compete with larger NRSROs.

#### **H. Rule 15GA-2 and Form ABS-15G**

Rule 15GA-2 and Form ABS-15G as proposed provides a process that issuers and underwriters may file the Form ABS-15G containing the findings and conclusions of any third-party due diligence report, or they may rely on the representation of all of the NRSROs within the rating process for the transaction to file their findings and conclusions of any third-party due diligence report at least 5 days prior to the first sale. The Form ABS-15G as proposed provides that the Form ABS-15G may be "furnished" and not "filed" with the Commission, which allows the NRSRO to avoid certain liability under Section 18 of the Exchange Act. Additionally, these findings and conclusions are not required to be contained in the prospectus, so the required disclosure would not have to be included in the prospectus, which avoids the need to determine whether the third-party due diligence provider is an "expert" required to consent to being named in the registration statement, and thereby be subject to liability under Section 11 of the Securities Act.

Nevertheless, at this time, we do not intend, and do not expect the other NRSROs will cooperate, to provide the Form ABS-15G to issuers or underwriters. NRSROs will be hesitant to take on any additional potential liability for issuers or underwriters, in light of increasing regulatory costs and downward pressure on fees. Logistically, the NRSROs are not necessarily in a position to know

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<sup>29</sup> *Id.* at 33524.

<sup>30</sup> *Id.* at 33461.

<sup>31</sup> *Id.* at 33523-33524.

when the first sale on a particular transaction will be executed and are not the engaging party for each third party due diligence report, so they are not in a position to determine whether all the applicable reports are complete.

Moreover, the Dodd-Frank Act specifically puts the burden on issuers and underwriters to provide this report and to provide these reports to the NRSRO.<sup>32</sup> Nowhere in the text of Section 15E(s)(4)(A) establishes a role for the NRSRO in this process.<sup>33</sup> The Commission's authorization to adopt rules related to Section 15E(s)(4)(A) is not explicit or implied under the Dodd-Frank Act, in contrast to the explicit direction to the Commission to promulgate rules related to Section 15E(s)(4)(B), for which the Commission has proposed Form Due Diligence-15E, discussed below. Therefore, we respectfully request that the Commission revise Rule 15GA-2 to remove references to the NRSRO.

## **I. Third-Party Due Diligence for Asset-Backed Securities**

We believe that generally the substance of the Form Due Diligence-15E meets the mandate established by the Dodd-Frank Act. We agree with the Commission's conclusion not to specify or mandate specific standards, such as sample size or the types of assets reviewed. We believe more prescriptive standards in Item 4 of Form ABS Due Diligence 15E than proposed would violate Section 15E(c)(2) of the Exchange Act, which prohibits the Commission from regulating the substance of credit ratings or the procedures and methodologies by which the NRSRO determines credit ratings. Additionally, more prescriptive standards may not adequately address the differences, which may continue to develop over time, between different ABS classes.

The Commission has proposed a catchall provision in Item 4 of Form ABS Due Diligence-15E to encompass CMBS and other ABS categories, which requires the NRSRO to include "any other factor or characteristic of the asset that would be material to the likelihood that the issuer of the . . . ABS will pay interest and principal according to its terms and conditions."<sup>34</sup> We believe that this catchall category is too broad and should include only factors or characteristics that were material to determining the credit rating and provided to the NRSRO for purposes of determining the credit rating.

It remains possible that certain third-party due diligence providers may refuse to provide these certifications or providing such certifications will slow the market. Furthermore, it may make it more difficult for certain relatively smaller transactions to come to market, since third-party due

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<sup>32</sup> Section 15E(s)(4)(B) of the Exchange Act provides that in "any case in which third-party due diligence services are employed by a nationally recognized statistical rating organization, an issuer or an underwriter, the person providing the due diligence services shall provide to any nationally recognized statistical rating organization that produces a rating to which such services relate."

<sup>33</sup> Section 15E(s)(4)(A) of the Exchange Act provides that the "issuer or underwriter of any asset-backed security shall make publicly available the findings and conclusion of any third party due diligence report contained by the issuer or underwriter."

<sup>34</sup> 76 F.R. at 33473.

diligence providers may only be willing to provide these certifications for the largest of transactions, where fees are at levels high enough to justify the associated costs and legal risks.

**J. Standards of Training, Experience and Competence**

We agree with the Commission that NRSROs should be permitted to design their analyst training, experience and competence standards based upon their size and unique procedures and methodologies for determining credit ratings and to determine the appropriate manner and frequency of periodic testing.<sup>35</sup> Furthermore, we believe that it would be beneficial that these standards include a requirement that at least one individual with 3 years or more experience in performing credit analysis participates in the determination of a credit rating.<sup>36</sup> However, we believe that experience performing credit analysis need not have been with a NRSRO, and guidance to the contrary, could negatively impact smaller NRSROs and possible new entrants, given the small number of entities in the industry.

\* \* \* \* \*

Thank you for the opportunity to provide comments and suggestions regarding the Commission's proposed rules for NRSROs. Please do not hesitate to contact us if you have any questions.

Very truly yours,

/s/ Robert Dobilas  
Robert Dobilas  
President  
Morningstar Credit Ratings, LLC

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<sup>35</sup> *Id.* at 33528.

<sup>36</sup> *Id.* at 33527.