

quantitative data as requested by the Commission.

After careful review of the comments, the Commission believes that expanding the rule to include all types of credit ratings (*i.e.*, the ability to compare the performance of all NRSROs) will maximize its benefits to users of credit ratings. The Commission acknowledges commenters' concerns over potential loss of NRSRO revenue, and notes that an overall drop in subscription revenues across the credit rating industry could be a sign that the rule's requirement that NRSROs publicly disclose their credit ratings histories is having the unintended effect of causing users of credit ratings to cease purchasing access to current credit ratings or downloads of current credit ratings due to the availability of ratings histories disclosed on a delayed basis.

As discussed further below, however, it is the Commission's belief that increasing the grace period between the time a ratings action is taken on a rating issued that is not issuer-paid and the time it is required to be disclosed to twenty-four months will address these concerns and mitigate any potential negative impact on such NRSRO revenues. To the extent that users of credit ratings are paying subscription fees in significant part to obtain current ratings information, ratings that are twenty-four months old likely will not constitute a sufficient substitute for current ratings information such that existing subscribers would cease to pay such subscription fees for access to current ratings information. In addition, while several NRSROs whose ratings are issuer-paid also earn revenue from payments for downloads of their ratings, the Commission understands that this revenue is a relatively small percentage of their overall revenue. The Commission believes that the twelve month delay in publication will help mitigate any effect on these revenues for the 100% disclosure requirement. As with the credit ratings that are not issuer-paid, ratings that are twelve months old likely will not constitute a sufficient substitute for current ratings information such that existing customers would cease to pay fees for access to current ratings information. Furthermore, the amended rule, as adopted, does not require the disclosure of the analysis and report that typically accompany the publication of a credit rating. NRSROs will continue to be able to distribute such information as they see fit, including selling such information to subscribers, which should also serve to mitigate any potential loss of subscribers.

Nonetheless, the Commission intends to closely monitor the impact, if any, the new disclosure requirements of the rule, as amended, have on the revenues NRSROs obtain from users purchasing access to current credit ratings or downloads of current credit ratings. Depending on what, if anything, this monitoring reveals, the Commission may re-examine the rule and, if appropriate, consider modifications designed to address the concerns of harm to NRSRO revenue derived from selling current ratings information, balanced against the concerns expressed by other commenters regarding the usefulness of ratings history disclosure to investors when such disclosure does not include more recent (and perhaps more relevant) ratings. For example, the Commission's monitoring may reveal that users of credit ratings are ceasing to purchase access to current credit ratings or downloads of current credit ratings because of the public disclosure of the histories of those ratings. Alternatively, it may reveal that investors and other users of credit ratings are continuing to pay subscription fees for access to current ratings information, thus confirming that they do not view historical ratings as an adequate substitute for such current ratings. To complement the Commission's monitoring, the Commission encourages interested persons to notify the Commission of relevant developments under the new rules. For example, NRSROs should notify the Commission if they believe they are losing revenues because users of credit ratings view the twenty-four months delayed ratings action history disclosure as an adequate substitute for purchasing access to up-to-date credit ratings or downloads of up-to-date credit ratings.

The Commission notes, however, that the rule is intended to foster greater accountability and transparency of credit rating performance for NRSROs and to increase competition by allowing users of credit ratings to better assess and compare the performance of NRSROs, and other Commission rules are designed to reduce undue reliance on ratings by investors and other market participants. The increased accountability and transparency provided by the rule could cause users of credit ratings to shift their business from one NRSRO to another based on their views as to which entity provides the most accurate credit ratings. A loss of revenues by some NRSROs resulting in the gain of revenues by other NRSROs occasioned by a shift in business would not be a reason to consider modifying the rule as

discussed above; indeed, it could be evidence that the rule is serving its intended purpose. A steep decrease in subscription revenues across the credit rating industry, however, could be the result of a number of factors, and the Commission would carefully examine such a decrease. Although a general decline in subscription revenue likely would reflect that investors and other market participants have less demand for ratings, such a decrease in demand would be expected if regulatory emphasis on credit ratings is reduced, investors are performing their own independent analyses, and investors had less confidence in the quality of ratings. However, a decrease in demand also could be a sign that the rule is having the unintended effect of causing users of credit ratings to cease purchasing access to current credit ratings or downloads of current credit ratings due to the availability of ratings histories disclosed on a twenty-four month delay.

To the extent NRSROs derive revenues from selling access to their ratings histories, the Commission acknowledges that the new rule may well have a negative impact on this revenue stream. As noted earlier, the amended rule, as adopted, does not require NRSROs to disclose the analysis or report that typically accompany a credit rating, which should also serve to mitigate any potential loss of subscribers to NRSROs' credit ratings histories. The Commission asked questions designed to quantify the amount of revenues derived by NRSROs from this activity but did not receive any revenue figures. However, information gathered by Commission staff over the course of discussions with NRSROs indicates that the amount of revenues they derived from selling access to ratings histories is not significant when compared to the revenues derived from other credit rating services. Nonetheless, the Commission encourages an NRSRO to notify the Commission if the rule causes a loss of this revenue source that is significant when compared to its total revenues. If that is the case, the Commission will re-examine the rule and review whether any action is appropriate.

The Commission also proposed, and requested comment on the appropriateness of, limiting the application of the proposed new disclosure requirements of paragraph (d)(3) of Rule 17g-2 to ratings initially determined on or after June 26, 2007, as well as comment on whether the data for ratings determined on or after that date would provide meaningful

information to users of credit ratings. The Commission asked, alternatively, whether the final rule should apply to ratings determined on or after a different date, such as the date of enactment of the Rating Agency Act, or to all outstanding credit ratings regardless of when issued.⁷⁵ Several commenters argued in favor of expanding the rule to cover all outstanding credit ratings,⁷⁶ with two stating that limiting disclosure to products initially rated on or after June 26, 2007 would exclude many of the structured finance products that contributed to the current financial crisis.⁷⁷ One commenter suggested that the rule be applied to all outstanding credit ratings starting three to five years ago,⁷⁸ while another stated that the disclosure required under the rule should include, at a minimum, the “2005 underwriting cohort.”⁷⁹ One commenter, stating that there is nothing in the Rating Agency Act that imposes a time-based limit on the Commission’s authority to require disclosure, argued that rating history disclosure should be required for as many ratings as possible and suggested a starting date “as early as the early 2000s” as “an absolute minimum.”⁸⁰ Another commenter stated that the costs for issuer-paid NRSROs to provide ratings histories for all outstanding credit ratings would not be substantial, arguing that the data was already available in digitized form and that the conversion to the XBRL format would require relatively simple technology.⁸¹

Two commenters expressed their opposition to applying the proposed new disclosure rule to all outstanding credit ratings, arguing that such a requirement would entail undue costs and burdens.⁸² One added that the benefit received from applying the disclosure requirements to all outstanding credit ratings would be of limited value.⁸³

The Commission believes that using the date of effectiveness of the Rating Agency Act strikes an appropriate balance between the Commission’s desire to maximize the amount of raw data to be disclosed and the potential costs of the disclosure. The amendment as adopted limits the application of the

rule’s new disclosure requirements to credit ratings issued after credit rating agencies were put on notice of the effectiveness of the Commission’s new regulatory authority over NRSROs. The Commission believes that using the date of effectiveness of the Rating Agency Act will permit, on a reasonable timeline, the development of a robust set of data while limiting the burden on NRSROs.

The Commission also requested comments as to whether the proposed twelve-month grace period between the time a ratings action was taken and the time it would be required to be disclosed under proposed paragraph (d)(3) of Rule 17g–2 would be sufficient to address concerns regarding the revenues NRSROs derive from selling downloads of, and data feeds to, their current issuer-paid credit ratings.⁸⁴ The Commission received twelve comments in response to these inquiries.⁸⁵ Of these, three commenters expressed agreement with the proposed twelve-month grace period,⁸⁶ with one noting that a six-month grace period would also be sufficient.⁸⁷

The commenters expressing disagreement with the proposed time lag offered a variety of suggestions as to the appropriate period. Three commenters argued for a longer grace period, citing the negative effects on revenue they expected would arise from a twelve-month period.⁸⁸ One commenter, arguing that the required disclosure would negatively impact sales of its historical database, expressed its belief that its database sales business would not be as negatively impacted if the Commission extended the time lag to at least 18 months. That commenter further expressed the belief that such a time lag would not impede third-party review of credit ratings performance.⁸⁹ One commenter suggested 36 months as the shortest possible delay to protect its subscription fees.⁹⁰ A third commenter, while stating that subscriber-paid NRSROs should never be required to disclose their ratings information, suggested a 2 to 3 year period as an alternative.⁹¹ Two commenters argued

that no grace period would be sufficient to avoid negatively impacting the revenues they derived from selling access to ratings history data.⁹²

Other commenters suggested a shorter grace period,⁹³ with one suggesting a six-month time-lag,⁹⁴ another two suggesting a three month time-lag,⁹⁵ and one suggesting immediate disclosure.⁹⁶ As noted above, one commenter supported either a six-month or twelve-month lag.⁹⁷ One commenter that supported the six-month time lag expressed the belief that six months represented an appropriate balance between the private commercial interests of the NRSROs impacted and the wider public interests.⁹⁸ One commenter that supported the three-month time lag stated that the twelve-month time would not meet the stated goal of the proposal to make it easier for persons to analyze the actual performance and accuracy of NRSROs’ credit ratings.⁹⁹ The other commenter supporting a three-month lag, noting that “rating information that is even three months old is extremely stale by market standards,” stated that a three-month lag would be more than adequate to protect NRSROs’ interest in selling data feeds and may be adequate to serve the purposes of the disclosure regime.¹⁰⁰ The commenter suggesting immediate disclosure argued that such disclosure was necessary to serve as a market check for “rating shopping.”¹⁰¹

The amendment, as adopted, includes different grace periods depending on whether a rating is issuer-paid or not. For issuer-paid credit ratings, the amendment, as adopted, retains the proposed twelve-month grace period between the time a ratings action is taken and the time it must be disclosed. This twelve-month grace period is intended to provide a sufficient volume of historical credit ratings information to permit comparison of credit ratings performance without unduly affecting the revenues NRSROs derive from selling downloads of their current credit ratings and access to historic information about their outstanding credit ratings. As noted above, the Commission asked questions designed to quantify the amount of revenues derived by NRSROs from this activity

⁷⁵ February 2009 Proposing Release, 74 FR at 6488.

⁷⁶ See, e.g., Council Letter; Fitch Letter; Colorado PERA Letter; ASF/SIFMA Letter; Hunt Letter; Multiple-Markets Letter.

⁷⁷ See Colorado PERA Letter; Council Letter.

⁷⁸ See ASF/SIFMA Letter.

⁷⁹ See Multiple-Markets Letter.

⁸⁰ See Hunt Letter.

⁸¹ See Multiple-Markets Letter.

⁸² See DBRS Letter; ABA Committee Letter.

⁸³ See ABA Committee Letter.

⁸⁴ February 2009 Proposing Release, 74 FR at 6488.

⁸⁵ See JCR Letter; DBRS Letter; Fitch Letter; ASF/SIFMA Letter; ICI Letter; Hunt Letter; Multiple-Markets Letter; R&I Letter; S&P Letter; Realpoint Letter; ABA Committee Letter; Rapid Ratings Statement; ICI Statement.

⁸⁶ See DBRS Letter; Fitch Letter; ABA Committee Letter.

⁸⁷ See DBRS Letter.

⁸⁸ See JCR Letter; R&I Letter; Realpoint Letter.

⁸⁹ See R&I Letter.

⁹⁰ See JCR Letter.

⁹¹ See Realpoint Letter.

⁹² See S&P Letter; Rapid Ratings Statement.

⁹³ See DBRS Letter; ASF/SIFMA Letter; ICI Letter; Hunt Letter; Multiple-Markets Letter.

⁹⁴ See DBRS Letter; ASF/SIFMA Letter.

⁹⁵ See ICI Letter; Hunt Letter.

⁹⁶ See Multiple-Markets Letter.

⁹⁷ See DBRS Letter.

⁹⁸ See ASF/SIFMA Letter.

⁹⁹ See ICI Letter.

¹⁰⁰ See ICI Letter; Hunt Letter.

¹⁰¹ See Multiple-Markets Letter.

but did not receive any revenue figures in response. The Commission notes, however, that one large NRSRO which primarily issues ratings under the issuer-paid business model stated that a twelve-month delay would be “sufficient to protect the commercialization of ratings of any type.”¹⁰²

Based on the comments received, however, the Commission believes that a longer grace period is appropriate for ratings actions on ratings that are not issuer-paid. As such, the amendment, as adopted, allows for a delay of up to twenty-four months on ratings actions taken on such credit ratings. Issuer-paid credit ratings are generally made available on an NRSRO’s Internet Web site free of charge for a designated period of time. For the NRSROs issuing such ratings, therefore, the 100% disclosure requirement adds a requirement that the NRSRO take data that has already been made public and, after a twelve-month grace period, make it permanently available in an aggregated form and in machine-readable (or later XBRL) format. In contrast, NRSROs operating under the subscriber-paid business model may only make their ratings available to paying subscribers. For these NRSROs, the 100% disclosure requirement will constitute a new disclosure, since it will require them to put into the public domain information that they generally do not make publicly available without collecting a fee.

In addition, although the Commission believes that the amended rule, as adopted, addresses the concerns raised by NRSROs regarding their ability to derive revenue from granting market participants access to their current credit ratings, the Commission also recognizes the possibility that this revenue may be negatively affected. If there were to be a negative impact, it will likely be disproportionately more significant for NRSROs that primarily or exclusively determine ratings paid for by subscribers compared to NRSROs that primarily or exclusively determine issuer-paid credit ratings. NRSROs that determine issuer-paid credit ratings earn the majority of their revenues from fees paid by issuers, underwriters, or sponsors. On the other hand, NRSROs that primarily or exclusively issue ratings paid for by subscribers derive their revenues almost entirely from the fees they charge subscribers. If subscribers consider non-current credit ratings as a reasonable substitute for current credit ratings, they may reconsider their subscriptions. In this

case, NRSROs that primarily or exclusively issue ratings paid for by subscribers are more likely to lose a more significant proportion of their revenue than NRSROs that determine issuer-paid credit ratings. The twenty-four month grace period for the disclosure of ratings actions on non-issuer paid credit ratings is designed to counterbalance this potentially disproportionate “substitution” effect. The Commission anticipates that the longer delay between the time a ratings action is taken on a non-issuer paid credit rating and the time it must be disclosed will significantly reduce the chances of users of credit ratings viewing the ratings histories to be disclosed as a viable substitute for subscribing to current credit ratings.

The parties that pay subscription fees for access to NRSRO credit ratings and who pay for access to downloadable packages of issuer-paid and unsolicited credit ratings obtain access to the NRSRO’s current views on the creditworthiness of obligors and debt instruments. Based on the comments of credit rating users and staff discussions with investors, the Commission believes that it would be unlikely that those parties would reconsider their purchase of those products due to the public availability of non-current ratings action information. The ability to receive data on a ratings action twenty-four months after it takes place would not appear to be an adequate substitute for subscribing to an NRSRO’s current credit ratings, nor would the ability to download current credit ratings be a substitute for downloading credit ratings that are 12 months old. The Commission further believes, however, that while increasing the length of the grace period from twelve to twenty-four months for credit ratings that are not issuer-paid will delay the emergence of the robust data set generated by the 100% disclosure requirement, the 100% disclosure requirement as adopted will have a positive effect on furthering the purposes of the Rating Agency Act to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.

Increasing the length of the grace period even further as suggested by some commenters would delay the development of a robust set of ratings history data and further reduce the ability to include more recent (and potentially relevant) ratings actions in an evaluation of ratings quality. Decreasing the grace period would increase the risk that NRSROs would lose revenues from subscribers to their

current credit ratings and downloads of their current credit ratings, as well as increase the risk of lost revenues from selling access to historic information about outstanding credit ratings. The grace periods adopted (twelve and twenty-four months) are intended to strike a balance between these two concerns, taking into account the particular effects with respect to issuer-paid and non issuer-paid credit ratings as discussed above. Furthermore, as noted above, the amended rule does not require NRSROs to disclose the analysis and report that typically accompany the publication of credit ratings, which should serve to further mitigate any potential loss of subscriber revenues or downloads. However, as noted above, the Commission intends to monitor the impact on revenues resulting from this disclosure requirement, as well as the benefits generated by this requirement.

As noted above, several commenters argued that the proposed 100% disclosure requirement was not narrowly tailored.¹⁰³ The Commission notes in response that the grace periods as well as the restriction of applicability of the new disclosure requirement to ratings initially determined on or after June 26, 2007, the effective date of the Ratings Agency Act, serve to appropriately narrow the application of the new disclosure requirement. Furthermore, as discussed above, the 100% disclosure requirement will provide different information and, as a result, differing types and customization of analysis, than the 10% disclosure requirement. The 100% disclosure requirement will, for example, allow a more granular analysis of how NRSROs each rated a specific obligor, security, or money market instrument, thereby furthering the goals of the Rating Agency Act to foster accountability, transparency, and competition in the credit rating industry. The Commission therefore believes that the amendment, as adopted, is narrowly tailored to meet the purposes of the Exchange Act and the Rating Agency Act.

Finally, the Commission notes that it has not yet published the List of XBRL Tags for NRSROs on its Internet Web site. The disclosure requirements of paragraph (d) of Rule 17g-2 as adopted in the *February 2009 Adopting Release*, which require NRSROs to make publicly available, in XBRL format and on a six-month delayed basis, the ratings histories for a random sample of 10% of issuer-paid credit ratings, became effective on August 10, 2009. On August 5, 2009, the Commission provided

¹⁰² See Fitch Letter.

¹⁰³ See, e.g., DBRS Letter; Moody’s Letter; S&P Letter.

notice that an NRSRO subject to those disclosure provisions can satisfy the requirement to make publicly available ratings history information in an XBRL format by using an XBRL format or any other machine-readable format, until such time as the Commission provides further notice.¹⁰⁴ Consistent with this approach, new paragraph (d)(3) as adopted will allow an NRSRO to make the required data available in an interactive data file in any machine-readable format, including XBRL, until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the List of XBRL Tags for NRSROs published by the Commission.

For the reasons discussed above, the Commission is adopting the proposed new paragraph (d)(3) with the following modifications: (1) The disclosure requirement is not limited to issuer-paid credit ratings but rather applies to any type of NRSRO credit rating (*i.e.*, issuer-paid, subscriber-paid, and unsolicited), (2) the grace period between the time a ratings action is taken and the time by which it must be disclosed has been increased from the proposed twelve months to twenty-four months for ratings actions related to non issuer-paid credit ratings, and (3) an NRSRO may make the required data available in an interactive data file in any machine-readable format, including XBRL, until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the List of XBRL Tags for NRSROs.

As adopted, paragraph (d)(3)(i)(A) of Rule 17g-2 requires an NRSRO to make publicly available on its corporate Internet Web site in an interactive data file that uses a machine-readable format the ratings action information required to be retained pursuant to paragraph (a)(8) of Rule 17g-5 (the ratings history information for all current credit ratings) for any credit rating initially determined by the nationally recognized statistical rating organization on or after June 26, 2007. Paragraph (d)(3)(i)(B) of Rule 17g-2, as adopted, provides that any ratings action information required to be made and kept publicly available on the NRSRO's corporate Internet Web

site pursuant to paragraph (d)(3)(i)(A) with respect to credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated need not be made public less than twelve months from the date such ratings action is taken. Consequently, under this provision, the grace period for disclosing ratings history information for issuer-paid credit ratings is twelve months. Paragraph (d)(3)(i)(C), as adopted, provides that any ratings action information required to be made and kept publicly available on the NRSRO's corporate Internet Web site pursuant to paragraph (d)(3)(i)(A) with respect to credit ratings other than those referred to in paragraph (d)(3)(i)(B) need not be made public less than twenty-four months from the date such ratings action is taken. Consequently, under this provision, the grace period for disclosing ratings history information for any credit rating other than issuer-paid credit ratings is twenty-four months. This includes subscriber-paid credit ratings. Finally, as adopted, paragraph (d)(3)(ii) of Rule 17g-2 provides that in making the information required under paragraph (d)(3)(i)(A) available in an interactive data file on its corporate Internet Web site, the NRSRO shall use any machine-readable format, including but not limited to XBRL format, until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO shall make this information available in an interactive data file on its corporate Internet Web site in XBRL format using the List of XBRL Tags for NRSROs as published by the Commission on its Internet Web site.

The Commission is adopting these amendments, in part, under authority to require NRSROs to make and keep for specified periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.¹⁰⁵ The Commission believes the new recordkeeping and disclosure requirements are necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

As discussed above, the Commission recognizes that the amended rule could affect the revenues of NRSROs. Nevertheless, the Commission believes that the amended rule, as adopted, strikes an appropriate balance in

furthering the purposes of the Rating Agency Act to increase transparency, accountability, and competition in the credit rating industry by providing users of credit ratings, investors, and other market participants and observers with the maximum amount of raw data with which to gauge the performance of NRSROs over time without unduly affecting NRSROs' ability to derive revenue from granting market participants access to their credit ratings and downloads of their credit ratings.

Accordingly, the Commission is adopting the amendments to paragraph (d) of Rule 17g-2 with the modifications discussed above.

III. Final Amendments to Rule 17g-5 and Regulation FD

A. Summary and Background

Rule 17g-5¹⁰⁶ identifies a series of conflicts of interest arising from the business of determining credit ratings. Under the rule, some of these conflicts must be disclosed and managed, while others are prohibited outright. In the *June 2008 Proposing Release*, the Commission proposed amending the rule to place additional requirements with respect to the conflict of being paid by the arranger of a structured finance product to rate the product as well as three new categories of conflicts of interest to be prohibited outright.¹⁰⁷ In the *February 2009 Adopting Release*, the Commission adopted the three new categories of prohibited conflicts of interest.¹⁰⁸ The Commission did not,

¹⁰⁶ 17 CFR 240.17g-5.

¹⁰⁷ See *June 2008 Proposing Release*, 73 FR at 36128-36228. The Commission's set of initial regulations implementing the Rating Agency Act designated eight types of conflicts of interest required to be disclosed and managed and prohibited outright four types of conflicts of interest. See *June 2007 Adopting Release*, 72 FR at 33595-33599.

¹⁰⁸ See *February 2009 Adopting Release*, 74 FR at 6465-6469. The three new categories of conflicts of interest prohibited outright are (1) issuing or maintaining a credit rating with respect to an obligor or security where the NRSRO or a person associated with the NRSRO made recommendations to the obligor or the issuer, underwriter, or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security, (2) issuing or maintaining a credit rating where the fee paid for the rating was negotiated, discussed, or arranged by a person within the NRSRO who has responsibility for participating in determining or approving credit ratings or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models, and (3) issuing or maintaining a credit rating where a credit analyst who participated in determining or monitoring the credit rating, or a person responsible for approving the credit rating received gifts, including entertainment, from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business

¹⁰⁴ See *Notice Regarding the Requirement to Use eXtensible Business Reporting Language Format to Make Publicly Available the Information Required Pursuant to Rule 17g-2(d) of the Exchange Act*, Exchange Act Release No. 60451 (August 5, 2009), 74 FR 40246 (August 11, 2009).

¹⁰⁵ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

however, adopt the new requirements that would have been triggered by the conflict of being paid by an arranger to rate a structured finance product. Instead, in the *February 2009 Proposing Release*, the Commission re-proposed the amendments with substantial modifications.¹⁰⁹ As discussed in detail below, the Commission is adopting the amendments substantially as re-proposed.

In the *June 2008 Proposing Release*, the Commission proposed to amend paragraph (b) of Rule 17g-5 by re-designating the existing paragraph (b)(9) of the rule as (b)(10) and creating a new paragraph (b)(9) identifying the conflict: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.¹¹⁰ In connection with specifying this type of conflict, the Commission proposed amendments to paragraph (a) of Rule 17g-5 that would have established additional conditions—beyond disclosing the conflict and establishing procedures to manage it—that would need to be met for an NRSRO to issue or maintain a credit rating subject to this conflict.¹¹¹

Specifically, the Commission proposed a new paragraph (a)(3) in the *June 2008 Proposing Release* that would have required, as a condition to the NRSRO rating a structured finance product, that the information provided to the NRSRO and used by the NRSRO in determining an initial credit rating and, thereafter, performing surveillance on the credit rating be disclosed through a means designed to provide reasonably broad dissemination of the information. The proposed amendments did not specify which entity—the NRSRO or the arranger—would need to disclose the information. The proposed amendments would have required further that, for offerings not registered under the Securities Act, the information would need to be disclosed only to investors and credit rating agencies on the day the offering price is set and, subsequently, publicly disclosed on the first business day after the offering closes.¹¹² The

activities such as meetings that have an aggregate value of no more than \$25.

¹⁰⁹ See *February 2009 Proposing Release*, 74 FR at 6493-6497.

¹¹⁰ See *June 2008 Proposing Release*, 73 FR at 36219-36226, 36251.

¹¹¹ See *id.*

¹¹² See *id.* This proposed requirement would have been in addition to the current requirements of paragraph (a) that an NRSRO disclose the type of conflict of interest in Exhibit 6 to Form NRSRO; and

Commission also provided in the *June 2008 Proposing Release* three proposed interpretations of how the information could be disclosed under the requirements of the proposed rule in a manner consistent with the provisions of the Securities Act. These interpretations addressed disclosure under the proposed amendment in the context of public, private, and offshore securities offerings.¹¹³

As discussed in the *February 2009 Proposing Release*, the majority of commenters addressing the proposal to amend paragraphs (a) and (b) of Rule 17g-5 set forth in the *June 2008 Proposing Release* opposed the proposed amendments or raised substantial practical or legal questions about how they would operate, particularly with respect to publicly disclosing the information.¹¹⁴ In response to the concerns raised by commenters, the Commission made significant changes to the proposed amendments and re-proposed them for further comment. Under the re-proposed amendments: (1) NRSROs that are hired by arrangers to perform credit ratings for structured finance products would have been required to disclose on a password-protected Internet Web site the deals for which they have been hired and provide access to that site to non-hired NRSROs that have furnished the Commission with the certification described below; (2) NRSROs that are hired by arrangers to perform credit ratings for structured finance products would have been required to obtain representations from those arrangers that the arranger would provide information given to the hired NRSRO to non-hired NRSROs that have furnished the Commission with the certification described below as well; and (3) NRSROs seeking to access information maintained by the NRSROs and the arrangers pursuant to the new rule would have been required to furnish the Commission an annual certification that they are accessing the information solely to determine credit ratings and would determine a minimum number of credit ratings using the information.¹¹⁵

The Commission received letters from nineteen commenters in response to the re-proposed amendments to Rule 17g-

establish, maintain and enforce written policies and procedures to address and manage the conflict of interest. 17 CFR 240.17g-5(a)(1) and (2).

¹¹³ See *June 2008 Proposing Release*, 73 FR at 36222-36226.

¹¹⁴ See *February 2009 Proposing Release*, 74 FR at 6491-6492.

¹¹⁵ See *February 2009 Proposing Release*, 74 FR at 6492-6497.

5.¹¹⁶ A majority of those commenters expressed their general support for the proposal,¹¹⁷ with several commenters expressing their belief that the disclosure required under the amendments would have a positive effect on competition within the credit rating industry.¹¹⁸ One commenter favoring the re-proposed amendments noted the benefit of a “level playing field,”¹¹⁹ while another expressed a belief that the proposed disclosure requirement would result in “true competition” in the credit rating industry.¹²⁰

A smaller number of commenters, however, expressed their general disagreement with the re-proposed amendments.¹²¹ One commenter argued that the re-proposed amendments would result in non-hired NRSROs being motivated to offer the most favorable preliminary ratings that the disclosed data would permit in order to encourage arrangers to abandon the originally hired NRSRO in favor of the non-hired NRSRO in order to obtain a “sweeter” final rating. The same commenter also argued that the proposal would favor large NRSROs with market power at the expense of smaller NRSROs.¹²² Another commenter expressed concerns that the proposed new requirements would cause small originators of structured finance products to abandon that market due to the costs associated with the proposed disclosure requirements.¹²³

One commenter cautioned that the proposal could reinforce, rather than diminish, an issuer's ability to engage in “ratings shopping” by creating incentives for issuers to shop for the NRSRO that will demand the least information in the initial rating process.¹²⁴ The Commission has expressed its concern over the practice of “ratings shopping” in the past.¹²⁵ In

¹¹⁶ See Marchywka Letter; JCR Letter; Council Letter; DBRS Letter; FSR Letter; Fitch Letter; Colorado PERA Letter; ASF/SIFMA Letter; ICI Letter; Hunt Letter; R&I Letter; S&P Letter; Moody's Letter; Realpoint Letter; ABA Committee Letter; CMSA Letter; CreditSights Statement; Moody's Statement; Realpoint Statement; RiskMetrics Statement; Egan-Jones Statement; ASF Statement.

¹¹⁷ See *e.g.*, Marchywka Letter; Council Letter; FSR Letter; Colorado PERA Letter; Hunt Letter; Realpoint Letter; ABA Committee Letter; CreditSights Statement; Realpoint Statement; Riskmetrics Statement; Egan-Jones Statement.

¹¹⁸ See *e.g.*, Hunt Letter, Riskmetrics Statement, Egan-Jones Statement.

¹¹⁹ See Riskmetrics Statement.

¹²⁰ See Egan-Jones Statement.

¹²¹ See *e.g.*, JCR Letter; ASF/SIFMA Letter; Moody's Letter; Moody's Statement; ASF Statement.

¹²² See JCR Letter.

¹²³ See R&I Letter.

¹²⁴ See Moody's Letter.

¹²⁵ See *e.g.*, *June 2008 Proposing Release*, 73 FR at 36218.

both the *June 2008 Proposing Release* and the *February 2009 Proposing Release*, the Commission noted that the amendments to Rule 17g-5 as proposed in the former release and re-proposed in the latter could help address ratings shopping by exposing an NRSRO that employed less conservative ratings methodologies in order to gain business.¹²⁶ In addition, the Commission has noted, the proposed amendments also could mitigate the impact of rating shopping, since NRSROs not hired to rate a deal could nonetheless issue a credit rating.¹²⁷

The Commission recognizes that an increase in the number of credit ratings available to investors by definition entails an increase in the number of NRSROs issuing those ratings, thereby giving issuers a broader pool of NRSROs among which to “shop” for a rating. The Commission also recognizes the concern that NRSROs not hired by the arranger might have the incentive to use information accessed pursuant to Rule 17g-5 as amended to issue an unduly favorable rating in an attempt to procure future business from a particular arranger. The Commission believes that there are several factors counteracting this incentive. First, the 100% disclosure requirement set forth in Rule 17g-2(d), as amended, will facilitate the ability of investors, academics and other users of credit ratings to directly compare the credit rating performance of all NRSROs issuing a credit rating for a given structured finance product, whether the NRSROs are hired by the arranger to do so or instead are issuing unsolicited ratings based on information obtained under the disclosure requirements of Rule 17g-5 as amended. This will likely enhance both hired and non-hired NRSRO’s accountability for the ratings they issue. Second, the information available pursuant to Rule 17g-5 will be accessible to all NRSROs, including NRSROs operating under the subscriber-paid model. Since the latter are not compensated by the structured products’ arrangers, they can issue unsolicited ratings without the pressure of worrying about the effect that the unsolicited ratings might have on their future revenue stream from arrangers of structured finance. Finally, by facilitating the issuance of unsolicited ratings, the amendments to Rule 17g-5 may serve to mitigate the potential for ratings shopping, since an arranger that “shopped” in order to obtain a higher rating would still face the possibility of

non-hired NRSROs issuing lower ratings.

The Commission is adopting the re-proposed amendments substantially as proposed in order to address conflicts of interest and improve the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products. Currently, when an NRSRO is hired to rate a structured finance product, some of the information it relies on to determine the rating is generally not made public. As a result, structured finance products frequently are issued with ratings from only one or two NRSROs that have been hired by the arranger, with the attendant conflict of interest that creates. The amendments to Rule 17g-5 are designed to increase the number of credit ratings extant for a given structured finance product and, in particular, to promote the issuance of credit ratings by NRSROs that are not hired by the arranger. This will provide users of credit ratings with more views on the creditworthiness of the structured finance product. In addition, the amendments are designed to reduce the ability of arrangers to obtain better than warranted ratings by exerting influence over NRSROs hired to determine credit ratings for structured finance products. Specifically, opening up the rating process to more NRSROs will make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the credit ratings issued by other NRSROs.

B. Paragraph (b)(9) of Rule 17g-5

New paragraph (b)(9) of Rule 17g-5 identifies the following conflict required to be disclosed and managed under paragraph (a) of the rule: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.¹²⁸ The Commission intends this provision, which mirrors, in part, the text of Section 15E(i)(1)(B) of the Exchange Act (enacted as part of the Rating Agency Act),¹²⁹ 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.

As the Commission noted when initially proposing new paragraph (b)(9) in the *June 2008 Proposing Release*, the conflict identified in new paragraph (b)(9) is a subset of the broader conflict already identified in paragraph (b)(1) of Rule 17g-5; namely, “being paid by issuers and underwriters to determine credit ratings with respect to securities or money market instruments they issue or underwrite.”¹³⁰ In the case of structured finance products, the Commission believes this “issuer/underwriter-pay” conflict is particularly acute because certain arrangers of structured finance products repeatedly bring ratings business to the NRSROs.¹³¹ As sources of frequent, repeated deal-based revenue, some arrangers have the potential to exert greater undue influence on an NRSRO than, for example, a corporate issuer that may bring far less ratings business to the NRSRO.¹³²

In the *February 2009 Proposing Release*, the Commission requested comment both generally on proposed new paragraph (b)(9) of Rule 17g-5 and on the specific question of whether the definition of the securities and money market instruments giving rise to the specific conflict—instruments issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction—should be broadened or narrowed.¹³³ One commenter argued that the definition as proposed was too broad and suggested that structured finance products should be defined identically to “asset-backed securities” in Regulation AB¹³⁴ or “expanded with sufficient precision to clarify the intended scope.”¹³⁵ In both the *June*

¹³⁰ 17 CFR 240.17g-5(b)(1). As the Commission noted when adopting Rule 17g-5, the concern with the conflict identified in paragraph (b)(1) “is that an NRSRO may be influenced to issue a more favorable credit rating than warranted in order to obtain or retain the business of the issuer or underwriter.” *June 2007 Adopting Release*, 72 FR at 33595.

¹³¹ See e.g., Testimony of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (April 22, 2008) pp. 4–6.

¹³² *Id.*; see also, *June 2008 Proposing Release*, 73 FR at 36219.

¹³³ See *February 2009 Proposing Release*, 74 FR at 6493.

¹³⁴ See 17 CFR 1101(c).

¹³⁵ See ABA Committee Letter.

¹²⁶ See *June 2008 Proposing Release*, 73 FR at 36243; *February 2009 Proposing Release*, 74 FR at 6506.

¹²⁷ *Id.*

¹²⁸ In connection with the adoption of new paragraph (b)(9) of Rule 17g-5, the Commission is re-designating the pre-existing paragraph (b)(9) as paragraph (b)(10).

¹²⁹ 15 U.S.C. 78o-7(i)(1)(B).

2008 *Proposing Release* and the February 2009 *Proposing Release*, however, the Commission explicitly stated its intention to broaden the scope of the proposed amendments rather than restrict it to structured finance products meeting narrower definitions such as the one set forth in Regulation AB.¹³⁶

In the February 2009 *Proposing Release*, the Commission stated that its intent is to have the definition be sufficiently broad to cover all structured finance products and noted that Section 15E(i)(1)(B) of the Exchange Act (adopted as part of the Rating Agency Act) uses identical language to describe a potentially unfair, coercive or abusive practice relating the ratings of securities or money market instruments.¹³⁷ Furthermore, the Commission adopted Rule 17g-6(a)(4),¹³⁸ in part, under this statutory authority, and Rule 17g-6(a)(4) uses the same language—securities or money market instruments “issued by an asset pool or mortgage-backed securities transaction”—to describe the prohibitive practice. As used in Rule 17g-6 and Rule 17g-5, the Commission intends this definition to cover the broad range of structured finance products, including, but not limited to, securities collateralized by pools of loans or receivables (e.g., mortgages, auto loans, school loans, credit card receivables), collateralized debt obligations, collateralized loan obligations, synthetic collateralized debt obligations that reference debt securities or indexes, and hybrid collateralized debt obligations. The Commission continues to believe that the broader definition will appropriately result in the amended rules’ application to a larger segment of credit ratings.

The Commission is adopting new paragraph (b)(9) of Rule 17g-5 as proposed.

C. Paragraph (a)(3) of Rule 17g-5

The Commission also is adopting new paragraphs (a)(3)(i), (ii), and (iii) of Rule 17g-5 substantially as proposed. New paragraph (a)(3)(i) requires an NRSRO subject to the conflict set forth in new paragraph (b)(9) to maintain a password-protected Internet Web site containing a list of each structured finance security or money market instrument for which it currently is in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the

date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii), as discussed below, can be accessed.¹³⁹

New paragraph (a)(3)(ii) requires an NRSRO subject to the conflict to provide free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in new paragraph (e) of Rule 17g-5 (discussed below) that covers that calendar year.¹⁴⁰ Taken together, new paragraphs (a)(3)(i) and (ii) of Rule 17g-5 create a mechanism requiring NRSROs hired to rate structured finance products to alert other NRSROs that an arranger has initiated the rating process and to promptly inform the other NRSROs where information being provided by the arranger to the hired NRSRO to determine the credit rating may be obtained.

Several commenters addressed the issue of the password protected Internet Web site to be maintained by hired NRSROs.¹⁴¹ Three commenters expressed support for the concept,¹⁴² with one noting that the requirements “to establish and maintain such web sites and to post very limited information on such web sites do not appear to be unduly burdensome to NRSROs.”¹⁴³ Three other commenters opposed the requirement, arguing that the costs of creating and maintaining a

Web site are significant and would negatively impact smaller NRSROs in addition to potentially creating security risks.¹⁴⁴ The Commission is sensitive to the costs of the new requirement but does not believe they are significant. All of the NRSROs currently maintain Internet Web sites, in most cases with password-protected portals that their subscribers and registered users can access to obtain information posted by the NRSRO. Consequently, adding a portal for other NRSROs to access pending deal information is not expected to require significant additional Internet Web site design and maintenance.

The Commission requested comment as to whether the information required to be maintained on the NRSRO’s Internet Web site would be sufficient to alert other NRSROs that the rating process has commenced and where they can locate information to determine an unsolicited rating, or whether the Commission should, for example, require an e-mail alert to be sent to all NRSROs that have access to the site as well.¹⁴⁵ One commenter suggested that instead of requiring NRSROs to maintain the list of deals, the Commission require arrangers to notify non-hired NRSROs of new deals by e-mail or, alternatively, that the Commission implement a pilot project to set up and maintain a Web site with information provided by the NRSROs and/or arrangers.¹⁴⁶ Two commenters, however, expressed their opposition to requiring NRSROs to send e-mails in addition to or in lieu of requiring them to maintain the Web site described in new paragraph (a)(3)(i), noting that monitoring such a Web site would be a simple and a non-time-consuming process for non-hired NRSROs.¹⁴⁷ One further noted that if e-mails were required, an NRSRO interested in determining its own ratings would have to monitor their e-mail for update messages from other NRSROs and still check other NRSROs’ Web sites in order to obtain the relevant information before checking the relevant issuer portals.¹⁴⁸ The second commenter also argued that an NRSRO should not have to send an e-mail to other NRSROs that may have no interest in rating a particular transaction.¹⁴⁹

The Commission is adopting the requirement that the hired NRSRO

¹³⁶ See June 2008 *Proposing Release*, 73 FR at 36213 note 15; February 2009 *Proposing Release*, 74 FR 6493.

¹³⁷ See 15 U.S.C. 780-7(i)(1)(B); see also February 2009 *Proposing Release*, 74 FR 6493.

¹³⁸ 17 CFR 240.17g-6(a)(4).

¹³⁹ As noted in the February 2009 *Proposing Release*, the text of proposed paragraph (a)(3)(i) refers to transactions where the NRSRO is in the process of determining an “initial” credit rating. The Commission does not intend that the rule require the NRSRO to include on the Internet Web site information about securities or money market instruments for which the NRSRO has published an initial rating and is monitoring the rating. Consequently, upon publication of the initial rating, the NRSRO can remove the information about the security or money market instrument from the list it maintains on the Internet Web site. The Commission notes that the information on the arranger’s Web site would remain available. If, however, the arranger decides to terminate the rating process before the hired NRSRO published an initial rating, the NRSRO would be permitted to remove the information from the list. See February 2009 *Proposing Release*, 74 FR at 6493-6494.

¹⁴⁰ The Commission notes that, pursuant to Section 17 of the Exchange Act as well as the rules thereunder (including Rule 17g-2), representatives of the Commission will have access to the information required to be disclosed on the NRSRO’s Internet Web site pursuant to Rule 17g-5.

¹⁴¹ See, e.g., DBRS Letter, ASF/SIFMA Letter, S&P Letter, Realpoint Letter, ABA Committee Letter, CMSA Letter.

¹⁴² See Realpoint Letter; RiskMetrics Statement; ABA Committee Letter.

¹⁴³ See ABA Committee Letter.

¹⁴⁴ See DBRS Letter; ASF/SIFMA Letter; Moody’s Letter.

¹⁴⁵ See February 2009 *Proposing Release*, 74 FR at 6494.

¹⁴⁶ See DBRS Letter.

¹⁴⁷ See S&P Letter; Moody’s Letter.

¹⁴⁸ See Moody’s Letter.

¹⁴⁹ See S&P Letter.

maintain an Internet Web site identifying pending deals as proposed. The Commission agrees with those commenters that are of the view that it is not necessary to require a hired NRSRO to send e-mail alerts to other NRSROs every time it is hired to rate a new transaction, either in addition to or in lieu of the hired NRSRO maintaining a list of its transactions on a password-protected Internet Web site. Concentrating the information about pending deals at the Internet Web site maintained by the hired NRSRO will permit other NRSROs to sort through the list of pending transactions and decide which arranger Web sites they want to access to obtain the information necessary to determine a credit rating. Further, the Commission requires the hired NRSRO to promptly disclose the required information on its Internet Web site, thereby notifying the non-hired NRSROs of the pending deal as soon as possible.¹⁵⁰ The Commission believes that the non-hired NRSRO will be better served by the ability to access, periodically at their own convenience, the lists of all pending transactions maintained on the hired NRSROs' Internet Web sites in order to determine whether any new deals have been initiated. The Commission does not believe that one-time notice e-mails are an adequate alternative in lieu of hired NRSROs maintaining lists of pending transactions. While the Commission does not believe it necessary to require hired NRSROs to send e-mail notices in addition to maintaining such lists, the Commission encourages hired NRSROs to voluntarily supplement maintaining the required lists of pending transactions by offering to notify other registered NRSROs by e-mail alert whenever they are hired to rate new transactions. This way the other NRSROs can decide for themselves whether they want to receive e-mail alerts or monitor the Internet Web sites.

As the Commission noted in the *February 2009 Proposing Release*, the text of paragraph (a)(3)(i) refers to transactions where the NRSRO is in the process of determining an "initial" credit rating.¹⁵¹ The rule does not require the NRSRO to include on the Internet Web site information about securities or money market instruments once the NRSRO has published the initial rating and is monitoring the rating. The amendment is designed to

alert other NRSROs about new deals and direct them to the Internet Web site of the arranger where information to determine initial ratings and monitor the ratings can be accessed. Consequently, upon publication of the initial rating, the NRSRO can remove the information about the security or money market instrument from the list it maintains on the Internet Web site. Similarly, if the arranger decides to terminate the rating process before a hired NRSRO publishes an initial rating, the NRSRO would be permitted to remove the information from the list. As discussed in more detail below, however, the representations a hired NRSRO will be required to obtain from an arranger include a representation that once an instrument is rated, the arranger will be required to post on its password-protected Internet Web site any information provided to the hired NRSRO for surveillance purposes.

The Commission is making clarifying changes to the text of new paragraphs (a)(3)(ii) and (a)(3)(iii) of Rule 17g-5 as proposed. As discussed above, that paragraph requires an NRSRO subject to the conflict set forth in new paragraph (b)(9) of Rule 17g-5 to provide free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in new paragraph (e) of Rule 17g-5 (discussed below) that covers that calendar year. The Commission is revising the proposed amendment to clarify that the hired NRSRO need only provide access to its password-protected Internet Web site to a non-hired NRSRO whose certification indicates that it has either (1) determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to Rule 17g-5(a)(3) as amended in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments; or (2) has not accessed information pursuant to Rule 17g-5(a)(3) as amended 10 or more times in the calendar year prior to the year covered by the certification. This revision ensures that hired NRSROs will only be required to provide access to their password-protected Internet Web sites to non-hired NRSROs that have met the requirements set forth in the certification to be provided to the Commission pursuant to new paragraph (e) of Rule 17g-5 as amended. The Commission is further clarifying that a

non-hired NRSRO would not be precluded from accessing the hired-NRSRO's Internet Web site if at some point prior to the most recently ended calendar year the NRSRO accessed the Web site 10 or more times. For example, if a non-hired NRSRO accessed the Web site 10 or more times in year 1, but did not access the Web site in year 2, the non-hired NRSRO would then be permitted to access the Internet Web site in year 3.

Accordingly, the Commission is adopting the amendments establishing new paragraphs (a)(3)(i) and (ii) of Rule 17a-5 substantially as proposed, with the revisions to the text as proposed as discussed above.

New paragraph (a)(3)(iii) of Rule 17g-5, adopted substantially as proposed, requires an NRSRO subject to the conflict set forth in new paragraph (b)(9) to obtain four representations from an arranger that hires it to rate a structured finance product: (1) Pursuant to paragraph (a)(3)(iii)(A) the arranger must represent that it will maintain the information described in paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of Rule 17g-5 available on an identified password-protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating; (2) pursuant to paragraph (a)(3)(iii)(B) of Rule 17g-5 the arranger must represent that it will provide access to that password-protected Internet Web site to any NRSRO that provides it with a copy of the certification described in new paragraph (e) of Rule 17g-5 (discussed below) that covers the current calendar year; (3) pursuant to paragraph (a)(3)(iii)(C) of Rule 17g-5 the arranger must represent that it will post on that password-protected Internet Web site all information the arranger provides to the NRSRO for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the NRSRO;¹⁵² and (4) pursuant to paragraph (a)(3)(iii)(D) of Rule 17g-5 the

¹⁵⁰ The Commission will take seriously any indications that the hired NRSRO is not complying with the requirement to promptly disclose the information pursuant to new paragraph (a)(3)(i) of Rule 17g-5.

¹⁵¹ See *February 2009 Proposing Release*, 74 FR at 6493.

¹⁵² The Commission expects that all the information will be provided in the same format. For example, if the arranger provides information to the hired NRSRO in downloadable and/or searchable format, the Commission expects the arranger to provide the same information in the same format on its Internet Web site. The Commission will take seriously any concerns raised in this regard.

arranger must represent that it will post on the password-protected Internet Web site all information the arranger provides to the NRSRO for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the NRSRO.

The representations required to be obtained by an NRSRO, as described in new paragraphs (a)(3)(iii)(A) through (D) of Rule 17g-5, taken together, provide that an arranger of a structured finance product agrees to make the information it provides to hired NRSROs, whether provided for the purpose of determining an initial rating or for monitoring a rating, available to other NRSROs. The hired NRSRO must obtain from the arranger a representation that the arranger will post that information on the arranger's Internet Web site at the same time it is given to the hired NRSRO, and that any time the information is updated or new information is given to the hired NRSRO, the arranger will post that information on its Internet Web site contemporaneously. An NRSRO also will be required to obtain from the arranger a representation that the arranger will tag the information in a manner that informs NRSROs accessing the Web site which information currently is operative for the purpose of determining the credit rating in order to ensure that NRSROs accessing the Internet Web site use the correct information to determine their credit ratings. Paragraph (a)(3)(iii) of Rule 17a-5, as adopted, adds the word "written" to the proposed text in order to clarify that these representations must be obtained in writing in order to ensure that they are formally documented and executed.

An NRSRO will violate Rule 17a-5(a)(3) if it determines an initial credit rating or maintains an existing credit rating for a structured finance product that is paid for by an arranger unless that NRSRO obtains a written representation from the arranger, upon which the NRSRO can reasonably rely, that the arranger will take the steps set forth in paragraph (a)(3)(iii)(A) through (D). One commenter expressed concern over the proposed amendment's standard of "reasonable" reliance on an arranger's representations.¹⁵³ The question of whether reliance was reasonable will depend on the facts and circumstances of a given situation.

Factors relevant to this analysis would include, but not be limited to: (1) Ongoing or prior failures by the arranger to adhere to its representations; or (2) a pattern of conduct by the arranger where it fails to promptly correct breaches of its representations. Further, the Commission recognizes that Internet Web sites periodically malfunction. Depending on the facts, a limited Internet Web site malfunction by itself would not cause the NRSRO to no longer be able to rely reasonably on a written representation from that arranger.

In addition to the scope of the safe harbor, commenters raised a number of other concerns in connection with paragraph (a)(3)(iii) as proposed.¹⁵⁴ Several commenters objected to the requirement that NRSROs obtain representations from arrangers, arguing that doing so inappropriately places NRSROs in the position of enforcing arranger compliance with disclosure requirements.¹⁵⁵ One commenter suggested that the required representations be made to the Commission instead of the hired NRSRO.¹⁵⁶ The Commission believes that the structure of the rule as amended is consistent with the Commission's regulation of NRSROs. The Commission notes that the rule as amended is designed to make clear the steps an NRSRO must take to provide a credit rating for a particular arranger. An NRSRO is not required to enforce compliance; however, if, for example, an NRSRO had knowledge that an arranger had not complied with its representations, the NRSRO would be on notice that future reliance on that arranger might not be reasonable. The Commission believes it is likely that the required representations will be part of the standard contracts entered into between NRSROs and arrangers and that an arranger that fails to comply with its representations will risk having the hired NRSRO withdraw the credit ratings paid for by that arranger and being denied the ability to obtain credit ratings from the hired NRSRO in the future, given that the hired NRSRO may not be able to reasonably rely on the safe harbor. The Commission believes that the consequences of losing the safe harbor should provide sufficient incentive for NRSROs to ensure that they obtain the representations from

arrangers as set forth in paragraph (a)(3)(iii) and that arrangers comply with their representations.

Another commenter argued that the duty to make the required information available should fall entirely on the hired NRSRO.¹⁵⁷ The Commission believes that arrangers are best positioned to disclose the information necessary to allow the NRSRO-users to determine credit ratings. The disclosure representation to be obtained from an arranger will apply to any information provided to a hired NRSRO, of which there may be more than one. One of the hired NRSROs may ask for more information than the other hired NRSROs. Allocating the responsibility of disclosure to the arranger will promote the most consistent and orderly dissemination of information to the NRSRO-users and allow them to access all relevant deal information in a single location rather than on multiple hired NRSROs' Internet Web sites.

Another commenter argued that requiring NRSROs to obtain such representations would have a chilling effect on oral communications by the issuer to the NRSRO and argued that the proposed amendment was an inappropriate means of regulating issuers' conduct.¹⁵⁸ The representations an NRSRO will be required to obtain from an arranger are not intended to result in the arranger providing different information to a hired NRSRO than it would otherwise, much less to "regulate" issuer conduct. The Commission 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. However, the Commission believes this will be a positive development. First, conveying information in writing rather than orally may promote credit rating accuracy in that the NRSRO analyst will be able to refer back to a document containing the information rather than his or her memory. Second, a more formal process of information exchange will create a better record of the data provided to the NRSRO, which will make it easier for Commission staff to understand the process used to determine the credit rating during an after-the-fact review of whether the NRSRO adhered to its procedures and methodologies for determining such credit ratings. This will benefit the NRSRO's compliance

¹⁵⁴ See e.g., Council Letter; DBRS Letter; Fitch Letter; ASF/SIFMA Letter; Moody's Letter; Realpoint Letter; ABA Committee Letter; CMSA Letter; RiskMetrics Statement; Colorado PERA Letter.

¹⁵⁵ See Fitch Letter; Moody's Letter; ABA Committee Letter.

¹⁵⁶ See ABA Committee Letter.

¹⁵⁷ See ASF/SIFMA Letter.

¹⁵⁸ See Moody's Letter.

¹⁵³ See Fitch Letter.

and internal audit functions as well as the Commission's examination function and benefit users of credit ratings.

The Commission requested comment as to whether the NRSRO should be required to obtain a representation from the arranger that the arranger will not provide any information to the hired NRSRO that is material without also disclosing that information on the arranger's Internet Web site.¹⁵⁹ The three commenters directly addressing this issue responded in the affirmative.¹⁶⁰ The Commission believes, however, that the representations the hired NRSRO will be required to obtain from an arranger, as set forth in paragraphs (a)(3)(iii)(C) and (D) as proposed, are sufficient to advance the purposes of the rule as amended. One commenter suggested that the Commission broaden the proposed amendment to permit unsolicited, subscriber-paid NRSROs to contact an arranger with questions regarding the information provided, or to be provided, on its password-protected Internet Web site for purposes of determining or monitoring a credit rating.¹⁶¹ The Commission believes that the representations an NRSRO will be required to obtain from an arranger are sufficient to accomplish the goals of the rule, as amended, and that it would be beyond the intended scope of the rule, as amended, to require arrangers to take on the responsibility of answering questions from the non-hired NRSROs obtaining access to the information that the arranger has disclosed.

Finally, one commenter stated that arranger, trustee, servicer and special servicer information and reports should be included in the arrangers' representation to disclose under paragraph (a)(3)(iii) of Rule 17g-5.¹⁶² The Commission agrees with this comment. The Commission recognizes that in many cases, the data required to monitor the rating of a structured finance product is provided by third parties such as trustees or loan servicers. In proposing the amendments to paragraph (a) of Rule 17g-5, the Commission did not intend to exclude such information from disclosure to non-hired NRSROs and potentially provide arrangers with an incentive to delegate the provision of information regarding a structured finance product to third parties in order to avoid such disclosure. Accordingly, the

Commission is adding the language "or contracts with a third party to provide to the nationally recognized statistical rating organization" to new paragraphs (a)(3)(iii)(C) and (D) of Rule 17g-5 in order to clarify that the proposed language "all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument" and "all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument" includes all information the issuer, sponsor or underwriter provides to the hired NRSRO *either directly or by contracting with a third party*.

The same commenter suggested that the Commission clarify that information made available to the arranger-paid NRSRO must be made available to the other NRSROs not only at the same time but also in the same manner, and with same search, access and other capabilities, as it is made available to the arranger-paid NRSRO.¹⁶³ The Commission notes that the nature of the relationship between the arranger and the hired NRSRO makes it inappropriate to mandate that all arranger information is made available in the same manner to non-hired NRSROs. For example, the rule as amended does not prohibit arrangers from continuing to deliver written materials directly to the hired NRSROs while posting that material on their password-protected Internet Web site for other NRSROs to access. Nevertheless, a hired NRSRO's reliance on an arranger's representations would not be reasonable if the arranger provided the information to non-hired NRSROs in an impaired manner such that it impeded the ability of the non-hired NRSROs to develop and maintain a credit rating.

The Commission is making one additional change to the text of new paragraph (a)(3)(iii)(B) of Rule 17g-5 as proposed. As discussed above, that paragraph requires a hired NRSRO to obtain from the arranger a representation that it will provide access to its password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in new paragraph (e) of Rule 17g-5 (discussed below) that covers that calendar year. The Commission is revising the text of the amendment as

proposed to clarify that the arranger, in the written representation it provides in the hired NRSRO, need only represent that it will provide access to its password-protected Internet Web site to a non-hired NRSROs whose certification indicates that it has either: (1) Determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to Rule 17g-5(a)(3) as amended in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments; or (2) has not accessed information pursuant to Rule 17g-5(a)(3) as amended 10 or more times in the most recently ended calendar year. This revision ensures that the representations that a hired NRSRO will be required to obtain from an arranger in order to rate a structured finance product will limit access to the arranger's password-protected Internet Web sites to non-hired NRSROs that have met the requirements set forth in the certification to be provided to the Commission pursuant to new paragraph (e) of Rule 17g-5 as amended.

The Commission is adopting new paragraph (a)(3)(iii) of Rule 17g-5 substantially as proposed, with the revisions to the text as proposed as discussed above.

D. Paragraph (e) of Rule 17g-5

The Commission also is adopting new paragraph (e) of Rule 17g-5 substantially as proposed. This provision requires that in order to access the Internet Web sites maintained by NRSROs and arrangers pursuant to the requirements of Rule 17g-5(a)(3), an NRSRO must annually execute and furnish to the Commission a certification stating the following:

The undersigned hereby certifies that it will access the Internet Web sites described in 17 CFR § 240.17g-5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to 17 CFR § 240.17g-5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 780-7(g)(1)) and 17 CFR § 240.17g-4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to 17 CFR § 240.17g-5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by

¹⁵⁹ See February 2009 Proposing Release, 74 FR at 6496.

¹⁶⁰ See Council Letter; DBRS Letter; Realpoint Letter.

¹⁶¹ See Realpoint Letter.

¹⁶² See Realpoint Letter.

¹⁶³ See Realpoint Letter.

the certification. Further, the undersigned certifies one of the following as applicable: (1) In the most recent calendar year during which it accessed information pursuant to 17 CFR § 240.17g-5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in 17 CFR § 240.17g-5(a)(3) and determined and maintained credit ratings for [Insert Number] of such securities and money market instruments; or (2) The undersigned previously has not accessed information pursuant to 17 CFR § 240.17g-5(a)(3) 10 or more times during the recently ended calendar year.¹⁶⁴

The 10% threshold set forth in paragraph (e) of Rule 17g-5, as amended, is designed to require the NRSRO accessing arranger Internet Web sites to determine a meaningful amount of credit ratings without forcing it to undertake work that it may not have the capacity or resources to perform. The Commission expressed its belief in the *February 2009 Proposing Release* that there should be some minimum level of credit ratings issued to demonstrate that the NRSRO is accessing the information for the purpose of determining credit ratings. On the other hand, if an NRSRO accesses information about a proposed deal that involves a structure or a type of assets that are new and that the NRSRO has not developed a methodology to incorporate into its ratings, it would not be appropriate or prudent to require the NRSRO to determine a credit rating. The requirement that the NRSRO list the number of times it accessed the information for issued securities and money market instruments and the number of credit ratings determined using that information on its next annual certification pursuant to paragraph (e) is designed to provide a level of verification that the NRSRO is, in fact, accessing the information for purposes of determining credit ratings.

The Commission received five comments on proposed paragraph (e) of Rule 17g-5.¹⁶⁵ Two commenters argued that NRSROs accessing arranger information pursuant to the rule should be required to provide confidentiality agreements to the arranger.¹⁶⁶ The

Commission is not requiring NRSROs accessing this information to enter into a confidentiality agreement with the arrangers. However, the Commission is sensitive to the concerns of commenters advocating such a requirement, namely that an arranger has a confidentiality agreement it could enforce directly itself. Accordingly, the representations an NRSRO must obtain from an arranger will not prevent the arranger from employing a simple process requiring non-hired NRSROs to agree to keep the information they obtain from the arranger confidential, provided that such a process does not operate to preclude, discourage, or significantly impede non-hired NRSROs' access to the information, or their ability to issue a credit rating based on the information. For example, an arranger could interpose a confidentiality agreement in a window (click-through screen) on the Internet Web site that appears after the NRSRO successfully enters its password to access the information and which requires the NRSRO to hit an "Agree" button before being directed to the information to be used to determine the credit rating. Presumably, this confidentiality agreement would contain the same terms as the confidentiality agreement between the arranger and the hired NRSRO. A process that effectively operates to preclude, discourage, or significantly impede non-hired NRSROs' access to the arranger's information or ability to issue unsolicited ratings, however, would be contrary to the Commission's purpose in adopting the rule as amended and, depending on the facts, may affect whether a hired NRSRO may reasonably rely on the arranger's representations.

The Commission also specifically requested comment as to whether the 10% threshold should be adjusted higher or lower.¹⁶⁷ Two commenters argued against the requirement,¹⁶⁸ with one stating that the 10% threshold could cause a chilling effect on NRSROs seeking to determine credit ratings using the arrangers' Internet Web sites and recommended that the Commission eliminate the provision and instead add a new provision to Rule 17g-2(a) requiring a non-hired NRSRO to make and retain records showing each deal it accessed pursuant to proposed rule 17g-5(a)(3).¹⁶⁹ The Commission continues to believe that a 10% threshold strikes an appropriate balance between ensuring that the NRSRO is accessing the

information for the purpose of determining credit ratings and not requiring the NRSRO to determine credit ratings for proposed deals that, upon review of the information provided, is beyond the current capabilities of the NRSRO. NRSROs that choose to access arrangers' Internet Web sites should do so with the intent to generate credit ratings, in which case a 10% threshold should not have a chilling effect. Eliminating the threshold requirement could have the undesirable effect of encouraging NRSROs to access the arranger Internet Web sites for reasons other than determining ratings, which would run contrary to the Commission's purposes for amending the rule. However, the Commission intends to closely monitor the effect of the 10% threshold requirement.

The Commission also specifically requested comment on whether an NRSRO should be prohibited from accessing the arranger information in the future if it accesses information 10 or more times in a calendar year and does not determine credit ratings for 10% or more of the deals.¹⁷⁰ One commenter directly addressed this question and stated that the NRSRO should not be barred from accessing the information in the future.¹⁷¹ The Commission believes that an NRSRO should be required to meet the 10% threshold to continue to access the information as this provides some evidence that the NRSRO is using the information for purposes of determining credit ratings and not for other reasons. At the same time, the Commission recognizes that there may be legitimate reasons why an NRSRO does not meet the 10% threshold in a given year, and NRSROs may request appropriate relief in such cases. For example, an NRSRO may access the information for a new type of financial instrument which it believed it was capable of rating but, upon reviewing the information posted by the arranger, determined that it did not have the resources or capacity to do so. In such a case, it would not be in the public interest for the non-hired NRSRO to produce a rating; nor, however, would it be desirable to penalize that NRSRO for its good-faith re-evaluation of its ability to produce the rating.

The Commission is revising the text of paragraph (e) to correct a typographical error contained in the *February 2009 Proposing Release* by removing the word "the" prior to the phrase "such securities and money market instruments" in the final sentence of the

¹⁶⁴ See *February 2009 Proposing Release*, 74 FR at 6496. The use of the term "issued securities and money market instruments" is intended to address potential deals that are posted on the Internet Web sites but that ultimately do not result in the publication of an initial rating because the arranger decides not to issue the securities or money market instruments. An NRSRO that accessed such information would not need to count it among the final deals that would be used to determine whether it met the 10% threshold. See *id.*

¹⁶⁵ See DBRS Letter; Fitch Letter; ASF/SIFMA Letter; Realpoint Letter; ABA Committee Letter.

¹⁶⁶ See ASF/SIFMA Letter; ABA Committee Letter.

¹⁶⁷ See *February 2009 Proposing Release*, 74 FR at 6497.

¹⁶⁸ See DBRS Letter, Realpoint Letter.

¹⁶⁹ See DBRS Letter.

¹⁷⁰ See *February 2009 Proposing Release*, 74 FR at 6497.

¹⁷¹ See Realpoint Letter.

certification. Additionally, the Commission is revising the text of paragraph (e) to clarify that the limit on accessing information 10 or more times occurred during the most recently ended calendar year.

Accordingly, the Commission is adopting paragraph (e) of Rule 17g-5 substantially as proposed.

E. Regulation FD

The Commission is adopting, substantially as proposed, the amendments to Regulation FD.¹⁷² The amendments to Regulation FD will accommodate the information disclosure program that the Commission is establishing under paragraphs (a) and (b) of Rule 17g-5, and permit the disclosure of material, non-public information to an NRSRO, solely for the purpose of allowing the NRSRO to determine or monitor a credit rating, irrespective of whether the NRSRO makes its ratings publicly available. As noted in the *February 2009 Proposing Release*, the amendments accommodate subscriber-based NRSROs that do not make their ratings publicly available for free, as well as NRSROs that access the information under Rule 17g-5 but ultimately do not issue a credit rating using the information.

Currently, Rule 100(b)(2)(iii) of Regulation FD¹⁷³ provides that the requirements of Regulation FD do not apply to disclosures of material non-public information made to an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available. As amended, Rule 100(b)(2)(iii) will contain two exceptions related to the issuance of credit ratings. Rule 100(b)(2)(iii)(A) of Regulation FD¹⁷⁴ will permit the disclosure of material, non-public information to an NRSRO, solely for the purpose of allowing the NRSRO to determine or monitor a credit rating pursuant to Rule 17g-5(a)(3), irrespective of whether the NRSRO makes its ratings publicly available. Rule 100(b)(2)(iii)(A) will apply only when the disclosures to NRSROs are made pursuant to Rule 17g-5(a)(3). Rule 100(b)(2)(iii)(B) of Regulation FD¹⁷⁵ will continue to permit issuers to disclose material, non-public information, solely for the purpose of determining or monitoring a credit rating, to any credit rating agency (including, but not limited

to, NRSROs), as that term is defined in Section 3(a)(61) of the Exchange Act,¹⁷⁶ that makes its credit ratings publicly available.

The proposed amendment to Regulation FD elicited few comments. One commenter supported the proposed amendment, but suggested expanding it to expressly permit unsolicited NRSROs to contact an arranger with questions regarding the information provided, or to be provided, on its password-protected Internet Web site for purposes of determining or monitoring a credit rating, and to require arrangers to post on such Internet Web site any additional material information provided in response to such questions.¹⁷⁷ The Commission expects that arrangers will have an incentive to post any additional information provided to an NRSRO on its password-protected Internet Web site because if they do not do so, other NRSROs developing credit ratings by accessing the Internet Web site would be determining their credit ratings without the benefit of the additional information. A lack of access to this additional information could adversely impact the ratings and lead to more frequent rating actions during the surveillance process. The purpose of the amendment to Regulation FD is to assure arrangers that providing information in compliance with Rule 17g-5(a)(3) will not violate Regulation FD. The Commission believes that the amendment, as adopted, will permit arrangers to post such additional information without causing a violation of Regulation FD, and that no expansion of the amendment is necessary.

Another commenter agreed that the disclosure regime proposed under Rule 17g-5 cannot operate effectively without the proposed amendment to Regulation FD, but suggested that such an expansion of the credit rating agency exemption presents a risk that none of the ratings determined for a structured finance product would be publicly available.¹⁷⁸ To address this potential risk, this commenter suggested that the exception be revised to allow information provided under Rule 17g-5(a)(3) to be disclosed to all NRSROs, provided that the ratings of at least one of those NRSROs are publicly available. The Commission does not believe this revision is necessary. Because the disclosure regime in Rule 17g-5(a)(3) will be triggered only when credit ratings for structured finance products are paid for by the issuer, sponsor, or underwriter, the Commission believes it

is already very likely that such ratings will be made publicly available.

Some NRSROs expressed concern that the proposed amendments would lead to a greater risk of selective disclosure of material, non-public information.¹⁷⁹ These commenters suggested that the proposed amendment to Regulation FD would hurt investor confidence in the fairness of U.S. markets,¹⁸⁰ encourage market abuse and undermine the integrity of the U.S. market.¹⁸¹ In particular, these commenters noted that the proposed amendment to the credit rating agency exemption in Regulation FD would permit NRSROs to obtain material non-public information from issuers and then selectively disclose it, or selectively disclose rating actions based upon it.¹⁸²

One commenter argued that the proposed amendment to Regulation FD would undercut the policy justification for including a credit rating agency exemption in Regulation FD.¹⁸³ This commenter highlighted that the Commission's rationale for exempting disclosure to credit rating agencies from Regulation FD was the widely available publication of the resulting credit rating.¹⁸⁴

The Commission is sensitive to commenters' concerns and will monitor the operation of the rule.¹⁸⁵ To aid the monitoring, the Commission encourages NRSROs and other market participants to notify the Commission if they believe the selective availability of non-public information is being abused. However, the Commission believes that the proposed amendments will not lead to misuse of material, non-public information by NRSROs. As noted above, the Commission believes that in order to promote competition in the credit rating industry NRSROs should

¹⁷⁹ See S&P Letter, Moody's Letter.

¹⁸⁰ See S&P Letter.

¹⁸¹ See Moody's Letter.

¹⁸² See Moody's Letter, S&P Letter.

¹⁸³ See S&P Letter.

¹⁸⁴ See *Selective Disclosure and Insider Trading*, Securities Act Release No. 7881 (August 15, 2000), 65 FR 51716 (August 24, 2000) ("Regulation FD Adopting Release"). In the Regulation FD Adopting Release the Commission explained that while it was aware that "ratings organizations often obtain nonpublic information in the course of their ratings work" it was not aware of any incidents of selective disclosure involving ratings organizations.

¹⁸⁵ Separately, the Commission reminds issuers and persons acting on their behalf of the need to consider whether information selectively disclosed under 17 CFR 243.100(b)(2)(iii)(A) or (B) also is required to be publicly disclosed in a registration statement, or periodic or current report, because disclosure of that information is necessary to make other statements made not misleading. In some circumstances, the fact that information is important to an NRSRO's analysis may be relevant to an issuer's evaluation of its other disclosure obligations.

¹⁷² 17 CFR 243.100-243.103.

¹⁷³ 17 CFR 243.100(b)(2)(iii).

¹⁷⁴ 17 CFR 243.100(b)(2)(iii)(A).

¹⁷⁵ 17 CFR 243.100(b)(2)(iii)(B).

¹⁷⁶ 15 U.S.C. 78c(a)(61).

¹⁷⁷ See Realpoint Letter.

¹⁷⁸ See DBRS Letter.

have access to material, non-public information from arrangers for the purpose of determining or monitoring unsolicited credit ratings for structured finance products. Because the Regulation FD exclusion added today is limited to NRSROs accessing the information in the context of Rule 17g-5(a)(3), entities receiving the material, non-public information will be subject to Section 15E(g) of the Exchange Act¹⁸⁶ and Rule 17g-4¹⁸⁷ thereunder. These statutory and regulatory provisions require NRSROs to establish, maintain and enforce policies and procedures reasonably designed to prevent the misuse of material, non-public information.

Moreover, an NRSRO will be required to furnish to the Commission prior to accessing a password-protected Internet Web site a certification under Rule 17g-5(e) that the NRSRO will keep the information it accesses pursuant to Rule 17g-5(a)(3) confidential and treat it as material, non-public information subject to its Section 15E(g) and Rule 17g-4 obligations. In addition, the disclosure regime in Rule 17g-5 will only be triggered when an issuer pays an NRSRO to issue or maintain a credit rating for a structured finance product. As a result, the Commission expects that a credit rating for such structured finance product will be issued publicly along with any unsolicited ratings from subscriber-based NRSROs.

In addition, the Commission is amending Rule 100(b)(2)(iii) to replace “developing” with “determining or monitoring[.]” This amendment to Rule 100(b)(2)(iii) is intended to mirror the use of “determining” in the Rating Agency Act¹⁸⁸ and other Commission rules regarding NRSROs.¹⁸⁹ The Commission also notes that this amendment will be consistent with the Rule 17g-5(e) certification that NRSROs will be required to furnish to the Commission and to arrangers in order to access an arranger’s password-protected Internet Web site described in Rule 17g-5(a)(3). New Rule 17g-5(e) requires NRSROs to certify that the NRSRO will access the arranger’s password-protected Internet Web site described in Rule 17g-5(a)(3) solely for the purpose of “determining or monitoring” credit ratings.

The Commission is also adopting, as proposed, the amendment to the text in Rule 100(b)(2)(iii)(B) of Regulation FD¹⁹⁰ to use the statutory definition of

“credit rating agency” as defined in Section 3(a)(61) of the Exchange Act.¹⁹¹ The Commission received one comment on this proposed amendment, which supported it.¹⁹²

F. Conclusion

The Commission is adopting these amendments to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.¹⁹³ The provisions in this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.¹⁹⁴ The Commission believes that the amendments are necessary and appropriate in the public interest and for the protection of investors because they are designed to address conflicts of interest and improve the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate these instruments.

The Commission believes that these amendments will advance the Rating Agency Act’s goal of promoting competition in the credit rating industry by facilitating the issuance of credit ratings by NRSROs that are not hired by the arranger. The Commission further believes that the resulting increase in the number of ratings extant for a given structured finance security or money market instrument will provide users of credit ratings with more views on the creditworthiness of the security or money market instrument. The amendments also are designed to make it more difficult for arrangers to exert influence over the NRSROs they hire to determine ratings for structured finance products. By facilitating the issuance of unsolicited ratings by non-hired NRSROs, the amendments will increase the likelihood that if a hired NRSRO issues a ratings that is higher than warranted, that fact will be revealed to the market through the lower ratings issued by other NRSROs.

For the reasons discussed above, the Commission is adopting the amendments to Rule 17g-5 and Regulation FD substantially as proposed.

IV. Paperwork Reduction Act

Certain provisions of the rule amendments contain a “collection of information” within the meaning of the Paperwork Reduction Act of 1995 (“PRA”). The Commission published a

notice requesting comment on the collection of information requirements in the *February 2009 Proposing Release* and submitted the proposed collection to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.¹⁹⁵ An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:

(1) Rule 17g-2, Records to be made and retained by nationally recognized statistical rating organizations (OMB Control Number 3235-0628); and

(2) Rule 17g-5, Conflicts of interest (OMB Control Number 3235-0649).

The amendment to Regulation FD does not contain a collection of information within the meaning of the PRA.

A. Collections of Information Under the Proposed Rule Amendments

The Commission is adopting rule amendments to impose additional disclosure and conflict of interest requirements on NRSROs. These amendments are designed to address concerns about the integrity of the credit rating procedures and methodologies at NRSROs and to promote transparency and objectivity in the NRSRO credit rating process by, among other things, increasing competition and making it easier for investors and other market participants and observers to assess the credit ratings performance of NRSROs. These amendments modify the Commission’s rules, adopted in June 2007 and modified in February 2009, implementing registration, recordkeeping, financial reporting, and oversight rules under the Rating Agency Act. The amendments contain recordkeeping and disclosure requirements that are subject to the PRA.

In summary, the rule amendments require: (1) An NRSRO to make publicly available on its Internet Web site in an interactive data file that uses any machine-readable computer format (until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the Commission’s List of XBRL Tags for NRSROs) ratings action histories for all credit ratings initially determined on or after June 26, 2007, with each new ratings action that is related to issuer-

¹⁸⁶ 15 U.S.C. 78o-7(g).

¹⁸⁷ 17 CFR 240.17g-4.

¹⁸⁸ See, e.g., 15 U.S.C. 78o-7(a)(1)(B)(ii).

¹⁸⁹ See, e.g., 17 CFR 240.17g-2.

¹⁹⁰ 17 CFR 243.100(b)(2)(iii)(B).

¹⁹¹ 15 U.S.C. 78c(a)(61).

¹⁹² See ABA Letter.

¹⁹³ 15 U.S.C. 78o-7(h)(2).

¹⁹⁴ *Id.*

¹⁹⁵ See *February 2009 Proposing Release*, 74 FR 6498-6501.

paid credit ratings to be reflected in such publicly disclosed histories no later than twelve months after it was taken, and each new ratings action that is related to credit ratings that are not issuer-paid to be reflected in such publicly disclosed histories no later than twenty-four months after it was taken;¹⁹⁶ (2) an NRSRO that is hired by arrangers to issue credit ratings for structured finance products to disclose the deals for which they are in the process of determining such credit ratings to non-hired NRSROs that have furnished the Commission with the certification as described below; (3) an NRSRO that is hired by arrangers to perform credit ratings for structured finance products to obtain written representations from arrangers, on which the NRSRO can reasonably rely, that the arrangers will provide all the information given to the hired NRSRO to non-hired NRSROs that have furnished the Commission with the certification described below;¹⁹⁷ and (4) an NRSRO seeking to access the information maintained by the NRSROs and the arrangers pursuant to the amended rules to furnish the Commission an annual certification that it is accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using that information.¹⁹⁸

B. Proposed Use of Information

The amendments enhance the framework for Commission oversight of NRSROs. As the Commission noted in the *February 2009 Proposing Release*,¹⁹⁹ the collections of information in the amendments are designed to provide users of credit ratings with information upon which to evaluate the performance of NRSROs and to enhance the accuracy of credit ratings for structured finance products by increasing competition among NRSROs who rate these products.

C. Respondents

In the *June 2007 Adopting Release*, the Commission estimated that approximately 30 credit rating agencies would be registered as NRSROs.²⁰⁰ Since the initial set of rules under the Rating Agency Act became effective in June 2007, ten credit rating agencies have registered with the Commission as

NRSROs.²⁰¹ The Commission, however, expects additional entities will register. The Commission received no comments on this estimate. The Commission believes that this estimate continues to be appropriate for identifying the number of respondents for purposes of the amendments.

In addition, under the amendments to paragraphs (a) and (b) of Rule 17g-5, NRSROs that are hired to rate structured finance products will be required to obtain representations from arrangers that the arrangers will provide information given to the hired NRSRO to other NRSROs. In the *June 2008 Proposing Release* and again in the *February 2009 Proposing Release*, based on staff information gained from the NRSRO examination process, the Commission estimated that approximately 200 arrangers would be respondents for the purpose of the PRA estimate.²⁰² The Commission received no comments on this estimate when originally proposed or re-proposed. The Commission continues to estimate, for purposes of this PRA, that approximately 200 arrangers will be affected.

D. Total Annual Recordkeeping and Reporting Burden

As discussed in further detail below, the Commission estimates the total recordkeeping burden resulting from the amendments will be approximately 71,550 hours on a one-time basis²⁰³ and 169,390 hours on an annual basis.²⁰⁴ This represents an increase from the estimates of 69,315 hours on a one-time basis and 169,045 hours on an annual basis set forth in the *February 2009 Proposing Release*.²⁰⁵ This increase is attributable in part to the fact that the amendments to Rule 17g-2(d) as adopted apply to all NRSROs, rather than only to NRSROs operating under the issuer-paid business model as proposed. The increase also reflects

additional burdens, as described in detail below.

The total annual and one-time hour burden estimates for NRSROs described below are averages across all types of NRSROs expected to be affected by the amendments. The size and complexity of NRSROs range from small entities to entities that are part of complex global organizations employing thousands of credit analysts. The Commission notes that, given the significant variance in size between the largest NRSROs and the smallest NRSROs, the burden estimates, as averages across all NRSROs, are skewed higher because the largest firms currently predominate in the industry.

1. Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and keep current certain records relating to its business and requires an NRSRO to preserve those and other records for certain prescribed time periods.²⁰⁶ The amendments to paragraph (d) of Rule 17g-2 require an NRSRO to make publicly available on its Internet Web site in an interactive data file that uses a machine-readable computer format ratings action histories for all credit ratings initially determined on or after June 26, 2007, with each new ratings action to be reflected in such publicly disclosed histories no later than twelve months after it was taken for ratings actions related to issuer-paid credit ratings and twenty-four months after it was taken for ratings actions related to credit ratings that are not issuer-paid. An NRSRO will be allowed to use any machine-readable format to make this data publicly available until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the Commission's List of XBRL Tags for NRSROs.²⁰⁷

The Commission requested comment in the *February 2009 Proposing Release* on all aspects of the burden estimates for the proposed amendments to Rule 17g-2(d) and received none.

In the *February 2009 Adopting Release*, the Commission determined that, in order to implement the Rule 17g-2(d) requirement that an NRSRO make public, in XBRL format and with a six-month grace period, the ratings action histories required under paragraph (a)(8) for a random sample of 10% of the credit ratings for each ratings class for which it has issued 500 or

²⁰¹ A.M. Best Company, Inc.; DBRS Ltd.; Fitch, Inc.; Japan Credit Rating Agency, Ltd.; Moody's Investors Service, Inc.; Rating and Investment Information, Inc.; Standard & Poor's Ratings Service; LACE Financial Corp.; Egan-Jones Rating Company; and Realpoint LLC.

²⁰² See *June 2008 Proposing Release*, 73 FR at 36237; *February 2009 Proposing Release*, 74 FR at 6498.

²⁰³ This total is derived from the total one-time hours set forth, in the order in which they are set forth, in the text below: 2,550 + 9,000 + 60,000 = 71,550.

²⁰⁴ This total is derived from the total annual hours set forth, in the order in which they are set forth, in the text below: 450 + 14,880 + 4,000 + 150,000 + 60 = 169,390.

²⁰⁵ *February 2009 Proposing Release*, 74 FR at 6498-6499.

²⁰⁶ 17 CFR 240.17g-2.

²⁰⁷ 17 CFR 240.17g-2(d)(iii).

¹⁹⁶ See 17 CFR 240.17g-2(d).

¹⁹⁷ See 17 CFR 240.17g-5(a)(3) and (b)(9).

¹⁹⁸ See 17 CFR 240.17g-5(e).

¹⁹⁹ See *February 2009 Proposing Release*, 74 FR at 6498.

²⁰⁰ See *June 2007 Adopting Release*, 72 FR at 33607.

more issuer-paid credit ratings, an NRSRO subject to the requirements will spend, on average, approximately 30 hours to publicly disclose the rating action histories in XBRL format and, thereafter, 10 hours per year to update this information.²⁰⁸ In the *February 2009 Proposing Release*, the Commission estimated, based on staff experience, that the proposed amendments to Rule 17g-2(d) requiring NRSROs to publicly disclose ratings action histories of all issuer-paid credit ratings would increase by 50% the estimated hour burdens for the disclosure requirements of paragraph (d) of Rule 17g-2 as adopted at that time.²⁰⁹ Therefore, the Commission estimated that the one time annual hour burden for each NRSRO affected by the rule would increase from 30 hours to 45 hours²¹⁰ and the annual hour burden would increase from 10 hours to 15 hours.²¹¹ Although the Commission based its estimates for individual NRSROs' hour burdens of Rule 17g-2(d) as proposed on the assumption that the requirements of the rule would apply only to issuer-paid credit ratings, the Commission believes that the estimates are valid for NRSROs operating under the subscriber-paid business model, all of which already have an Internet Web site, as well.²¹²

The Commission notes the *February 2009 Proposing Release* contemplated that NRSROs would provide the information in XBRL when it determined its estimates. The Commission does not believe that requiring the information to be disclosed initially in any machine readable format alters those burden estimates because we believe the steps to be taken are quite similar. The Commission also notes that currently seven NRSROs are providing the disclosure required pursuant to Rule 17g-2(d) (or the 10% requirement) in machine-readable format. The Commission does believe that there will be an hour burden associated with transitioning from disclosing the information in a machine-readable format into an XBRL format.

²⁰⁸ The Commission also based this estimate on the current one-time and annual burden hours for an NRSRO to publicly disclose its Form NRSRO. No alternatives to these estimates as proposed were suggested by commenters and the Commission adopted these hour burdens. See *February 2009 Adopting Release*, 74 FR at 6472.

²⁰⁹ See *February 2009 Proposing Release*, 74 FR at 6499.

²¹⁰ 50% of 30 hours = 15 hours + 30 hours = 45 hours.

²¹¹ 50% of 10 hours = 5 hours + 10 hours = 15 hours.

²¹² See *February 2009 Proposing Release*, 74 FR at 6499.

Specifically, the Commission estimates that this hour burden will be approximately 40 hours per NRSRO. This estimate is based on Commission's staff experience regarding cost associated with XBRL programming. The 40 hours estimate includes time for the appropriate staff of the NRSRO²¹³ to research and become familiar with the List of XBRL Tags, map the information disclosed in the machine-readable format to the XBRL taxonomy and conduct initial testing.

Accordingly, the Commission estimates that the total aggregate one-time burden for NRSROs to make their ratings histories publicly available initially in machine-readable interactive format, and the one-time burden to transition the disclosure of information from machine-readable to XBRL will be approximately 2,550 hours,²¹⁴ and the total aggregate annual burden hours will be approximately 450 hours.²¹⁵ This represents an increase from the estimates of 210 hours on a one-time basis and 70 hours on an annual basis set forth in the *February 2009 Proposing Release*.²¹⁶ This increase is attributable to the fact that the amendments to Rule 17g-2(d) as adopted apply to all NRSROs, rather than only to NRSROs operating under the issuer-paid business model as originally proposed.

2. Amendments to Rule 17g-5

Rule 17g-5 requires an NRSRO to manage and disclose certain conflicts of interest²¹⁷ and prohibits certain other types of conflicts of interest outright.²¹⁸ The amendments to Rule 17g-5 add an additional conflict to paragraph (b) of Rule 17g-5 for NRSROs to manage: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.²¹⁹ The amendments to paragraph (a) of the rule further specify that an NRSRO subject to this conflict is prohibited from issuing a credit rating for a structured finance product, unless

certain information about the transaction and the assets underlying the structured finance product are disclosed or arranged to be disclosed by the NRSRO. Specifically, the amendments require an NRSRO that is hired by arrangers to perform credit ratings for structured finance products to disclose to other NRSROs the deals for which it is in the process of determining such credit ratings and to obtain written representations from arrangers that the arrangers will provide the same information given to the hired NRSRO to other NRSROs. An NRSRO rating such products will need to disclose to other NRSROs the following information on a password protected Internet Web site: A list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of Rule 17g-5 as amended can be accessed.²²⁰

The Commission estimated in the *February 2009 Proposing Release* that it would take an NRSRO approximately 300 hours to develop a system, as well as policies and procedures, for the disclosures required.²²¹ This estimate was based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.²²² In addition to the estimated one-time hour burden, the amendments will result in an annual hour burden to the NRSRO arising from the requirement to make disclosures for each deal being rated. Based on staff experience, the Commission estimated that it would take approximately 1 hour per transaction for an NRSRO to update the lists maintained on its password protected Internet Web sites.²²³

In the *February 2009 Proposing Release*, the Commission repeated its estimate, originally set forth in the *June 2008 Proposing Release*,²²⁴ that a large NRSRO would have rated approximately 2,000 new RMBS and CDO transactions in a given year. The

²¹³ The Commission believes a Senior Programmer would be tasked to perform the transition of disclosing the information in machine-readable format to XBRL.

²¹⁴ 45 hours × 30 NRSROs = 1,350 hours, plus the one time burden to change from machine readable format to XBRL of 40 hours × 30 NRSROs = 1,200 hours; for a total one-time burden of 1,350 + 1,200 = 2,550.

²¹⁵ 15 hours × 30 NRSROs = 450 hours.

²¹⁶ *February 2009 Proposing Release*, 74 FR at 6499.

²¹⁷ 17 CFR 240.17g-5(a) and (b).

²¹⁸ 17 CFR 240.17g-5(c).

²¹⁹ 17 CFR 240.17g-5(b)(9).

²²⁰ Paragraph (a)(3)(i) of Rule 17g-5.

²²¹ See *February 2009 Proposing Release*, 74 FR at 6500.

²²² See *June 2007 Adopting Release*, 72 FR at 33609.

²²³ See *February 2009 Proposing Release*, 74 FR at 6500.

²²⁴ See *June 2008 Proposing Release*, 73 FR at 36240.

Commission based this estimate on the number of new RMBS and CDO deals rated in 2006 by two of the largest NRSROs which rated structured finance transactions. The Commission adjusted this number to 4,000 transactions in order to account for other types of structured finance products, including commercial real estate MBS and other consumer assets.²²⁵ As noted in the *February 2009 Proposing Release*, the Commission recognizes that the number of new structured finance transactions has dropped precipitously since 2006 because of the credit market turmoil. Nonetheless, to account for future market developments, which is a more conservative approach, the Commission retained the estimate that a large NRSRO will rate 4,000 new deals per year.²²⁶ The Commission received no comments on the estimate.

Based on the number of outstanding structured finance ratings submitted by the ten registered NRSROs on their Form NRSROs, the Commission estimated that the three largest NRSROs account for 97% of the market for structured finance ratings. As explained in greater detail in the *February 2009 Proposing Release*, the Commission used that estimate of market share to estimate that the total structured finance ratings issued by all NRSROs in a given year would be 14,880.²²⁷

The Commission requested comment on its burden estimates for the proposed amendments to Rule 17g-5(a) and (b) and received one comment from a large NRSRO arguing that the Commission significantly underestimated the initial and recurring burdens associated with the proposed amendments.²²⁸ Specifically, the commenter argued that developing the software and password-protected Internet Web page could require a thousand, if not thousands, of hours of work and that the development of policies and procedures and controls to implement the requirement could take at least a thousand hours, and that developing a training module and training affected staff could take at least 500 hours. The commenter further stated that it may take one to two hours per transaction to update the NRSRO Web site, depending on the frequency with which key data change during the rating process.²²⁹

The Commission is sensitive to the potential burdens imposed on NRSRO by these new disclosure requirements.

²²⁵ See *February 2009 Proposing Release*, 74 FR at 6500.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See Moody's Letter.

²²⁹ See Moody's Letter.

However, based on staff experience, the Commission does not believe the cost will result in the burdens estimated by the sole commenter expressing disagreement with the Commission's original estimates. As previously noted, all of the NRSROs currently maintain Internet Web sites, in most cases with password-protected portals that their subscribers and registered users can access to obtain information posted by the NRSRO. The Commission believes that adding a portal for other NRSROs to access pending deal information should not require significant additional Internet Web site design and maintenance.

Consistent with the estimates set forth in the *February 2009 Proposing Release*,²³⁰ the Commission believes, based on staff experience, that an NRSRO will take approximately 300 hours on a one-time basis to implement a disclosure system to comply with the new requirements of Rule 17g-5(a)(3)(i) and (ii), resulting in a total one-time hour burden of 9,000 hours for 30 NRSROs.²³¹ The Commission further believes that based on its estimates that the total structured finance ratings issued by all NRSROs in a given year would be 14,880 and that it will take each NRSRO affected by the rule approximately 1 hour per transaction for the NRSRO to update the lists maintained on the NRSROs' password protected Internet Web sites, the total annual hour burden for the industry will be 14,880 hours.²³²

New paragraph (a)(3)(iii) of Rule 17g-5 requires that an NRSRO hired to rate a structured finance product obtain from the arranger a written representation on which it can reasonably rely that it will disclose the following information on a password-protected Internet Web site at the same time the information is provided to the NRSRO:

- All information the arranger provides to the NRSRO for the purpose of determining the initial credit rating for the security or money market instrument, including information about characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument; and

- All information the arranger provides to the NRSRO for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of

²³⁰ See *February 2009 Proposing Release*, 74 FR at 6500.

²³¹ 300 hours × 30 NRSROs = 9,000 hours.

²³² 14,880 ratings × 1 hour = 14,880 hours.

the assets underlying or referenced by the security or money market instrument.²³³

In the *February 2009 Proposing Release*, the Commission estimated that there would be approximately 200 arrangers affected by the proposed new paragraph (a)(iii) of Rule 17g-5 and that it would take each arranger approximately 300 hours to develop a system, including policies and procedures, for the disclosures.²³⁴ These estimates were based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.²³⁵ The Commission further noted that in addition to this one-time hour burden, the proposed amendments would result in an annual hour burden for arrangers arising from the disclosure of information on a transaction-by-transaction basis each time an initial rating process is commenced. The Commission estimated, based on staff experience and the estimate of 4,000 new structured finance deals per year as discussed above, that each respondent would disclose information for approximately 20 new transactions per year²³⁶ and that it would take approximately 1 hour per transaction to post the information to its password-protected Internet Web sites. The Commission noted that the number of new transactions per year would vary by the size of issuer, with larger respondents perhaps arranging in excess of 20 new deals per year and smaller arrangers perhaps initiating less. The estimate of 20 new deals per year is therefore an average across all respondents.²³⁷ Based on this analysis, the Commission estimated that it would take a respondent approximately 20 hours²³⁸ to disclose this information, on an annual basis, for a total aggregate annual hour burden of 4,000 hours.²³⁹ The Commission received no comments on this estimate, nor did the Commission receive any comments on an identical burden estimate in the original proposing release.

In addition, Rule 17g-5(a)(3)(iii)(D) requires that an NRSRO hired to rate a structured finance product obtain from the arranger a written representation on which it can reasonably rely that the

²³³ Paragraph (a)(3)(iii) of Rule 17g-5.

²³⁴ See *February 2009 Proposing Release*, 74 FR at 6500.

²³⁵ See *June 2007 Adopting Release*, 72 FR at 33609.

²³⁶ 4,000 new transactions/200 issuers = 20 new transactions per issuer.

²³⁷ See *February 2009 Proposing Release*, 74 FR at 6501.

²³⁸ 20 transactions × 1 hour = 20 hours.

²³⁹ 20 hours × 200 respondents = 4,000 hours.

arranger will disclose the information it provides to the hired NRSRO to be used for credit rating surveillance on a security or money market instrument on a password-protected Internet Web site at the same time the information is provided to the hired NRSRO. Because surveillance covers more than just initial ratings, the Commission estimated, in the *June 2008 Proposing Release* and the *February 2009 Proposing Release*, based on staff information gained from the NRSRO examination process, that monthly disclosure would be required with respect to approximately 125 transactions on an ongoing basis.²⁴⁰ Also based on staff information gained from the NRSRO examination process, the Commission estimated that it would take a respondent approximately 0.5 hours per transaction to disclose the information.²⁴¹

The Commission requested comment in the *February 2009 Proposing Release* on all aspects of its estimates for the amount of time arrangers would spend complying with the requirements of proposed paragraph (a)(3)(iii) of Rule 17g-5. The Commission did not receive any comments in response to this request.

Accordingly, the Commission believes, based on its estimate that an arranger will take approximately 300 hours on a one-time basis to implement a disclosure system consistent with the representations to be made pursuant to new paragraph (a)(3)(iii) of Rule 17g-5, that the total one-time hour burden for arrangers will be 60,000 hours.²⁴² The Commission further believes, based on its estimate of an average of 125 ongoing transactions each month and 30 minutes spent on the monthly disclosure for each transaction, that each respondent will spend approximately 750 hours²⁴³ on an annual basis disclosing information consistent with the representations to be made pursuant to new paragraph (a)(3)(iii) of Rule 17g-5, for a total aggregate annual burden of 150,000 hours.²⁴⁴

An NRSRO that wishes to access information on another NRSRO's Internet Web site or on an arranger's Internet Web site pursuant to Rule 17g-5(a)(3) as amended is required to provide the Commission with an annual certification described in proposed new paragraph (e) to Rule 17g-5. In the

February 2009 Proposing Release, the Commission estimated that this annual certification would become a matter of routine over time and should take less time than it takes an NRSRO to submit its annual certification under Rule 17g-1(f).²⁴⁵ The annual certification required under Rule 17g-1(f) involves the disclosure of substantially more information than the certification in proposed paragraph (e) of Rule 17g-5. The Commission estimated that it will take an NRSRO approximately 10 hours to complete the Rule 17g-1(f) annual certification.²⁴⁶ Given that the paragraph (e) certification requires much less information, the Commission estimated, based on staff experience, that it would take an NRSRO approximately 20% of the time it takes to do the Rule 17g-5 annual certification, or 2 hours.²⁴⁷ The Commission assumed that all 30 NRSROs ultimately registered with the Commission would complete the certification. The Commission requested comment on this estimate but did not receive any. Accordingly, the Commission estimates it will take an NRSRO approximately 2 hours to complete the proposed paragraph (e) certification for an aggregate annual hour burden to the industry of 60 hours.²⁴⁸

To comply with the requirement under Rule 17g-5(a)(3)(iii) that it obtain from the issuer, sponsor or underwriter a written representation that reasonably can be relied upon, an NRSRO likely will include such a representation in the standardized contract it uses in each transaction the NRSRO contracts to rate. The Commission notes that the Rule 17g-5(a)(3)(iii) includes representations an NRSRO is required to obtain from an arranger. The Commission expects an NRSRO's in-house attorney to draft the representations based on this text, which will be inserted into the NRSRO's existing standardized contracts. Based on staff experience, the Commission estimates that there will be a one-time burden of five hours for this language to be drafted, negotiated and added to the NRSRO's standardized contract. This estimate is based in part on the two hour burden estimate that the Commission believes would result from an NRSRO completing the certification required under paragraph (e) of Rule 17g-5. However, the added hours reflect the additional time needed to draft the

representations because the specific language is not included in the rule. Therefore, there will be a total one-time aggregate hour burden of 150 hours.²⁴⁹

E. Collection of Information Is Mandatory

The recordkeeping and notice requirements for the amendments are mandatory for credit rating agencies that choose to register as NRSROs with the Commission.²⁵⁰

F. Confidentiality

The disclosures required under the amendments to Rule 17g-2(d) will be public. Pursuant to the representations an NRSRO hired to rate a structured finance product is required to obtain under the amendments to Rule 17g-5, arrangers will make the information they provide to the hired NRSRO available to other NRSROs. Pursuant to Rule 17g-5(e), the NRSROs are required to provide certifications to the Commission agreeing to keep the information they access under Rule 17g-5(a)(3) confidential.

The information an NRSRO posts on its Internet Web site pursuant to Rule 17g-5(a)(3)(i) and (ii) will be available only to NRSROs that have provided to the NRSRO that posts the information a certification that was furnished to the Commission pursuant to subparagraph (e). The representations made by the arranger and provided to the NRSRO will not be made public, unless the NRSRO or arranger chooses to make them public. All documents maintained by an NRSRO are subject to inspection by representatives of the Commission. The Commission will not make public the certifications provided by NRSROs pursuant to subparagraph (e). NRSROs will also provide copies of their certifications to arrangers when accessing arranger Web sites. Arrangers are not expected to make these certifications public.

V. Costs and Benefits of the Amended Rules

The Commission is sensitive to the costs and benefits that result from its rules. In the *February 2009 Proposing Release*, the Commission identified certain costs and benefits of the amendments and requested comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in the analysis.²⁵¹ The Commission

²⁴⁰ See *infra* note 286 and accompanying text.

²⁴¹ See *June 2008 Proposing Release*, 73 FR at 36240; *February 2009 Proposing Release*, 74 FR at 6500.

²⁴² 300 hours × 200 respondents = 60,000 hours.

²⁴³ 125 transactions × 30 minutes × 12 months = 45,000 minutes/60 minutes = 750 hours.

²⁴⁴ 750 hours × 200 respondents = 150,000 hours.

²⁴⁵ 17 CFR 240.17g-1(f). See *February 2009 Proposing Release*, 74 FR at 6501.

²⁴⁶ See *June 2007 Adopting Release*, 72 FR at 33609.

²⁴⁷ 20% of 10 hours = 2 hours.

²⁴⁸ 2 hours × 30 NRSROs = 60 hours.

²⁴⁹ 5 hours × 30 NRSROs = 150 hours.

²⁵⁰ See Section 15E of the Exchange Act (15 U.S.C. 78o-7).

²⁵¹ For the purposes of the cost/benefit analysis set forth in the *February 2009 Proposing Release*,

sought comment and data on the value of the benefits identified. The Commission also solicited comments on the accuracy of its cost estimates in each section of this cost-benefit analysis, and requested commenters to provide data so the Commission could improve the cost estimates, including identification of statistics relied on by commenters to reach conclusions on cost estimates. Finally, the Commission requested estimates and views regarding these costs and benefits for particular types of market participants, as well as any other costs or benefits that may result from the adoption of the rule amendments.

A. Benefits

The purposes of the Rating Agency Act, as stated in the accompanying Senate Report, are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.²⁵² As the Senate Report states, the Rating Agency Act establishes “fundamental reform and improvement of the designation process” with the goal that “eliminating the artificial barrier to entry will enhance competition and provide investors with more choices, higher quality ratings, and lower costs.”²⁵³

The amendments are designed to improve the transparency of credit ratings performance and promote competition by making histories of credit ratings actions publicly available and creating a mechanism for NRSROs to determine unsolicited credit ratings for structured finance products.

The amendments to Rule 17g-2(d) require NRSROs to publicly disclose all

of their ratings actions histories for credit ratings in an interactive data file that uses a machine-readable computer format either with a twelve month or twenty-four month grace period, depending on whether the credit rating was issuer-paid or not. An NRSRO will be allowed to use any machine-readable format to make this data publicly available until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the Commission’s List of XBRL Tags for NRSROs. This disclosure will allow the marketplace to better compare the performance of NRSROs determining credit ratings. The Commission believes that making this information publicly available will benefit users of credit ratings by providing them with useful metrics with which to compare NRSROs. The Commission also notes that the 100% requirement will be useful to market participants and observers within a short period of the rule being effective as the vast majority will be available at twelve months.

Analyzing ratings history information for outstanding credit ratings is the most direct means of comparing the performance of two or more NRSROs. The access to ratings history data provided by the rule as amended will facilitate the ability of users of credit ratings to compare how each NRSRO that maintains a credit rating for a particular obligor or debt instrument initially rated the instrument and, thereafter, how and when it adjusted its credit rating over time. This will provide the benefit of allowing the person reviewing the credit rating histories of the NRSROs to reach conclusions about which NRSROs did the best job in determining an initial rating and, thereafter, making appropriate and timely adjustments to the credit rating. Increased disclosure of ratings history for credit ratings will make the performance of the NRSROs more transparent to the marketplace and, thereby, highlight those firms that do a better job assessing creditworthiness. This may cause users of credit ratings to give greater weight to credit ratings of NRSROs that distinguish themselves by a better history of credit rating performance than their peers. Moreover, to the extent this improves the quality of the credit ratings, persons that use credit ratings, for example, to make investment or lending decisions will have better

information upon which to base their decisions.

In addition to facilitating the ability of individual comparisons of NRSRO ratings performance, the Commission believes the ratings history disclosures will enable market observers and participants to generate statistics about NRSRO performance by compiling and processing the information in the aggregate. The ratings history disclosure requirements adopted today will facilitate the ability of market observers and participants and other users of credit ratings to complement the standardized performance metrics disclosure required under Commission rules by designing their own performance metrics in order to generate the performance statistics most meaningful to them. Specifically, the raw data to be provided by NRSROs will allow market participants to develop performance measurement statistics that would supplement those required to be published by the NRSROs themselves in Exhibit 1 to Form NRSRO, tapping into the expertise of credit market observers and participants in order to create better and more useful means to compare the performance of NRSROs. In addition, the Commission believes that the new disclosure requirements will provide the benefit of fostering greater accountability for NRSROs as well as promoting competition among NRSROs by making it easier for users of credit ratings to analyze the actual performance of credit ratings in terms of accuracy (as defined by each individual user of credit ratings) in assessing creditworthiness, regardless of the business model under which an NRSRO operates. These disclosures may also enhance competition by making it easier for smaller and less established NRSROs to develop proven track records of determining accurate credit ratings.

As discussed above and below in the cost discussion, the Commission recognizes that the amended rule may negatively affect the revenues of NRSROs. Nevertheless, as explained in greater detail above, the Commission believes that the amended rule, as adopted, strikes an appropriate balance between providing users of credit ratings, investors, and other market participants and observers with a sufficient volume of raw data with which to gauge the performance of different NRSROs’ ratings over time while at the same time addressing concerns raised by NRSROs regarding their ability to derive revenue from granting market participants access to their credit ratings and downloads of their credit ratings. In particular, by providing 100% of credit ratings

the Commission used salary data from the Securities Industry and Financial Markets Association (“SIFMA”) *Report on Management and Professional Earnings in the Securities Industry 2007*, which provides base salary and bonus information for middle-management and professional positions within the securities industry. The Commission believes that the salaries for these securities industry positions would be comparable to the salaries of similar positions in the credit rating industry. The salary costs derived from the report and referenced in this costs and benefits section, are modified to account for an 1,800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. Hereinafter, references to data derived from this SIFMA report as modified in the manner described above will be cited as *SIFMA 2007 Report as Modified*. For the purposes of this costs and benefits section, the Commission is using updated salary data from SIFMA’s *Management and Professional Earnings in the Securities Industry 2008* with similar modifications. Hereinafter, references to data derived from the most recent SIFMA report as modified in the manner described above will be cited as *SIFMA 2008 Report as Modified*.

²⁵² Senate Report, p. 2.

²⁵³ *Id.* p. 7.

histories for ratings initially determined after June 26, 2007, the rule as amended will over time provide a robust data set for users of credit ratings, investors, and other market participants and observers.

At the same time, the Commission believes that the twenty-four month grace period before a credit rating action that is not issuer-paid is required to be disclosed, as well as requiring only the disclosure of the credit ratings and not any analysis or report accompanying the publication of a rating, will not lead to significant or undue lost revenues to NRSROs operating under the subscriber-paid business model. Additionally, the Commission believes that the disclosure of a credit rating action that is issuer-paid on a twelve month delayed basis also will not lead to undue lost revenue. As noted previously, the Commission understands that the revenue derived from payments for downloads of their ratings represents a relatively small percentage of their total net revenue. The rule does not require an NRSRO to disclose any analysis or report along with the rating history. Therefore, the Commission does not believe the fees that NRSROs derive from selling their analysis along with their ratings will be significantly impacted. Further, the ability to receive data on a ratings action twenty-four months after it takes place would not appear to be an adequate substitute for subscribing to an NRSRO's current credit ratings, nor would the ability to download credit ratings that are twelve months old be a substitute for downloading current credit ratings.

The amendments to paragraphs (a) and (b) of Rule 17g-5 require NRSROs that are paid by arrangers to determine credit ratings for structured finance products to maintain a password-protected Internet Web site that lists each deal they have been hired to rate. They also will be required to obtain written representations from the arranger hiring the NRSRO, on which the NRSRO can reasonably rely, that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password protected Internet Web site. NRSROs not hired to determine and monitor the ratings will then be able to access the NRSRO Internet Web sites to learn of new deals being rated and access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites will be limited to NRSROs that certify to the Commission on an annual basis,

among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and that they will determine credit ratings for at least 10% of the deals for which they obtain information if they access such information for ten or more structured finance products in the calendar year covered by the certification. They are also required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification, or, alternatively that they previously had not accessed such information ten or more times in the most recently ended calendar year.

The Commission is adopting these amendments to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.²⁵⁴ These provisions provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.²⁵⁵ The amendments are designed to address conflicts of interest and improve competition and the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products. Generally, the information relied on by the hired NRSROs to rate structured finance products is non-public. This makes it difficult for other NRSROs to rate these securities and money market instruments. As a result, the products frequently are issued with ratings from only one or two NRSROs and only by NRSROs that are hired by the issuer, sponsor, or underwriter (*i.e.*, NRSROs that are subject to the conflict of being repeatedly paid by certain arrangers to rate these securities and money market instruments).

The Commission's goal is to increase the number of ratings extant for a given structured finance security or money market instrument and, in particular, promote the issuance of ratings by NRSROs that are not hired by the arranger. This will provide users of credit ratings with a broader range of views on the creditworthiness of the security or money market instrument than is currently available. The amendments are also designed to make

it more difficult for arrangers to exert influence over the NRSROs they hire to determine ratings for structured finance products. Specifically, by opening up the rating process to more NRSROs, the amendments may make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the ratings issued by other NRSROs.

As discussed in detail above, the Commission recognizes that the amendments to Rule 17g-5 will increase the number of credit ratings available to investors by increasing the number of NRSROs issuing those ratings, thereby potentially giving arrangers a broader pool of NRSROs among which to "shop" for a rating. The Commission also recognizes the concern that NRSROs not hired by the arranger might have the incentive to use information accessed pursuant to Rule 17g-5 as amended to issue an unduly favorable rating in an attempt to procure future business from a particular arranger. The Commission believes that there are several factors counteracting this incentive. First, the 100% disclosure requirement set forth in Rule 17g-2(d), as amended, will facilitate users of credit ratings to compare the credit rating performance of all NRSROs issuing a credit rating for a given structured finance product, whether the NRSROs are hired by the arranger to do so or instead are issuing unsolicited ratings based on information obtained under the provisions of Rule 17g-5 as amended. This will likely enhance both hired and non-hired NRSRO's accountability for the ratings they issue. Second, the information disclosed pursuant Rule 17g-5 will be available to all NRSROs, including NRSROs operating under the subscriber-paid model. Since the latter are not compensated by the structured products' arrangers, they can issue unsolicited ratings without the pressure of worrying about the effect that the unsolicited ratings might have on their future revenue stream from arrangers of structured finance. Finally, by facilitating the issuance of unsolicited ratings, the amendments to Rule 17g-5 may serve to mitigate the potential for ratings shopping, since an arranger that "shopped" in order to obtain a higher rating would still face the possibility of non-hired NRSROs issuing lower ratings.

The Commission generally requested comment on all aspects of the benefits

²⁵⁴ 15 U.S.C. 78o-7(h)(2).

²⁵⁵ *Id.*

of the amendments as proposed.²⁵⁶ In addition, the Commission requested specific comment on the available metrics to quantify these benefits and any other benefits the commenter may identify, including the identification of sources of empirical data that could be used for such metrics. The Commission did not receive any specific comments in response.

The amendment to Regulation FD will accommodate the information disclosure program that the Commission is establishing under paragraphs (a) and (b) of Rule 17g-5. Specifically, it will permit issuers to rely on Regulation FD in providing information to NRSROs that require subscriptions to access their ratings. In this way, the amendment will not favor a particular NRSRO business model. Furthermore, to the extent that it increases the number of NRSRO credit ratings for structured finance products, users of credit ratings will have more choices. Finally, the amendment to Regulation FD will provide legal certainty to arrangers who provide access to the information to NRSROs consistent with the mechanisms established by Rule 17g-5.

B. Costs

As discussed below, the amendments will result in costs to NRSROs, arrangers, and others. The costs to a given NRSRO arising from the amendments adopted today will depend on its size and the complexity of its business activities. The size and complexity of NRSROs vary significantly. Therefore, the cost to implement these rule amendments will vary significantly across NRSROs. The cost to NRSROs will also vary depending on which classes of credit ratings an NRSRO issues and how many outstanding ratings it has in each class. NRSROs which issue credit ratings for structured finance products may incur higher compliance costs than those NRSROs which do not issue such credit ratings or issue very few credit ratings in that class. For these reasons, the cost estimates represent the average cost across all NRSROs.

1. Amendment to Rule 17g-2

The amendments to paragraph (d) of Rule 17g-2 require NRSROs to make 100% of their ratings action histories for any credit rating initially determined on or after June 26, 2007 publicly available in an interactive data file that uses a machine-readable format, with either a twelve month or twenty-four month grace period, depending on whether the

rating action relates to an issuer-paid credit rating or not.²⁵⁷ An NRSRO will be allowed to use any machine-readable format to make this data publicly available until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the Commission's List of XBRL Tags for NRSROs. As discussed with respect to the PRA, the Commission estimates that the total aggregate one-time burden to the industry to make the history of its rating actions publicly available initially in a machine-readable format, and subsequently in XBRL, will be 2,550 hours²⁵⁸ and the total aggregate annual burden hours will be 450 hours.²⁵⁹ For cost purposes, the Commission believes that a senior programmer will perform the functions required to comply with these requirements. Accordingly, the Commission estimates that an NRSRO will incur an average one-time cost of \$24,820 and an average annual cost of \$4,380, as a result of the proposed amendment.²⁶⁰ The Commission does not believe the NRSRO will incur any additional software cost from initially providing the information in machine-readable format prior to transitioning to XBRL. Based on staff experience, the Commission believes that NRSROs already have the necessary software to provide this disclosure in machine-readable format. Moreover, the Commission notes that currently seven NRSROs are providing the disclosure required pursuant to Rule 17g-2(d) (or the 10% requirement) in machine-readable format. Therefore, the Commission estimates the total aggregate one-time paperwork cost to

²⁵⁷ See 17 CFR 240.17g-2(d).

²⁵⁸ 45 hours × 30 NRSROs = 1,350 hours + 5 hours × 30 NRSROs for the one time burden of switching the disclosure to XBRL for a total of 1,500; see also *supra* note 209 at accompanying text.

²⁵⁹ 15 hours × 30 NRSROs = 450 hours; see also *supra* note 210 at accompanying text.

²⁶⁰ The SIFMA 2008 Report as Modified indicates that the average hourly cost for a Senior Programmer is \$292. Therefore, the average one-time cost would be \$24,820 [(45 hours × \$292 per hour) + (40 hours × \$292 per hour for the transition to disclose the information in XBRL)] and the average annual cost would be \$4,380 (15 hours per year × \$292 per hour). In the February 2009 Proposing Release, the Commission based its estimate on an average hourly cost of \$289 for a Senior Programmer as set forth in the SIFMA 2007 Report as Modified, which resulted in estimates of a one-time cost of \$13,005 (45 hours × \$289 per hour) and an average annual cost of \$4,335 (15 hours per year × \$289 per hour).

the industry will be \$744,600²⁶¹ and the total aggregate paperwork costs annual cost to the industry will be \$131,400.²⁶²

In the February 2009 Proposing Release, the Commission noted that the amendments may impose other costs. For example, making some information about ratings action histories available to the public for free may have some impact on the business models of NRSROs, although the amendment is designed to minimize any such impact. Further, the rule may affect NRSROs with different revenue sources and business models differently.

The Commission generally requested comment on all aspects of these cost estimates for the proposed amendments to paragraph (d) of Rule 17g-2. In addition, the Commission requested specific comment on the costs, for example, costs that will result from lost revenues incurred because NRSROs subject to the rule may not be able to sell ratings action histories if they are required to be publicly disclosed.²⁶³ The Commission received seven letters that addressed the costs associated with complying with the proposed amendments to paragraph (d) of Rule 17g-2.²⁶⁴ Several commenters argued that the proposed amendments entailed a higher likelihood of substantial financial harm to subscriber-paid NRSROs,²⁶⁵ potentially resulting in fatal harm to the viability of the subscriber-paid business model.²⁶⁶ Three commenters stated that without a longer grace period, the subscriber-based NRSROs would suffer a negative impact on sales of their products.²⁶⁷ Two commenters stated that the proposed amendment would reduce the diversification of their revenue sources.²⁶⁸ None of these commenters, however, provided any figures quantifying these costs.

As discussed in detail above,²⁶⁹ the Commission believes that the grace periods in the rule will significantly mitigate the negative impact on NRSRO revenues that are derived from selling access to current ratings and downloads

²⁶¹ \$24,820 × 30 NRSROs = \$744,600. The estimate set forth in the February 2009 Proposing Release was \$390,050 (\$13,005 × 30 NRSROs).

²⁶² \$4,380 × 30 NRSROs = \$131,400. The estimate set forth in the February 2009 Proposing Release was \$130,150 (\$4,335 × 30 NRSROs).

²⁶³ See February 2009 Proposing Release 74, FR at 6503.

²⁶⁴ See JCR Letter, ASF/SIFMA Letter, R&I Letter, Realpoint Letter, Moody's Letter, and S&P Letter.

²⁶⁵ See e.g., Hunt Letter; Realpoint Letter; Rapid Ratings Statement.

²⁶⁶ See e.g., Rapid Ratings Statement.

²⁶⁷ See JCR Letter, R&I Letter, and Realpoint Statement.

²⁶⁸ See Moody's Letter, S&P Letter.

²⁶⁹ See *supra* discussion in Section II.D.

²⁵⁶ See February 2009 Proposing Release, 74 FR at 6473.

of current ratings. The Commission believes that the parties that pay subscription fees for access to NRSRO credit ratings and who pay for access to downloadable packages of issuer-paid and unsolicited credit ratings are unlikely to reconsider their purchase of those products due to the public availability of twelve to twenty-four month-old ratings action information. The Commission believes that most of the persons who pay for these services want access to the NRSRO's current views on the creditworthiness of obligors and debt instruments; as such, it is not likely that they will view credit ratings that may be as much as twenty-four months old as an adequate substitute for access to the NRSRO's current credit ratings. Furthermore, the amended rule, as adopted, does not require the disclosure of the analysis and report that typically accompany the publication of a credit rating. NRSROs will continue to be able to distribute such information as they see fit, including selling information to subscribers, which should serve to mitigate any such potential loss. As explained in detail above, the Commission's goals in adopting the amendments are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry, and the Commission has balanced carefully its goals with the potential costs. While the Commission believes that NRSRO revenues derived from selling access to current ratings and downloads of current ratings will not be affected significantly by these new disclosure requirements, as previously stated, the Commission intends to closely monitor the impact, if any, they have on those revenues.

To the extent NRSROs derive revenues from selling access to their ratings histories, the Commission acknowledges that the new rule may well have a negative impact on this revenue stream. As noted above, the amended rule does not require NRSROs to disclose the analysis or report that typically accompany a credit rating, which is expected to mitigate any potential loss of revenue. Also, as noted above, information gathered by Commission staff over the course of discussions with NRSROs indicates that the amount of revenues they derived from selling access to ratings histories is not significant when compared to the revenues derived from other credit rating services. Nonetheless, the Commission will monitor this issue and, as part of that monitoring, the

Commission encourages an NRSRO to notify the Commission if the rule causes a loss of this revenue source that is significant when compared to its total revenues.

While the Commission intends to closely monitor the impact, if any, of the rule amendments being adopted today on the revenue derived from selling access to current and historical ratings as discussed above, the Commission notes that a decrease in revenues could be the result of a number of factors. External factors, such as a reduction in regulatory emphasis on credit ratings, an increase in the level of independent analysis performed by investors, and a loss of confidence in the quality of ratings generally could result in an industry-wide loss of revenues unrelated to the rule amendments being adopted today. In addition, the increased transparency provided by the rule may cause users of credit ratings to shift their business to an NRSRO that the marketplace views as providing better credit ratings.

One commenter raised an issue regarding the costs associated with supplying the disclosure with the required CUSIP, stating that it anticipates an increase in transaction costs to amend its CUSIP license as well as a potentially higher annual licensing fee.²⁷⁰ The Commission notes that it addressed the potential increased costs associated with CUSIP licensing security in the *February 2009 Adopting Release* and that it believes that the estimates and evaluations of the costs set forth at that time continue to be valid.²⁷¹

2. Amendment to Rule 17g-5

Rule 17g-5 requires an NRSRO to manage and disclose certain conflicts of interest²⁷² and prohibits certain other types of conflicts of interest outright.²⁷³ The amendments to Rule 17g-5 add an additional conflict to paragraph (b) of Rule 17g-5 for NRSROs to manage: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.²⁷⁴ The amendments further specify that an NRSRO subject to this conflict is prohibited from issuing a credit rating for a structured finance

product, unless certain information about the transaction and the assets underlying the structured finance product are disclosed: The amendments require an NRSRO that is hired by arrangers to perform credit ratings for structured finance products to disclose to other NRSROs the deals for which it is in the process of determining such credit ratings and to obtain representations from arrangers that the arrangers will provide the same information given to the hired NRSRO to other NRSROs. Specifically, an NRSRO rating such products will need to disclose to other NRSROs the following information on a password protected Internet Web site: A list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of Rule 17g-5 as amended can be accessed.²⁷⁵

The Commission estimates that the average one-time cost to each NRSRO to establish the Internet Web site required under the rule as amended would be \$66,900,²⁷⁶ resulting in a total aggregate one-time cost to all NRSROs of \$2,007,000.²⁷⁷ As discussed with respect to the PRA, the Commission estimates a total aggregate annual hour burden of 14,880 hours.²⁷⁸ The Commission estimates that the average annual cost to a large NRSRO would be \$799,280, the average annual cost to an NRSRO not in that category would be

²⁷⁵ Paragraph (a)(3)(i) of Rule 17g-5.

²⁷⁶ The Commission believes that an NRSRO would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Compliance Manager is \$258 and the average hourly cost for a Programmer Analyst is \$193. Therefore, the average one-time cost to an NRSRO would be (150 hours × \$253) + (150 hours × \$193) = \$66,900. In the *February 2009 Proposing Release*, the Commission based its estimate on an average hourly cost of \$245 for a Compliance Manager and \$194 for a Programmer Analyst as set forth in the *SIFMA 2007 Report as Modified*, which resulted in an estimate of an average one-time cost to an NRSRO of (150 hours × \$245) + (150 hours × \$194) = \$65,850.

²⁷⁷ \$66,900 × 30 NRSROs = \$2,007,000. The estimate set forth in the *February 2009 Proposing Release* was \$1,975,500 (\$65,850 × 30 NRSROs).

²⁷⁸ (3,880 hours per large NRSRO × 3) + (120 hours per NRSRO not in that category × 27) = 14,880 hours.

²⁷⁰ See Moody's Letter.

²⁷¹ See *February 2009 Adopting Release*, 74 FR at 6477.

²⁷² 17 CFR 240.17g-5(a) and (b).

²⁷³ 17 CFR 240.17g-5(c).

²⁷⁴ Paragraph (b)(9) of Rule 17g-5.

\$24,720,²⁷⁹ and the total aggregate annual cost to NRSROs will be \$3,065,280.²⁸⁰

The amendments also require the hired NRSRO to obtain representations from the arranger that the arranger will disclose the following information:

- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and
- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.²⁸¹

For purposes of the PRA, as discussed above, the Commission estimates that it will take an NRSRO approximately 5 hours to develop the written representation that the NRSRO is required to obtain from the issuer, sponsor or underwriter. The Commission estimates that the average one-time cost to an NRSRO would be \$1,525 and the total aggregate one-time cost to NRSROs will be \$45,750.²⁸²

²⁷⁹ The Commission believes that an NRSRO would have a Webmaster perform these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Webmaster is \$206. Therefore, the average annual cost for a large NRSRO averaging 3,880 structured finance ratings would be \$799,280 (3,880 hours × \$206) and the average annual cost for an NRSRO not in that category averaging 120 structured finance ratings would be \$24,720 (120 hours × \$206). In the *February 2009 Proposing Release*, the Commission based its estimate on an average hourly cost of \$205 for a Webmaster as set forth in the *SIFMA 2007 Report as Modified*, which resulted in an estimate of an average annual cost to a large NRSRO of \$795,400 (3,880 hours × \$205) and an average annual cost to NRSROs not in that category of \$24,600 (120 hours × \$205 = \$24,600.)

²⁸⁰ (\$799,280 × 3) + (\$24,720 × 27) = \$3,065,280.

²⁸¹ See 17 CFR 240.17g-5(a)(3)(iii).

²⁸² The Commission believes that the NRSRO would have an in-house Attorney perform these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for an Attorney is \$305. Therefore, the average one-

time cost to an NRSRO would be (5 hours × \$305) = \$1,525, and the aggregate one-time cost to an NRSRO would be 30 NRSROs × \$1,525 = \$45,750.

As discussed with respect to the PRA, in addition to the one-time hour burden, arrangers also will disclose the information on a transaction by transaction basis. Based on staff experience and the estimate of 4,000 new structured finance deals per year, as discussed above, the Commission estimates that the amendments will result in each arranger disclosing information with respect to approximately 20 new transactions per year and that it will take approximately 1 hour per transaction to make the information publicly available.²⁸⁶ Therefore, as discussed with respect to the PRA, the Commission estimates that the total aggregate annual hour burden for arrangers will be 4,000 hours.²⁸⁷ The Commission estimates that the average

time cost to an NRSRO would be (5 hours × \$305) = \$1,525, and the aggregate one-time cost to an NRSRO would be 30 NRSROs × \$1,525 = \$45,750.

²⁸³ 300 hours × 200 respondents = 60,000 hours.

²⁸⁴ The Commission believes that an arranger would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Compliance Manager is \$258 and the average hourly cost for a Programmer Analyst is \$193. Therefore, the average one-time cost to an arranger would be (150 hours × \$253) + (150 hours × \$193) = \$66,900. In the *February 2009 Proposing Release*, the Commission based its estimate on an average hourly cost of \$245 for a Compliance Manager and \$194 for a Programmer Analyst as set forth in the *SIFMA 2007 Report as Modified*, which resulted in an estimate of an average one-time cost to an arranger of (150 hours × \$245) + (150 hours × \$194) = \$65,850.

²⁸⁵ \$66,900 × 200 arrangers = \$13,380,000. The estimate set forth in the *February 2009 Proposing Release* was \$13,117,000 (\$65,850 × 200 arrangers = \$13,117,000).

²⁸⁶ This estimate is based on the arranger already implementing the system and policies and procedures for disclosure. The Commission cannot estimate the number of initial transactions per year with certainty. The Commission believes that the number of deals on which each arranger will disclose information will vary widely based on the size of the arranger. In addition, the Commission believes that the number of asset-backed or mortgaged-backed issuances being rated by NRSROs in the next few years is difficult to predict given the recent credit market turmoil. The estimates, however, reflect the Commission's best assessment of the number of transactions based on experience and the available data.

²⁸⁷ 20 hours × 200 respondents = 4,000 hours.

annual cost to a respondent to be \$4,120²⁸⁸ and the total annual cost to the industry to be \$824,000.²⁸⁹

Rule 17g-5(a)(3)(iii)(D) requires hired NRSROs to obtain representations from the arranger that the arranger will disclose information provided to the hired NRSRO to undertake credit rating surveillance on a structured product. Because surveillance covers more than just initial ratings, the Commission estimates that an arranger will disclose information with respect to approximately 125 transactions on an ongoing basis and that the information will be provided to the hired NRSRO on a monthly basis. As discussed with respect to the PRA, the Commission estimates a total aggregate annual burden hours of 150,000 hours.²⁹⁰ The Commission estimates that the average annual cost to a respondent will be \$154,500²⁹¹ and the total annual cost to the industry will be \$30,900,000.²⁹²

An NRSRO that wishes to access information on another NRSRO's Web site or on an arranger's Web site will need to provide the Commission with an annual certification described in proposed new paragraph (e) to Rule 17g-5. In the PRA, the Commission estimates an aggregate annual hour burden to the industry of 60 hours.²⁹³ For these reasons, the Commission estimates it will cost an NRSRO approximately \$516 dollars per year²⁹⁴

²⁸⁸ The Commission believes that an arranger would have a Webmaster perform these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Webmaster is \$206. Therefore, the average one-time cost to a respondent would be 20 hours × \$206 = \$4,120. In the *February 2009 Proposing Release*, the Commission based its estimate on an average hourly cost of \$205 for a Webmaster as set forth in the *SIFMA 2007 Report as Modified*, which resulted in an estimate of an average one-time cost to an arranger of \$4,100 (20 hours × \$205 = \$4,100.)

²⁸⁹ \$4,120 × 200 respondents = \$824,000. The estimate set forth in the *February 2009 Proposing Release* was \$820,000 (\$4,100 × 200 respondents = \$820,000.)

²⁹⁰ 750 hours × 200 respondents = 150,000 hours.

²⁹¹ The Commission believes that an arranger would have a Webmaster perform these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Webmaster is \$206. Therefore, the average annual cost to a respondent would be 750 hours × \$206 = \$154,500. In the *February 2009 Proposing Release*, the Commission based its estimate on an average hourly cost of \$205 for a Webmaster as set forth in the *SIFMA 2007 Report as Modified*, which resulted in an estimate of an average annual cost to an arranger of \$153,750 (750 hours × \$205 = \$153,750.)

²⁹² \$154,500 × 200 respondents = \$30,900,000. The estimate set forth in the *February 2009 Proposing Release* was \$30,750,000 (\$153,750 × 200 respondents = \$30,750,000).

²⁹³ 2 hours × 30 NRSROs = 60 hours.

²⁹⁴ The Commission believes that an NRSRO would have a Compliance Manager prepare the annual certification. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Compliance Manager is \$258. Therefore, the

and the industry \$15,480 per year to comply with the certification requirement.²⁹⁵

The Commission requested comment on all aspects of these cost estimates for the amendments to Rule 17g-5. In addition, the Commission requested specific comment on whether the proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs; and whether there would be additional costs not identified.²⁹⁶ The Commission received three comment letters that addressed the costs associated with the amendments to Rule 17g-5.²⁹⁷ One commenter stated that the consideration of financial impact should be based on the economic value a given entity contributes to the economy and not the company's financial health.²⁹⁸ Another stated that the proposal would create the need for additional technology and staff, especially in consideration of the strong controls needed to protect the proprietary data published on the Web site.²⁹⁹ The third commenter raised the concern that the formulations of the disclosures and information-sharing proposals could create costs that outweigh any burden.³⁰⁰ As discussed above, the Commission believes the benefits of the enhanced disclosure requirements pursuant to Rule 17g-5 justify the costs.

Lastly, the Commission notes that the conforming amendment to Regulation FD needed to facilitate the disclosure requirements under Rule 17g-5 will not result in any additional costs.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a)(2) of the Exchange Act³⁰¹ requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. In

average annual cost to an arranger would be \$516 (2 hours × \$258 = \$516). In the *February 2009 Proposing Release*, the Commission based its estimate on an average hourly cost of \$245 for a Compliance Manager which resulted in an estimate of an average annual cost to an arranger of \$490 (2 hours × \$245 = \$490.)

²⁹⁵ \$516 × 30 NRSROs = \$15,480. The estimate set forth in the *February 2009 Proposing Release* was \$14,700 (\$490 × 30 NRSROs = \$14,700).

²⁹⁶ See *February 2009 Proposing Release*, 74 FR at 6505.

²⁹⁷ See Marchywka Letter, FSR Letter, ASF Statement.

²⁹⁸ See Marchywka Letter.

²⁹⁹ See FSR Letter.

³⁰⁰ See ASF Statement.

³⁰¹ 15 U.S.C. 78w(a).

addition, Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act³⁰² requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.

As discussed in detail above, the amendments to paragraph (d) of Rule 17g-2 are designed to provide the marketplace with additional information for comparing the ratings performance of NRSROs and, therefore, provide users of credit ratings with more useful metrics with which to compare these NRSROs. Increased disclosure of ratings history for credit ratings will make the performance of the NRSROs more transparent to the marketplace and, thereby, highlight those firms that do a better job analyzing credit risk. This may cause users of credit ratings to give greater weight to credit ratings of NRSROs that distinguish themselves by creating a track record of better credit rating performance than their peers. Moreover, to the extent this improves the quality of the credit ratings, persons that use credit ratings to make investment or lending decisions would have better information upon which to base their decisions. As a consequence, the rule may result in a more efficient allocation of capital and loans to issuers and obligors based on the risk appetites of the investors and lenders. The Commission believes that this enhanced disclosure will benefit smaller NRSROs that determine issuer-paid credit ratings to the extent they do a better job of assessing creditworthiness because these smaller NRSROs will be better able to compete with the larger NRSROs for new business; users of credit ratings will be able to compare credit rating performance, allowing smaller NRSROs more easily to compete based on quality and creditability of their ratings.

Also as discussed in detail above, the amendments to paragraphs (a) and (b) of Rule 17g-5 are designed to enhance competition among NRSROs. The goal of these amendments is to provide a mechanism to enhance the ability of NRSROs to prepare unsolicited credit ratings, which would provide users of credit ratings with more assessments of the creditworthiness of a structured finance product. This mechanism may

expose NRSROs whose procedures and methodologies for determining credit ratings are less conservative in order to gain business. In the same way, by creating a mechanism for a range of NRSROs to issue ratings, it also may mitigate the impact of rating shopping if ratings issued by NRSROs not hired to rate a deal differ from those of hired NRSROs. These potential impacts of the amendments may help to restore confidence in credit ratings and, thereby, promote capital formation. The Commission further believes that these amendments could promote the more efficient allocation of capital by investors to the extent the quality of credit ratings is improved. In addition, these amendments could increase competition by creating a mechanism for smaller NRSROs to obtain the information necessary to rate structured products and to market themselves based on a demonstrated proficiency in rating these structured products.

The Commission generally requested comment on all aspects of this analysis of its consideration of the effect on competition and promotion of efficiency, competition, and capital formation. Several commenters argued that the proposed amendments entailed a higher likelihood of substantial financial harm to subscriber-paid NRSROs,³⁰³ potentially resulting in fatal harm to the viability of the subscriber-paid business model.³⁰⁴ Three commenters stated that without a longer grace period, the subscriber-based NRSROs would suffer a negative impact on sales of their products.³⁰⁵

As discussed in detail above, the Commission acknowledges the different grace periods provided for ratings disclose with respect to credit ratings that are issuer-paid or not.³⁰⁶ The Commission believes that any competitive effects are limited because of the tailored time periods. The Commission believes that the twenty-four month grace period will significantly mitigate the negative impact on NRSRO revenues that are derived from selling subscriptions to their credit ratings and that the twelve month grace period will mitigate the impact on NRSRO revenues that are derived from selling downloadable access to their current credit ratings. Furthermore, the Commission believes that the parties that pay subscription fees for access to NRSRO credit ratings

³⁰³ See e.g., Hunt Letter; Realpoint Letter; Rapid Ratings Statement.

³⁰⁴ See e.g., Rapid Ratings Statement.

³⁰⁵ See JCR Letter, R&I Letter, and Realpoint Statement.

³⁰⁶ See *supra* discussion in Section II.D.

³⁰² 15 U.S.C. 78c(f).

are unlikely to reconsider their purchase of those products due to the public availability of twenty-four month-old ratings action information. Likewise, the Commission believes that persons who pay for downloadable access to their current credit ratings are unlikely to reconsider their purchase of those products due to the public availability for databases containing twelve-month-old ratings action information.³⁰⁷ The Commission believes that most of the persons who pay for these services want access to the NRSRO's current views on the creditworthiness of obligors and debt instruments; as such, it is not likely that they will view credit ratings that are twelve to twenty-four months old as an adequate substitute for access to the NRSRO's current credit ratings. As noted previously, the amended rule, as adopted, does not require the disclosure of the analysis and report that typically accompany the publication of a credit rating. NRSROs will continue to be able to distribute such information as they see fit, including restricting access to such information to paying subscribers, which should serve to mitigate any potential loss of subscribers.

As stated above, the Commission's goals in adopting the amendments are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry. Enacting regulations that would threaten the ability of competitors to enter and compete with existing NRSROs in a manner consistent with the Exchange Act would be adverse to these goals. While the Commission believes that NRSRO revenues derived from selling access to current credit ratings will not be affected significantly by these new disclosure requirements, as previously stated, the Commission intends to closely monitor the impact, if any, they have on those revenues.

VII. Final Regulatory Flexibility Analysis

The Commission proposed amendments to Rules 17g-2 and 17g-5 under the Exchange Act. An Initial Regulatory Flexibility Analysis ("IRFA") was published in the *February 2009 Proposing Release*.³⁰⁸ The Commission has prepared the following Final Regulatory Flexibility Analysis ("FRFA"), in accordance with the provisions of the Regulatory Flexibility Act,³⁰⁹ regarding the amendments to

Rules 17g-2 and 17g-5 under the Exchange Act.

A. Need for and Objective of the Amendments

The amendments prescribe additional requirements for NRSROs to address concerns relating to the transparency of ratings actions and the conflicts of interest at NRSROs. The objectives of the Rating Agency Act are "to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry."³¹⁰ The amendments are designed to improve the transparency of credit ratings performance by making credit ratings actions publicly available and the accuracy of credit ratings for structured finance products by increasing competition among the NRSROs that rate these securities and money market instruments.

B. Significant Issues Raised by Commenters

The Commission sought comment with respect to every aspect of the IRFA, including comments with respect to the number of small entities that may be affected by the amendments.³¹¹ The Commission asked commenters to specify the costs of compliance with the proposed rules and suggest alternatives that would accomplish the goals of the rules.³¹² The Commission did not receive any comments on the IRFA. The Commission, did, however receive comments arguing that the amendments requiring disclosure of 100% of ratings actions would negatively impact the revenue of NRSROs operating under the subscriber-paid model, although these commenters did not address whether their comments pertained to entities that would be small businesses for purposes of Regulatory Flexibility Act analysis.³¹³

As stated above, the Commission believes that the twenty-four month grace period will significantly mitigate any negative impact on NRSRO revenues that are derived from selling subscriptions to current ratings. The parties that pay subscription fees for access to NRSRO credit ratings are unlikely to reconsider their purchase of those products due to the public availability of twenty-four month-old ratings action information. Furthermore, the amended rule, as adopted, does not require the disclosure of the analysis

and report that typically accompany the publication of a credit rating. NRSROs will continue to be able to distribute such information as they see fit, including restricting access to such information to paying subscribers, which should serve to mitigate any potential loss of subscribers. While the Commission believes that NRSRO revenues derived from selling access to current credit ratings will not be affected significantly by these new disclosure requirements, the Commission will closely monitor the impact, if any, they have on those revenues. If this monitoring reveals that users of credit ratings are ceasing to purchase access to current credit ratings or downloads of current credit ratings because of the public disclosure of the histories of those ratings, the Commission will re-examine the rule and, if appropriate, consider modifications. At the same time, the Commission notes that the purpose of the rule is to allow users of credit ratings to better assess and compare the performance of NRSROs. The increased transparency provided by the rule could cause users of credit ratings to shift their business to an NRSRO that the marketplace views as providing the highest quality credit ratings. As a result, smaller NRSROs may benefit to the extent that they are better able to establish a reputation for providing high quality ratings and therefore increase their market share.

Although, the Commission did not receive any comments on the IRFA with respect to the re-proposed amendments to Rule 17g-5, the Commission did receive comments that addressed the proposal. Specifically, one commenter argued that the new disclosure requirement would favor large NRSROs with market power at the expense of small NRSROs.³¹⁴ The Commission notes that the rule is designed, among other things, to benefit small NRSROs to allow them the opportunity to rate structured finance products even if they are not hired by the arranger to determine the credit rating. The Commission recognizes that small NRSROs that are hired by an arranger to rate a structured finance product will incur a burden by having to make this information available to other NRSROs and conceivably lose business if other NRSROs develop a track record for doing a better job. However, the Commission believes that the burden of having to disclose the information is not significant. Moreover, with respect to losing business the rule is designed to foster competition and create a market

³¹⁰ See *Senate Report*.

³¹¹ See *February 2009 Proposing Release* 74 FR at 6506.

³¹² *Id.*

³¹³ See e.g. JCR Letter; R&I Letter; Realpoint Statement.

³¹⁴ See JCR Letter.

³⁰⁷ *Id.*

³⁰⁸ See *February 2009 Proposing Release*, 74 FR at 6506.

³⁰⁹ 5 U.S.C. 603.

where an NRSRO must perform well in determining a credit rating to succeed.

Three other comments argued that the costs of creating and maintaining a Web site are significant and would negatively impact smaller NRSROs in addition to potentially creating security risks.³¹⁵ As noted above, the Commission is sensitive to the costs of the new requirement but does not believe they are significant. As previously discussed, all of the NRSROs currently maintain Internet Web sites, in most cases with password-protected portals that their subscribers and registered users can access to obtain information posted by the NRSRO. Consequently, the Commission believes that adding a portal for other NRSROs to access pending deal information is not expected to require significant additional Internet Web site design and maintenance.

C. Small Entities Subject to the Rule

Paragraph (a) of Rule 0–10 provides that for purposes of the Regulatory Flexibility Act, a small entity “[w]hen used with reference to an ‘issuer’ or a ‘person’ other than an investment company” means “an ‘issuer’ or ‘person’ that, on the last day of its most recent fiscal year, had total assets of \$5 million or less.”³¹⁶ The Commission believes that an NRSRO with total assets of \$5 million or less qualifies as a “small” entity for purposes of the Regulatory Flexibility Act.

As noted in the *June 2007 Adopting Release*,³¹⁷ the Commission believes that approximately 30 credit rating agencies ultimately would be registered as an NRSRO. Currently, there are two NRSROs that are classified as “small” entities for purposes of the Regulatory Flexibility Act.³¹⁸

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The amendments to paragraph (d) Rule 17g–2 add the requirement that an NRSRO disclose ratings actions histories in an interactive data file that uses a machine-readable format for all credit ratings initially determined on or after June 26, 2007, with each new ratings action to be reflected in such publicly disclosed histories no later than twelve months after the action for rating actions related to credit ratings that are issuer-paid, and no later than twenty-four months after it is taken for rating actions related to credit ratings that are not

issuer-paid.³¹⁹ An NRSRO will be allowed to use any machine-readable format to make this data publicly available until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the Commission’s List of XBRL Tags for NRSROs.³²⁰ This new disclosure requirement applies to all NRSRO credit ratings regardless of the business model under which they are determined.

The amendments to paragraphs (a) and (b) of Rule 17g–5 being adopted today require an NRSRO that is hired by arrangers to perform credit ratings for structured finance products (1) to disclose to non-hired NRSROs that have furnished the Commission with the certificate described below the deals for which they are in the process of determining such credit ratings and (2) to obtain written representations from arrangers on which the NRSRO can reasonably rely that the arrangers will provide information given to the hired NRSRO to non-hired NRSROs that have furnished the Commission with the certificate described below.³²¹ In addition, a new paragraph (e) of Rule 17g–5 requires NRSROs seeking to access the information maintained by the NRSROs and the arrangers pursuant to the amended rules to furnish the Commission an annual certification that they are accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using that information.³²²

E. Significant Alternatives

Pursuant to Section 3(a) of the Regulatory Flexibility Act,³²³ the Commission must consider certain types of alternatives, including: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The Commission is not establishing different compliance or reporting

requirements or timetables but is using performance standards. The Commission believes that obtaining comparable information from NRSROs regardless of size is important. Moreover, because the amendments are designed to improve the overall quality of ratings by promoting transparency, accountability, and competition, and to enhance the Commission’s oversight, the Commission believes that small entities should be covered by the rule.

VIII. Statutory Authority

The Commission is amending Rule 17g–2 and Rule 17g–5 pursuant to the authority conferred by the Exchange Act, including Sections 3(b), 15E, 17, and 23(a).³²⁴

Text of the Amendments

List of Subjects in 17 CFR Parts 240 and 243

17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

17 CFR Part 243

Reporting and recordkeeping requirements, Securities.

■ In accordance with the foregoing, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Section 240.17g–2 is amended by revising paragraph (d) to read as follows:

§ 240.17g–2 Records to be made and retained by nationally recognized statistical rating organizations.

* * * * *

(d)(1) *Manner of retention.* An original, or a true and complete copy of the original, of each record required to be retained pursuant to paragraphs (a) and (b) of this section must be maintained in a manner that, for the applicable retention period specified in paragraph (c) of this section, makes the original record or copy easily accessible

³¹⁵ See DBRS Letter; ASF/SIMFA Letter; Moody’s Letter.

³¹⁶ 17 CFR 240.0–10(a).

³¹⁷ *June 2007 Adopting Release*, 72 FR at 33618.

³¹⁸ See 17 CFR 240.0–10(a).

³¹⁹ See Paperwork Reduction Act, *supra* Section IV.

³²⁰ See 17 CFR 240.17g–2(d).

³²¹ See 17 CFR 240.17g–5(a)(3) and (b)(9); see also Paperwork Reduction Act, *supra* Section IV.

³²² See 17 CFR 240.17g–5(e).

³²³ 5 U.S.C. 603(c).

³²⁴ 15 U.S.C. 78c(b), 78o–7, 78q, and 78w.

to the principal office of the nationally recognized statistical rating organization and to any other office that conducted activities causing the record to be made or received.

(2) A nationally recognized statistical rating organization must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information for ten percent of the outstanding credit ratings required to be retained pursuant to paragraph (a)(8) of this section, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more outstanding credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d)(2) need not be made public less than six months from the date such ratings action is taken. If a credit rating made public pursuant to this paragraph is withdrawn or the instrument rated matures, the nationally recognized statistical rating organization must randomly select a new outstanding credit rating from that class of credit ratings in order to maintain the 10 percent disclosure threshold. In making the information available on its corporate Internet Web site, the nationally recognized statistical rating organization shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site.

(3)(i)(A) A nationally recognized statistical rating organization must make publicly available on its corporate Internet Web site in an interactive data file that uses a machine-readable format the ratings action information required to be retained pursuant to paragraph (a)(8) of this section for any credit rating initially determined by the nationally recognized statistical rating organization on or after June 26, 2007.

(B) Any ratings action information required to be made and kept publicly available on a nationally recognized statistical rating organization's corporate Internet Web site pursuant to paragraph (d)(3)(i)(A) of this section with respect to credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated need not be made public less than twelve months from the date such ratings action is taken.

(C) Any ratings action information required to be made and kept publicly available on a nationally recognized statistical rating organization's corporate Internet Web site pursuant to paragraph (d)(3)(i)(A) of this section with respect to credit ratings other than those ratings

described in paragraph (d)(3)(i)(B) of this section need not be made public less than twenty-four months from the date such ratings action is taken.

(ii) In making the information required under paragraph (d)(3)(i) of this section available in an interactive data file on its corporate Internet Web site, the nationally recognized statistical rating organization shall use any machine-readable format, including but not limited to XBRL format, until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the nationally recognized statistical rating organization shall make this information available in an interactive data file on its corporate Internet Web site in XBRL format using the List of XBRL Tags for NRSROs as published by the Commission on its Internet Web site.

* * * * *

■ 3. Section 240.17g-5 is amended by:

- a. Removing the word "and" at the end of paragraph (a)(1);
- b. Removing the period at the end of paragraph (a)(2) and in its place adding "; and";
- c. Adding paragraph (a)(3);
- d. Redesignating paragraph (b)(9) as paragraph (b)(10);
- e. Adding new paragraph (b)(9); and
- f. Adding new paragraph (e).

The additions read as follows:

§ 240.17g-5 Conflicts of interest.

(a) * * *

(3) In the case of the conflict of interest identified in paragraph (b)(9) of this section relating to issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction, the nationally recognized statistical rating organization:

(i) Maintains on a password-protected Internet Web site a list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of this section can be accessed;

(ii) Provides free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any nationally recognized statistical rating organization that

provides it with a copy of the certification described in paragraph (e) of this section that covers that calendar year, provided that such certification indicates that the nationally recognized statistical rating organization providing the certification either:

(A) Determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to 17 CFR 240.17g-5(a)(3)(iii) in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments;

or

(B) Has not accessed information pursuant to 17 CFR 240.17g-5(a)(3) 10 or more times during the most recently ended calendar year; and

(iii) Obtains from the issuer, sponsor, or underwriter of each such security or money market instrument a written representation that can reasonably be relied upon that the issuer, sponsor, or underwriter will:

(A) Maintain the information described in paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of this section available at an identified password-protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating;

(B) Provide access to such password-protected Internet Web site during the applicable calendar year to any nationally recognized statistical rating organization that provides it with a copy of the certification described in paragraph (e) of this section that covers that calendar year, provided that such certification indicates that the nationally recognized statistical rating organization providing the certification either:

(1) Determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to 17 CFR 240.17g-5(a)(3)(iii) in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments;

or

(2) Has not accessed information pursuant to 17 CFR 240.17g-5(a)(3) 10 or more times during the most recently ended calendar year.

(C) Post on such password-protected Internet Web site all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization, or contracts with a

third party to provide to the nationally recognized statistical rating organization, for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and

(D) Post on such password-protected Internet Web site all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization, or contracts with a third party to provide to the nationally recognized statistical rating organization, for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.

* * * * *

(b) * * *

(9) Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or

underwriter of the security or money market instrument;

* * * * *

(e) *Certification.* In order to access a password-protected Internet Web site described in paragraph (a)(3) of this section, a nationally recognized statistical rating organization must furnish to the Commission, for each calendar year for which it is requesting a password, the following certification, signed by a person duly authorized by the certifying entity:

The undersigned hereby certifies that it will access the Internet Web sites described in 17 CFR 240.17g-5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to 17 CFR 240.17g-5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 78o-7(g)(1)) and 17 CFR 240.17g-4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to 17 CFR 240.17g-5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by the certification. Further, the undersigned certifies one of the following as applicable: (1) In the most recent calendar year during which it accessed information pursuant to 17 CFR 240.17g-5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in 17 CFR 240.17g-5(a)(3) and determined and maintained credit ratings for [Insert Number] of such securities and money market instruments; or (2) The undersigned

previously has not accessed information pursuant to 17 CFR 240.17g-5(a)(3) 10 or more times during the most recently ended calendar year.

PART 243—REGULATION FD

■ 4. The authority citation for part 243 continues to read as follows:

Authority: 15 U.S.C. 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a-29, unless otherwise noted.

■ 5. Section 243.100 is amended by revising paragraph (b)(2)(iii) to read as follows:

§ 243.100 General rule regarding selective disclosure.

* * * * *

(b) * * *

(2) * * *

(iii) To the following entities solely for the purpose of determining or monitoring a credit rating:

(A) Any nationally recognized statistical rating organization, as that term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(62)), pursuant to § 240.17g-5(a)(3) of this chapter; or

(B) Any credit rating agency, as that term is defined in Section 3(a)(61) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(61)), that makes its credit ratings publicly available; or

* * * * *

By the Commission.

Dated: November 23, 2009.

Elizabeth M. Murphy,
Secretary.

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