May 13, 2013

VIA E-MAIL: ***rule-comments@sec.gov***

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
Attn: Elizabeth M. Murphy, Secretary

Re: Release No. 34-69433; File No. 4-661

Ladies and Gentlemen:

The American Securitization Forum ("ASF")[1] appreciates the opportunity to submit this letter in advance of tomorrow's Securities and Exchange Commission's (the "Commission") Credit Ratings Roundtable (the "Roundtable")[2] being held pursuant to the recommendations set forth in the Commission's December 18, 2012 "Report to Congress on Assigned Credit Ratings" ("Franken Amendment Report"). The Franken Amendment Report, required by Section 939F ("Section 939F") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), outlines the results of the Commission's study and the comments received in response to Release No. 34-64456; File No. 4-629 (the "RFC"),[3] regarding, among other matters, the feasibility of establishing a system in which a public or private utility or a self-regulatory organization ("SRO") assigns nationally recognized statistical rating organizations ("NRSROs") to determine credit ratings for structured finance products. **This letter seeks to answer the questions released as part of the agenda for the Roundtable, including detailed reasons for our strong opposition to implementation of the proposed Franken Amendment as well our proposed solutions to strengthen Rule 17g-5 to improve the market for credit ratings.** For a brief overview of ASF's concerns and suggestions, please see Attachment A of this letter.

[1] The American Securitization Forum is a broad-based professional forum through which hundreds of institutional participants in the U.S. structured finance market advocate their common interests on important legal, regulatory and market practice issues. ASF members includes issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in structured finance transactions. ASF also provides information, education and training on a range of structured finance market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

[2] *See* http://www.sec.gov/news/press/2013/2013-71.htm.

[3] *See* http://www.gpo.gov/fdsys/pkg/FR-2011-05-16/pdf/2011-11877.pdf and ASF's comment letter from September 12, 2011 at http://www.americansecuritization.com/uploadedFiles/ASF_Letter_to_SEC_regarding_Franken_Amendment_%289-12-11%29.pdf.

Overview

Section 939F requires the Commission, by rule, *as it determines is necessary or appropriate in the public interest or for the protection of investors*, to establish a system for the assignment of NRSROs to determine the initial credit ratings of structured finance products, in a manner that prevents the issuer, sponsor or underwriter of the structured finance product from selecting the NRSRO that will determine the initial credit ratings and monitor such credit ratings. Section 939F was included in the Dodd-Frank Act in lieu of Section 939D of H.R. 4173 (111th Congress) ("Section 939D"), as passed by the Senate on May 20, 2010 (the "Senate Bill"), which would have added Section 15E(w) to the Exchange Act ("Section 15E(w)"). In place of Section 939D, Section 939F requires that the Commission implement the system described in Section 15E(w) unless the Commission determines that an alternative system would better serve the public interest and the protection of investors.

Section 15E(w) would have established an SRO in the form of a board responsible for assigning a qualified NRSRO to provide the initial credit ratings on structured finance products. Section 15E(w) would have precluded issuers of structured finance products from requesting an initial credit rating directly from an NRSRO but would not have precluded an issuer from obtaining other ratings from an NRSRO if the initial credit rating was provided in accordance with the board assignment provisions. The goal of Section 15E(w) was to eliminate the perceived conflict of interest (the "issuer-pay conflict of interest") for NRSROs where an issuer, a sponsor or an underwriter pays the NRSRO to provide a rating on a structured finance product (referred to as the "issuer-pay compensation model") and to remove the possibility of ratings shopping by issuers, sponsors or underwriters.

In June 2010, the Commission's amendments to Rule 17g-5(a), (b)(9) and (e) under the Exchange Act (the "Rule 17g-5 Program") became effective. The Rule 17g-5 Program was intended to deal with many of the same issues that Section 15E(w) was intended to address; generally, Rule 17g-5 prohibits NRSROs from issuing ratings if certain specified conflicts of interest exist and requires disclosure and written policies with respect to management of other specified conflicts of interests. The Rule 17g-5 Program precludes an NRSRO from rating structured finance products where an issuer-pay conflict exists unless it complies with certain requirements, including the requirement that it obtain from the transaction issuer, underwriter or sponsor (the arranger) a representation that the arranger will post all of the information provided to a hired NRSRO on a website that is available to other NRSROs. The Commission's goal was 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.

While both Section 15E(w) and the Rule 17g-5 Program seek to address the issuer-pay conflict of interest, each uses a different method to accomplish this goal. The Section 15E(w) provisions attempt to achieve this goal by precluding issuers from selecting the NRSRO that will provide the initial credit rating, with the intent that issuers will not be able to pressure a rating agency into giving a good score in exchange for future business. In contrast, the Rule 17g-5 Program aims at achieving this goal by making it more difficult for arrangers to exert influence over the NRSROs they hire because any inappropriate rating could be exposed to the market through the

unsolicited ratings issued by NRSROs not hired to rate the structured finance product. Ultimately, and as further discussed below, the structure of Section 15E(w) raises the potential for new conflicts of interest and moral hazards that make the assignment system unworkable. These same concerns do not arise under Rule 17g-5. **In light of this, ASF believes that a revamped Rule 17g-5 Program would ultimately be more beneficial than the implementation of a Section 15E(w) system.**

Finally, it is also important to consider that competition, one of the main pre-crisis concerns, has resolved itself through natural market forces. In today's structured finance market, there are two new NRSROs rating transactions that did not previously exist, mainly because these entities were able to fill a perceived or actual void in the market. In this respect, we believe targeted, incremental reforms are much better policy options than a radical overhaul of the ratings process.

Assessment of Assignment System under Section 15E(w)

Section 15E(w) is contrary to the goals of Dodd-Frank and raises concerns relating to the role of the U.S. government in the assignment process.

We are concerned that creation of a board will further encourage overreliance by investors on credit ratings through the implication that the board has endorsed the ratings of the NRSROs it qualifies, thus conferring an implicit stamp of government approval. We believe there is further risk that this endorsement could be attributable to the U.S. government itself in creating such a board. While subsequent board members will be selected by current board members, the initial board members, who will be appointed by the Commission, will be the most influential in setting up the system and selecting qualified NRSROs. The critical decisions and planning for the process — the development of criteria for determining qualified NRSROs, the approval of applications for qualified NRSROs and the establishment of an assignment process — will occur during the initial term.

By creating a government-sanctioned special category of NRSROs that are the only NRSROs permitted to issue initial credit ratings to issuers, Section 15E(w) would further entrench certain NRSROs into the system; this is in direct conflict with Section 939A of Dodd-Frank, which aimed to remove ratings from regulations to eliminate what then Senator George LeMieux (R-FL) referred to as a "sanctioned monopoly." Further, we believe the selection and evaluation process of qualified NRSROs under Section 15E(w) will create a perception by investors and other market participants that the qualified NRSROs (and the initial ratings they issue) have been vetted and sanctioned by the government, because it established this board.

In addition, we believe the board could be subject to enormous political pressure to adjust its methodology to achieve a particular agenda by favoring (or disfavoring) NRSROs whose methodologies or criteria promote (or run counter to) that agenda, such as increased homeownership in particular segments of the country or access for certain borrowers to credit. NRSROs that rate structured finance products are also in the business of rating other debt, including corporate bonds and the debt of sovereign nations, states and municipalities. For instance, on August 5, 2011, an NRSRO lowered the long-term sovereign credit rating of the

United States to AA+ from AAA. While the merits of the downgrade are not relevant for this comment letter, what followed the downgrade should inform any determination to move decision-making to a government-created board. The downgrade was met with strong criticism from U.S. government officials and reportedly led to inquiries by the Commission to the NRSRO, including a review of the model used to trigger the downgrade and the firm's confidentiality policies, and was followed by an announcement that the Department of Justice was joining an investigation, and ultimately a lawsuit, by the Commission against the NRSRO (and others) with respect to ratings on certain structured finance products prior to the credit crisis.

Substitution of the market's assessment of NRSRO performance with a third-party assessment is inappropriate and will undermine market acceptance.

We are concerned with the feasibility of creating a fair and transparent basis for measuring NRSRO performance by a third party in lieu of the market's assessment, particularly where the allocation of rating assignments will be tied to this nascent performance measure. Many of our members believe it would be impossible to develop a model that fairly measures performance, and none support the proposal that an untested performance measure should become the basis for determining which NRSRO will provide the initial credit rating on a transaction. Additionally, allocating the development and maintenance of a performance measure to a board is inappropriate and could result in a performance measure (or application of that measure, in a manner) that diverges from the market's performance assessment.

Creating a performance measure will result in NRSROs migrating to similar methodologies and effectively replace NRSROs' opinions of credit quality with that of the board.

Under Section 15E(w), the board's method of assigning NRSROs to rate a transaction would take into account the NRSRO's performance. We question how the board will evaluate the performance of an NRSRO – if the performance measure relies merely on downgrades to assess performance, NRSROs could be driven to overly conservative initial ratings to lessen the likelihood of a downgrade. If, rather than measuring performance on the basis of downgrades, the board analyzed transactions to determine if it assessed the NRSRO's ratings as accurate, the board would be doing the same thing as the NRSRO – making a determination of the credit quality of the security based on its analysis of the transactions.

By creating a performance measure, Section 15E(w) would limit development of new methodologies and/or cause NRSROs to migrate to more similar methodologies, i.e., ones that are perceived to be most in line with the board's performance assessment. By tying NRSRO rating assignments to the board's performance measures, the only accurate rating system becomes that of the board's, rather than those of the experts at what used to be an independent credit rating agency. In effect, this would replace independent and competitive NRSROs with a monolith rating agency – the board. NRSROs would then serve no practical purpose if their role was merely to produce ratings that mirrored the preferences or opinions of the Section 15E(w) board. This contrived system would remove all competition among NRSROs to produce credit

ratings most valued by the market and instead result in homogenous ratings developed to meet the board's performance measures.

Section 15E(w) provides no method of market oversight of the board and severs NRSRO accountability to the market.

We are unclear how and if Section 15E(w) would be evaluated to determine if it is working for the market, such as in cases where the market does not approve of the NRSROs that are being assigned and whether investors would be forced to accept the board's assessment in place of their own without any means of effective redress. While the Commission has the power to issue further rules and regulations as it deems necessary, it is unclear what recourse the market would have if the system is failing. Section 15E(w) would create a system in which NRSROs are no longer accountable to the market – the ultimate consumer of the product.

Section 15E(w) will increase cost and could threaten the viability of the securitization markets.

Many investors are required through private contract or investment guidelines to purchase securities with minimum ratings issued by specific NRSROs. Moreover, the identity of an NRSRO affects the price the investor is willing to pay for the securities. For these reasons, an issuer must select an NRSRO acceptable to investors and it must consider the effect the identity of the NRSRO will have on pricing.

Section 15E(w) could limit competition and innovation as well as harm small NRSROs.

Under the Rule 17g-5 Program, an NRSRO can compete with other NRSROs through fees. However, under Section 15E(w), fees are not an element for consideration in determining how an NRSRO will be assigned to provide an initial credit rating. As a result, Section 15E(w) may in fact increase the barriers to entry for small or new NRSROs that might otherwise seek to establish or increase their market share by offering lower rates to issuers. Additionally, the Section 15E(w) application and review process to the board presents another hurdle for NRSROs, which are required to present information regarding their institutional and technical capacity as well as any other information the board may require. Depending on the composition of the board, this could work against smaller NRSROs with little or no track record in rating structured finance securities because the investor members of the board might prefer certain rating agencies over others, which is a natural effect of competition in the market.

Ratings are not the only determinant in whether to hire an NRSRO.

Each NRSRO has different criteria regarding the assets underlying a transaction relative to the overall structure of asset-backed securities issued in a transaction. The ratings process varies between each NRSRO and also varies with the different asset classes underlying structured finance securitizations. NRSROs can differ in their criteria with respect to many items, including structural terms, matters related to true sale opinions and contractual provisions. Certain NRSROs do not provide ratings on certain types of securities. In some cases, an issuer may determine that use of an NRSRO is unfeasible given these criteria or limitations.

Additionally, the decision of an issuer not to retain an NRSRO may be unrelated to the transaction and instead relate to the NRSRO's terms of engagement or concerns regarding an NRSRO's practices. Each NRSRO has a different form of engagement letter that sets out the terms of the agreement between the NRSRO and the issuer that hires it. Engagement letters can differ in a number of respects, including terms related to indemnification, compensation and confidentiality. Since 2010, we have seen a number of cases where certain market participants refused to engage an NRSRO based on the terms of engagement letters (and not their ratings methodology or enhancement levels). In other cases, an issuer may choose not to work with an NRSRO due to concerns regarding an NRSRO's practices, such as quality of staffing considerations or policies with regard to confidential information. We appreciate the goal of eliminating the negative effect of ratings shopping, however, we believe certain elements of issuer selection *are appropriate*. Removing any ability of the issuer to set the terms of engagement forces the issuer to choose between a method of financing and otherwise unacceptable terms – whether commercial or legal.

Enhanced Rule 17g-5 would be an effective alternative to Section 15E(w)

We believe that the significant problems associated with Section 15E(w) make it an unworkable alternative. Instead, we believe the Commission should focus on revamping its Rule 17g-5 Program to make it more effective. A revamped Rule 17g-5 Program could achieve the same goals sought by Section 15E(w), but without the grave consequences for the structured finance market.

We believe that Rule 17g-5 facilitates the development of a diversity of rating views, by making available to all rating agencies all of the information needed to evaluate any new issuance. However, while Rule 17g-5 is an effective tool to make information available to rating agencies, potential liability and lack of incentive for issuing unsolicited and unpaid ratings may limit its use. Even so, we believe that it is important to facilitate a diversity of rating agency opinions because thoughtful and independent rating views will foster credibility for our industry in the long term.

Increase transparency to investors.

We believe investors would benefit from knowing if an issuer received enhancement levels from multiple NRSROs on a transaction but elected to retain only certain of those NRSROs to issue ratings. This would alert investors to the possibility of ratings shopping. If concerned, an investor could approach the other NRSROs that were engaged for a transaction but ultimately not selected to provide an unsolicited rating or seek unofficial comment on the transaction. We propose that issuers would be required to disclose in their offering documents if they had executed a Rule 17g-5 certification in favor of an NRSRO with respect to the transaction but ultimately did not select that NRSRO to issue a final rating. We note that any disclosure requirement should not trigger any consent requirement pursuant to Rule 436(g) under the Securities Act of 1933.

Lower barriers for access to arranger websites for non-hired NRSROs.

Rule 17g-5 limits a non-hired NRSRO to accessing no more than 10 arranger websites unless the NRSRO issues ratings on at least 10% of the transactions that it accesses. We understand from our NRSRO members that a non-hired NRSRO is most likely to provide an unsolicited rating or unofficial commentary on a transaction when its assessment differs from that of the hired NRSRO to distinguish its view of a transaction from that of the hired NRSRO. We suggest significantly increasing the threshold number of transaction websites a non-hired NRSRO may access before it is required to rate at least 10% of the securities for which it accesses information to enable non-hired NRSROs to survey more deals in an effort to identify transactions on which their views diverge from the hired NRSROs.

In addition, we suggest that the Commission modify Rule 17g-5(e) to permit NRSROs to count towards its 10% requirement any ratings commentary provided on a transaction at or prior to closing of the transaction. By increasing the number of websites NRSROs may access and permitting ratings commentary to count towards the 10% threshold (in particular, if our "credit opinion" suggestion is not taken), smaller or new NRSROs also might more easily develop a track record in ratings commentary than in unsolicited ratings, thereby gaining exposure and credibility with investors and issuers.

Classify Rule 17g-5 ratings as "credit opinions" to minimize liability.

The Rule 17g-5 Program could facilitate the development of additional rating agencies with the product and transaction experience and investor credibility necessary to ultimately become issuer- and investor-preferred rating agencies. We believe Rule 17g-5 ratings should be considered something less than a full rating, such as a "credit opinion," because a full rating may create potential liability for the non-hired rating agency and discourage them from providing views through the Rule 17g-5 process.

Rule 17g-5 allows NRSRO opinions to flourish without disrupting market-driven ratings processes.

As noted above, a critical problem with Section 15E(w) is that issuers and rating agencies are forced into a contractual relationship to rate a transaction. This is not workable in structured finance transactions, where rating agencies and issuers may disagree on a number of contractual and structural terms. This problem does not arise in the case of Rule 17g-5, where the non-hired rating agency is only providing their opinion as to the appropriateness of the rating for the transaction given the terms negotiated by the issuer and the hired rating agencies.

Issuers and rating agencies devote substantial time and resources to evaluating transaction terms, parties and documentation, which they leverage for the timely and efficient execution of subsequent transactions. Especially at this tenuous stage of re-entry of private capital into the housing finance market, the introduction of a rating process that would upset this efficiency would be highly disruptive. Therefore, we believe that a framework such as Rule 17g-5, in which a rating agency is permitted to offer an opinion as a supplement to, rather than a

replacement for, other rating agencies, could provide helpful alternative perspective and credibility without disrupting the availability or efficiency of credit to consumers.

* * * *

ASF believes that the most effective manner in which to address the issuer-pay conflict of interest and related issues is through an enhanced Rule 17g-5 Program. We believe that, through improving a framework in which non-hired NRSROs can gain access to information to provide unsolicited credit opinions, an enhanced Rule 17g-5 Program will better serve the public interest and the protection of investors than implementation of the Section 15E(w) provisions or any other compensation model.

ASF very much appreciates the opportunity to provide the foregoing views in connection with the Commission's Credit Ratings Roundtable. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me directly at 212.412.7107 or at tdeutsch@americansecuritization.com.

Sincerely,

Tom Deutsch

Tom Deutsch
Executive Director
American Securitization Forum

Cc: Thomas J. Butler, Director, Office of Credit Ratings
Annmarie Ettinger, Senior Counsel, Office of Credit Ratings
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ATTACHMENT A

Overview of ASF Comments for SEC Credit Ratings Roundtable

KEY DEFICIENCIES OF AN ASSIGNMENT SYSTEM UNDER SECTION 15E(W)

- ***Section 15E(w) will limit investor choice and flexibility.***
    - Most investors are required by investment guidelines to purchase securities with minimum ratings issued by specific NRSROs, not any NRSRO.
    - While investors would be free to solicit supplemental ratings in accordance with their guidelines, such duplication would be costly and unnecessary.
- ***Section 15E(w) is contrary to the goals of Dodd-Frank and raises concerns relating to the role of the U.S. government in the assignment process.***
    - Creation of an assignment board may encourage overreliance by investors on credit ratings through the implication that the board has endorsed the ratings, thus conferring an implicit stamp of government approval.
    - Government-sanctioned NRSROs would further entrench NRSROs into the capital markets; this is in direct conflict with Section 939A of Dodd-Frank, which requires removal of all references to credit ratings in federal regulations.
- ***Creating a performance measure will result in NRSROs migrating to similar methodologies and effectively replace NRSROs' opinions of credit quality with that of the government established assignment board.***
    - By creating a performance measure, Section 15E(w) would limit development of new methodologies and/or cause NRSROs to migrate to more similar methodologies—that is NRSROs that are perceived to be most in line with the board's performance assessment and more likely to get future assignments from the board.
    - Such a system would remove all competition among NRSROs and instead result in homogenous ratings developed to meet the board's performance measures.

- ***Alternatively, the government established assignment board will either make assignments based on the pricing by various NRSRO's or mandate uniform pricing.***

    - The assignment board will have to consider the price each NRSRO charges for their rating as compared to their effectiveness, putting a government mandated board in the pricing business; OR

    - The board may have to mandate standard fees for certain ratings, which would reduce incentives for NRSROs to compete on accuracy, rather than conforming to the assignment board's ratings preferences.

- ***Forcing a rating agency or issuer into a contractual relationship inhibits a functioning structured finance market.***

    - Each NRSRO has different criteria regarding the assets underlying a transaction relative to the overall structure of asset-backed securities issued in a transaction, as well as regarding structural terms, matters related to true sale opinions and contractual provisions.

    - Each NRSRO has a different form of engagement letter that sets out the terms of the agreement between the NRSRO and the issuer that hires it. Engagement letters can differ in a number of respects, including terms related to indemnification, compensation and confidentiality. Many market participants may refuse to engage an NRSRO based on the terms of engagement letters (and not their ratings methodology or enhancement levels).

    - Certain elements of issuer selection are appropriate and removing any ability of the issuer to set the terms of engagement forces the issuer to choose between a method of financing and otherwise unacceptable terms – whether commercial or legal.

- ***Section 15E(w) will increase cost and threaten the viability of the structured finance markets.***

    - An issuer must select an NRSRO acceptable to investors and it must consider the effect the specific NRSRO will have on pricing of transactions in the first place, which it would be unable to do under an assignment system.

ENHANCED RULE 17G-5 WOULD BE AN EFFECTIVE ALTERNATIVE TO SECTION 15E(W)

- ***Rule 17g-5 allows NRSRO opinions to develop without disrupting market-driven ratings processes.***

    - A revamped Rule 17g-5 Program could achieve the same goals sought by Section 15E(w), but without the strong adverse consequences for the structured finance market.

    - Rule 17g-5 does not raise the same contractual and structural problems as Section 15E(w), as the non-hired rating agency is only providing their opinion as to the appropriateness of the rating for the transaction, which would not disrupt the terms negotiated by the issuer and the hired rating agencies.

- ***Increase transparency to investors.***

    - Investors would benefit from issuers disclosing in their offering documents that they had executed a Rule 17g-5 certification in favor of an NRSRO with respect to the transaction, but ultimately did not select that NRSRO to issue a final rating.

    - Such disclosure would enable investors to seek out opinions from non-hired rating agencies.

- ***Lower barriers for access to arranger websites for non-hired NRSROs.***

    - Significantly increase the threshold number of transaction websites a non-hired NRSRO may access before it is required to rate at least 10% of the securities for which it accesses information will enable non-hired NRSROs to identify transactions on which their views diverge from the hired NRSROs.

    - Similarly, modify Rule 17g-5(e) to permit NRSROs to count towards its 10% requirement any ratings commentary provided on a transaction at or prior to closing of the transaction.

- ***Classify Rule 17g-5 ratings as "credit opinions" to minimize liability.***

    - Rule 17g-5 ratings should be considered something less than a full rating, such as a "credit opinion," because a full rating may create potential liability for the non-hired rating agency and discourage them from providing views through the Rule 17g-5 process.