CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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Ms. Elizabeth Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Treatment of Asset-Backed Issuers Under the Investment Company Act Release No. IC-29779; File No. S7-35-11

Dear Ms. Murphy:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing more than 3 million businesses and organizations of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. To achieve this objective it is an important priority of the CCMC to advance an effective and transparent system for capital formation. The CCMC welcomes this opportunity to comment on the Securities and Exchange Commission's (the "Commission") advance notice of proposed rulemaking on the treatment of asset-backed issuers under the Investment Company Act of 1940, as amended (the "Investment Company Act").

We are pleased that the Commission has taken the step to withdraw its 2008 proposal to amend rule 3a-7. If implemented as proposed, that rule would have significantly disrupted legitimate and beneficial capital formation and restricted many investors' investment options by prohibiting investments in asset-backed securities by investors other than accredited investors and qualified institutional buyers. While the decision to withdraw the 2008 proposed rule is a positive step, as discussed in more detail below, the CCMC has significant concerns with the Commission's advance notice, including:

- The Commission has not demonstrated a need for or benefit of amending rule 3a-7's reliance on credit ratings for the purpose of assessing structural safeguards as a "proxy" for Investment Company Act registration or for treating securities issued in reliance on rule 3a-7 as investment securities;

- The Commission has not identified a demonstrated harm that it seeks to rectify through amendment of the 3a-7 exemption;

- Amending the rule 3a-7 exemption for asset-backed securities could have drastic consequences for businesses of all sizes and in all industries.

Accordingly, we request that Commission withdraw this advance notice of proposed rulemaking.

Discussion

In adopting rule 3a-7, the Commission stated its purpose in exempting structured financings was to remove "an unnecessary and unintended barrier to the use of structured financings in all sectors of the economy, including the small business sector" by permitting public offerings of asset-backed securities without registration as an investment company. It was recognized that, as adopted in 1992, rule 3a-7 provided protections to investors similar to those intended to be provided through Investment Company Act registration, but without imposing additional unnecessary restrictions involved with Investment Company Act registration that are not applicable to asset-backed issuers.

1. The advance notice does not demonstrate a need to revise rule 3a-7

a. The Commission has not demonstrated a need for or benefit of amending rule 3a-7's use of credit ratings.

Central to the exemption was the requirement that asset-backed issuers relying on rule 3a-7 generally must have their fixed income securities rated by at least one NRSRO in one of the four highest ratings categories. The credit ratings requirement was intended to "be a type of proxy" for the investor protections afforded by the Investment Company Act as well as a means of distinguishing asset-backed issuers from most registered investment companies.

While concerns have been raised about the NRSRO ratings process broadly, these concerns are more appropriately addressed by the Commission through initiatives directly related to the credit ratings process. Moreover, the Commission has recognized that the inclusion of the credit ratings requirement in rule 3a-7 was intended to provide assurances related to the issuer's structural safeguards for purposes of investor protection, not for the purpose of assessing the creditworthiness of the issuer.[1]

Therefore, initiatives related to the NRSRO process are the most appropriate way to address issues related to the use of credit ratings for the limited purpose for which they are used under rule 3a-7, provided that evidence supports the contention that rule 3a-7, in its current form, does not provide sufficient investor protection. This concern is particularly relevant in light of the tremendous rulemaking burden already placed on the Commission by the Dodd-Frank Act.

b. The Commission has not demonstrated a need for or benefit of treating securities issued in reliance on rule 3a-7 as investment securities.

The advance notice asks whether securities issued in reliance on the rule 3a-7 exemption should be treated as investment securities, which could, under certain circumstances, result in their holder being required to register as an investment company. As the basis for this information request, the advance notice provides some anecdotes of recent developments in companies' use of rule 3a-7 in their financing strategies. Notably absent from this discussion, however, is an assertion that investors are harmed, either directly or indirectly, from such uses of the rule 3a-7 exemption. Therefore, in light of the lack of a demonstrated harm to investors, the rule 3a-7 exemption should continue to apply to the securities issued in reliance on that exemption and their holders.

2. The Commission has not identified a specific harm that it seeks to rectify

[1] As a result, while the Commission is required by Section 939A of the Dodd-Frank Act to review this rule because of its reference to credit ratings, the Commission has taken the position that it is not required by Section 939A to remove the references and to substitute another "appropriate standard of creditworthiness."

In adopting rule 3a-7, the Commission sought to promote efficient capital formation consistent with the Investment Company Act's investor protection principles, without imposing additional and unnecessary burdens of Investment Company Act registration that would chill capital formation. The Commission has identified the following three categories of investor protection issues which the Commission sought, in enacting rule 3a-7, to promote outside of Investment Company Act registration: (i) concerns about self-dealing by insiders, misvaluation of assets and inadequate asset coverage as they relate to the structure and operation of the asset-backed issuer; (ii) the benefits of an independent review of the asset-backed issuer's structure and intended operations in addressing these concerns; and (iii) preservation and safekeeping of the asset-backed issuer's eligible assets and cash flow.

With respect to each issue, the Commission's advance notice identifies possibilities for amendment of rule 3a-7, in each case without identifying a demonstrated need for amendment, and without providing empirical evidence to support the need for agency action on the rule. In all rulemakings, it is crucial that the implementing agency engage at the outset in a rigorous cost benefit analysis to ensure that the proposed regulation appropriately balances the various regulatory ends which the agency is charged with promoting—in the case of the Commission, investor protection, orderly markets, and efficient capital formation. The importance of cost-benefit analysis to the rulemaking process was recognized by the signing of Executive Order 13563 (as applied to independent agencies by Executive Order 13579), which reaffirmed, for executive agencies, regulatory principles and rulemaking processes that include an enhanced process for examining the costs and benefits of proposed rules and their alternatives. Accordingly, it is critical, in any rulemaking, that the regulatory purpose is fleshed out at the outset, so that the resulting rule will be built on a solid economic foundation. However, in this case, the Commission has not demonstrated any specific harms that it seeks to rectify by amending rule 3a-7, and therefore runs the very real risk that it is creating a solution in search of a problem.

3. Wrong issue at the wrong time

The rule 3a-7 exemption is frequently used, both directly and indirectly through a holding company structure, by companies of all sizes and industries to increase liquidity to the finance and mortgage markets. Thus, it is likely that an amendment to rule 3a-7 will have unintended effects which may unnecessarily restrict capital formation and market liquidity. Like many other sectors of the U.S. economy, the asset-backed securities markets and the industries they support through the creation of liquidity have experienced tremendous turmoil over the past three years and struggle to raise capital. As the industry recovers from the economic downturn and commercial activity picks up again, financial regulators should use caution when considering rules that could hamper capital formation.

Conclusion

In conclusion, the CCMC believes that the Commission's proposal to amend rule 3a-7 is premature, given the lack of demonstrated need for any changes and the potential adverse consequences to capital formation and the broader U.S. economy. Thus, we urge the Commission to withdraw the advance notice at this time. We appreciate the opportunity to comment on the treatment of asset-backed issuers under the Investment Company Act and thank you for your consideration. We continue to look forward to working with the Commission throughout this process.

Sincerely,

Tom Quaadman