

CLEARY GOTTlieb STEEN & HAMILTON LLP

ONE LIBERTY PLAZA
NEW YORK, NY 10006-1470
(212) 225-2000
FACSIMILE (212) 225-3999
WWW.CLEARYGOTTlieb.COM

WASHINGTON, DC • PARIS • BRUSSELS
LONDON • MOSCOW • FRANKFURT • COLOGNE
ROME • MILAN • HONG KONG • BEIJING

Writer's Direct Dial: (212) 225-2122
E-Mail: rcheck@cgsh.com

MARK A. WALKER
LESLIE B. SAMUELS
ALLAN G. SPERLING
MAX GITTER
EVAN A. DAVIS
LAURENT ALPERT
VICTOR I. LEWKOW
LESLIE N. SILVERMAN
ROBERT L. TORTORIELLO
A. RICHARD SUSKO
LEE C. BUCHHEIT
JAMES M. PEASLEE
ALAN L. BELLER
THOMAS J. MOLONEY
JONATHAN I. BLACKMAN
WILLIAM F. GORIN
MICHAEL L. RYAN
ROBERT P. DAVIS
YARON Z. REICH
RICHARD S. LINGER
JAIME A. EL KOURY
STEVEN G. HOROWITZ
ANDREA G. PODOLSKY
JAMES A. DUNCAN
STEVEN M. LOEB
DANIEL S. STERNBERG
DONALD A. STERN
CRAIG B. BROD
WANDA J. OLSON
MITCHELL A. LOWENTHAL
DEBORAH M. BUELL
EDWARD J. ROSEN
LAWRENCE B. FRIEDMAN
NICOLAS GRABAR
CHRISTOPHER E. AUSTIN

SETH GROSSHANDLER
WILLIAM A. GROLL
JANET L. FISHER
DAVID L. SUGERMAN
HOWARD S. ZELBO
DAVID E. BRODSKY
ARTHUR H. KOHN
ANA DEMEL
RAYMOND B. CHECK
RICHARD J. COOPER
JEFFREY S. LEWIS
PAUL J. SHIM
YVETTE P. TEOFAN
STEVEN L. WILNER
ERIKA W. NIJENHUIS
LINDSEE P. GRANFIELD
DAVID C. LOPEZ
CARMEN A. CORRALES
JAMES L. BROMLEY
PAUL E. GLOTZER
MICHAEL A. GERSTENZANG
LEWIS J. LIMAN
NEIL Q. WHORISKEY
JORGE U. JUANTORENA
MICHAEL D. WEINBERGER
DAVID LEINWAND
JEFFREY A. ROSENTHAL
ETHAN A. KLINGSBERG
MICHAEL D. DAYAN
CARMINE D. BOCCUZZI, JR.
JEFFREY D. KARPFF
KIMBERLY BROWN BLACKLOW
ROBERT J. RAYMOND
DAVID I. GOTTLIEB
LEONARD C. JACOBY

SANDRA L. FLOW
FRANCISCO L. CESTERO
DANA G. FLEISCHMAN
FRANCESCA L. ODELL
SANG JIN HAN
WILLIAM L. MCRAE
JASON FACTOR
MARGARET S. PEPONIS
LISA M. SCHWEITZER
KRISTOFER W. HESS
JUAN G. GIRÁLDEZ
DUANE MCLAUGHLIN
BREON S. PEACE
CHANTAL E. KORDULA
BENET J. O'REILLY
RESIDENT PARTNERS
SANDRA M. ROCKS
ELLEN M. CREEDE
S. DOUGLAS BORISKY
JUDITH KASSEL
DAVID E. WEBB
PENELOPE L. CHRISTOPHOROU
BOAZ S. MORAG
MARY E. ALCOCK
GABRIEL J. MESA
DAVID H. HERRINGTON
MARK A. ADAMS
HEIDE H. ILGENFRITZ
KATHLEEN M. EMBERGER
NANCY I. RUSKIN
WALLACE L. LARSON, JR.
JAMES D. SMALL
AVRAM E. LUFT
RESIDENT COUNSEL

July 25, 2008

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Release No. 34-57967; File No. S7-13-08; Proposed Rules for Nationally
Recognized Statistical Rating Organizations

Dear Ms. Morris:

We submit this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments on the proposed rules for nationally recognized statistical rating organizations.¹ We support the Commission's desire to increase the transparency of ratings of structured finance obligations and facilitate comparisons of the performance of competing nationally recognized statistical rating organizations ("NRSROs"). In our view, the Commission's proposals for the most part represent a measured effort to address weaknesses that the subprime crisis has exposed in the role that ratings and rating agencies play in the current market. However, we believe certain of the Commission's proposals deserve reconsideration.

I. The Proposed Requirement to Publicly Disclose All Information Used by NRSROs in Rating Structured Finance Obligations Is Unlikely to Achieve Its Purpose and Would Unnecessarily Increase the Liability of Market Participants

The Commission's proposed requirement for public disclosure of all information an NRSRO receives from an issuer, underwriter, sponsor, depositor or trustee of a structured finance obligation that the NRSRO uses to determine the initial credit rating for that obligation is intended to permit competing rating agencies to issue unsolicited ratings of the obligation, and to provide potential investors with data that will enable them to perform their own independent analysis

¹ SEC Release No. 34-57967; File No. S7-13-08 (June 25, 2008) (the "Release").

before making a purchase decision. We believe, as currently framed, the proposal is unlikely to achieve either of these objectives in a meaningful way.

In order to analyze the performance of a structured finance obligation under various conditions, it is necessary to have two kinds of data: data on the structure of the transaction and data on the underlying assets. It is then possible to construct a computer simulation of the interaction between those assets and that structure. After the computer model is constructed, it can be used to model the effects of changes in external factors (such as prevailing interest rates) or factors directly affecting the underlying assets (such as increased default rates for the assets as a whole or for specific sub-sets). The process of structuring an asset-backed security often involves optimizing both the structure and the asset pool to achieve the best result. Accordingly, both the structure of a transaction (such as number and size of tranches) and the underlying assets (which can often be devoted to a particular securitization or instead earmarked for a different one where they “fit” better) often change repeatedly and materially up until the final pricing. This is an iterative process involving the sponsor or underwriter that is structuring the transaction, one or several rating agencies, and sometimes the asset originator. Each party may have its own computer model and its own views concerning which changes in structure or asset mix will yield the best result. Constructing these models, modifying them for structural changes, and performing repeated runs using different asset mixes and different external variables or stress factors is both technically difficult and time-consuming.

The Commission acknowledges the iterative nature of the structuring process by noting that preliminary data and structures would not be required to be disclosed under the proposed rules, and it recognizes the timing constraints under which this market operates by correctly noting that the structure and assets are not likely to be finalized until the transaction is priced. We agree that it would not be useful to require disclosure of the (often numerous) iterations of structures and assets that are analyzed in order to arrive at the final structure and asset mix. However, it is unrealistic to expect that rating agencies or potential investors who are provided access to transaction data at pricing will be able to construct a model that reflects the transaction structure, confirm that the model functions correctly when fed the underlying asset data, and then perform scenario analyses using that model and those data, all in time to publish an informed competitive rating or make a purchase decision in a timely manner.

Certainly other rating agencies are more likely to be in a position to do this than investors, as they will at least have the necessary resources and expertise, as well as perhaps a stronger motivation to devote them to such an undertaking. However, different rating agencies employ different analytical frameworks to stress-test transactions and so may require different data in order to perform their analyses. And even if rating agencies will be able to use the data as the Commission envisions, it seems much less likely that individual investors will have the necessary resources and specialized expertise, or that those investors that do have the necessary resources and expertise would choose to dedicate them to analyzing a potential investment that would presumably represent a comparatively small portion of their portfolios, as opposed (for example) to devoting that capability to monitoring the complex investments they have already made.

The uncertain benefits of the disclosure requirement should be weighed against the fact that required disclosure would significantly raise the risk of securities law liability to the underwriters and issuers of these transactions. While the disclosure documents for structured finance transactions contain very detailed descriptions of the transaction structure, the disclosure concerning the asset pool is normally much less detailed than what is provided to the rating agencies. The type of asset-pool data given in offering documents differs significantly between different asset classes and transaction types, but for any given type of transaction, over time the market has evolved generally accepted standards for asset-level information that is deemed material. Indeed, Regulation AB's detailed disclosure requirements were formulated largely by reference to the disclosure standard that had developed for mortgage-backed transactions through informal market practice. The extremely detailed information provided to rating agencies goes well beyond what would be considered material in the context of the transaction as a whole, and because it is being provided to a sophisticated user as part of a process that involves dialogue with the transaction sponsors, the data itself is not accompanied by the disclosures and explanations that would be necessary to put it into context and permit its useful interpretation if it were presented to prospective investors on a free-standing basis, such as it would be under the Commission's proposal. We believe that when highly detailed data is presented to investors outside the context of a normal disclosure document, there is a significant risk that some investors will misinterpret the data, place undue emphasis on particular aspects of it, or simply be unable to assess its significance in the context of the transaction as a whole and their prospective investment in it. The resulting confusion would not only be counter-productive from the perspective of facilitating more informed investment decisions by prospective investors, but also is very likely to result in unwarranted liability to the transactions' issuers and underwriters. The risk of the latter is especially acute given the fact that such granular data can be almost impossible to verify thoroughly enough to support its disclosure under typical standards of due diligence. Underwriters employ sampling and other techniques to confirm that the asset disclosures in their offering documents are materially correct at the aggregate level on which they are presented. Disclosure at an asset-by-asset level could easily create an impression that such a level of detail is material to the transaction and has been diligenced accordingly, when such an impression would likely be mistaken on both counts.

II. The Commission should Clarify the Effect of the Required Disclosures on Private Placements and Provide Safe Harbors for Related Disclosures

If the Commission does proceed with a disclosure rule along the proposed lines, we suggest that it provide more detailed guidance, perhaps including safe harbors, concerning the effects of such disclosure on the Securities Act exemptions relied on by structured transactions that are offered as private placements. We assume that if sponsors of such transactions are required to disclose extremely detailed asset-level and structure data at closing as proposed by the Commission, they will also wish to make publicly available the offering document for the transaction to try to minimize the risk that prospective investors will rely on the data itself without the context and supplemental disclosure that the full offering document provides. The Commission should make clear that public disclosure at transaction closing, of both the information required by the proposed rule and related data that underwriters and issuers may wish

to make available to accompany it, will not constitute general solicitation even if the underwriter continues to hold underwritten securities issued in the transaction that it will be seeking to sell after closing. If the Commission declines to provide such assurance, it should modify the proposed rule to require disclosure only after all allotments have been sold. The Commission should similarly make clear that public disclosure of the required information will not affect the private placement status of secondary sales, including transactions by an underwriter that may provide liquidity by purchasing and reselling the securities in the market from time to time.

III. The Proposed Prohibition of NRSROs Making Recommendations with Respect to Securities they Rate will be Impossible to put into Practice

We believe the Commission's proposal to prohibit an NRSRO from issuing or maintaining a rating if it or its associated persons have "made recommendations to the obligor or the issuer, underwriter, or sponsor of the securities about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security" will prove to be unworkable in practice. Simply put, the line between an NRSRO making "recommendations" concerning a rating and providing normal and necessary feedback to issuers and arrangers on the ratings process and its results seems an impossible one to draw. In the case of structured products, strict adherence to the rule would appear to require arrangers to engage in a guessing game with NRSRO personnel because those personnel would be concerned that they were prohibited from making affirmative statements about which characteristics of a proposed asset pool were the limiting factors to attaining, for example, a given ratings level or tranche size. It would seem that prohibiting such an exchange of information not only imposes unnecessary obstacles to the normal ratings process but is also inconsistent with the Commission's desire to increase the transparency of structured finance ratings methodologies. Similarly, in the case of corporate credit ratings it is difficult to imagine what purpose would be served by limiting the dialogue between an issuer and an NRSRO concerning, for example, whether the NRSRO views the issuer as too highly leveraged to issue further debt and still maintain its current rating, or believes the issuer's credit rating is constrained by the quality of its assets.

* * *

We thank the Commission for the opportunity to submit this comments letter. We would be happy to discuss with you any of the concerns described above or any other matters that would be helpful in adopting the final rules. Please do not hesitate to contact Leslie N. Silverman or Raymond B. Check (212-225-2000) if you would like to discuss these matters further.

Very truly yours,

CLEARY GOTTlieb STEEN & HAMILTON LLP