



July 22, 2010

VIA E-MAIL

Securities and Exchange Commission  
Division of Corporation Finance  
100 F Street, NE  
Washington, DC 20549-1090  
Attention: Paula Dubberly, Deputy Director  
Policy and Capital Markets

Re: Need for Immediate SEC Action with respect to Repeal of Rule 436(g)

Dear Ms. Dubberly:

The American Securitization Forum (the "ASF")<sup>1</sup> is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. We write regarding the "Dodd-Frank Wall Street Reform and Consumer Protection Act" (the "Act"),<sup>2</sup> which was signed into law by President Obama on July 21, 2010.

Many of the provisions of the Act require rulemaking by the applicable regulator before they become effective. However, our letter relates to a provision of the Act that became effective today (the day after the Act was signed), which is the repeal of Rule 436(g) under the Securities Act of 1933, as amended (the "Securities Act"). The immediate impact of the repeal of this rule has been the complete shut down of the U.S. public securitization market.

We understand that Congress intends to work on a "correction bill," but we expect that it will be months before such a bill is finalized. We believe this issue is of immediate concern, not only to the securitization market, but to the credit markets generally, and to consumers, in particular. In the past, securitization has been a significant source of consumer and residential mortgage lending in the United States and, while down from its peak levels, as of June 2009, out of \$18 trillion worth of real estate loans and consumer credit, nearly 19% was funded through private-

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<sup>1</sup> ASF members include over 340 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. The ASF also provides information, education and training on a range of securitization 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](http://www.americansecuritization.com).

<sup>2</sup> The Act is available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h4173enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf).

label securitization.<sup>3</sup> There is clear recognition of the importance of the securitization process and the access to financing that it provides lenders, and of its importance to the availability of credit that ultimately flows to consumers, businesses and the real economy.

The ASF seeks immediate, temporary, action by the SEC to remedy the current paralysis, and to avoid the potential long-term closing of the public securitization market.

### **Rule 436(g) under the Securities Act**

Section 939G of the Act provides that “Rule 436(g) promulgated by the Securities and Exchange Commission under the Securities Act of 1933, shall have no force or effect.” For ease of reference, we refer to this as the repeal of Rule 436(g). Rule 436(g) of the Securities Act is often referred to as the NRSRO expert exemption because its effect is to exempt nationally recognized statistical rating organizations (“NRSROs”) from liability as experts for their ratings under Section 11 of the Securities Act.

If the ratings of registered asset-backed securities (“ABS”) are a condition to the issuance or sale of such ABS, Item 1103(a)(9) and Item 1120 of Regulation AB<sup>4</sup> require disclosure of the minimum rating required and the identity of each rating agency issuing the ratings (regardless of whether the entity is an NRSRO).<sup>5</sup> Currently, investors expect that the ABS they purchase from underwriters will have specific ratings. For this reason, ABS underwriting agreements (pursuant to which the underwriters commit to purchase the ABS from the issuer (or the depositor)) have, as a closing condition, the receipt of evidence that the rating agencies have assigned specific ratings. As a result, under Regulation AB, ABS issuers must disclose in the prospectus the ratings that are a condition to the issuance or sale of the ABS and the identity of the rating agency issuing the rating. In addition, in response to comments received from the SEC staff during the review process, certain issuers using shelf registration statements include a statement to the effect that the ABS must be rated investment grade at the time of issuance.

Rule 436(g) specifically provided that credit ratings issued by NRSROs (but not other credit rating agencies) on debt securities, convertible debt securities and preferred stock were not considered part of the registration statement prepared or certified by a person within the meaning of Sections 7 and 11 of the Securities Act. Section 7 of the Securities Act requires any accountant or person whose profession gives authority to a statement made by him (often referred to as an “expert”) who is named as having prepared or certified any part of the registration statement, or who is named as having prepared or certified a report for use in connection with the registration, to file a written consent with the registration statement. Because Rule 436(g) specifically provided that ratings issued by NRSROs were not considered part of the registration statement prepared or certified by a person within the meaning of Section

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<sup>3</sup> Navigating the Financial Challenges Ahead, Global Financial Stability Report, World Economic and Financial Surveys, International Monetary Fund (Oct. 2009), 78.

<sup>4</sup> 17 C.F.R. §§229.1100 - 229.1123.

<sup>5</sup> See Item 1103(a)(9) and Item 1120 of Regulation AB.

7, prior to the repeal of Rule 436(g), NRSROs were specifically exempt from the Section 7 requirement to file a written consent.<sup>6</sup>

Because NRSROs did not file consents as experts, they were not subject to liability under Section 11 of the Securities Act for the ratings included in a registration statement. Section 11 imposes liability *over and above* that which would apply under common law or under Rule 10b-5 of the Securities Exchange Act of 1934, as amended, on those who are involved in the preparation of the registration statement. Section 11 of the Securities Act applies to any person that signs the registration statement, directors of the issuer, underwriters and “experts” who have been named in the registration statement as having prepared or certified any part of the registration statement or any report or valuation used in connection with the registration statement that provided their consent for filing with a registration statement. Therefore, although Item 1103(a)(9) and Item 1120 of Regulation AB require disclosure of the ratings that are a condition to the sale or issuance of the ABS and the identity of the rating agency (and, in some cases, the issuer agreed to disclose that the ABS must be rated investment grade at the time of issuance), Rule 436(g) specifically exempted NRSROs from the consent requirement under Section 7 of the Securities Act. This, in turn, meant NRSROs were not subject to Section 11 of the Securities Act, which imposes civil liability on experts providing a consent for filing with a registration statement.

Given the uncertainty with respect to the applicability of the Section 7 consent requirement, with the repeal of Rule 436(g) under the Securities Act, public issuance of ABS will not move forward unless issuers obtain the consent of the NRSROs rating the securities. Several of the NRSROs have indicated they are studying this matter but have expressed concern with the scope of liability attached to their being considered an “expert.” This concern is consistent with comments previously made by the NRSROs to the SEC in connection with proposals that would have subjected NRSROs to the consent requirement, and therefore, increased liability. The immediate repeal of Rule 436(g), without any transition period, or reliance on SEC rulemaking, has not provided rating agencies sufficient time to adjust to the new environment by creating and implementing policies and procedures relating to their issuance of consents, including the planning and execution of the “reasonable investigation” contemplated by Section 11(b)(3)(B) of the Securities Act or the installation of related internal supervisory controls. We note that accounting firms, by contrast, have the benefit of decades of experience and extensive professional guidance in this area.

To remedy the current shut-down of the public ABS markets as a result of the repeal of Rule 436(g), we request that the SEC, temporarily, provide that disclosure of ratings is not required for issuers of asset-backed securities under Item 1103(a)(9) or Item 1120 of Regulation AB or on the basis of SEC staff comments that the registration statement must include disclosure to the effect that the securities must be rated investment grade.

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<sup>6</sup> We note that while many believe that registrants would be able to comply with the disclosure requirements of Items 1103(a)(9) and 1120 without triggering the Section 7 consent requirement, no ABS public market participant is comfortable from a legal standpoint moving forward on this basis without guidance from the SEC.

We very much appreciate your consideration of our commentary and industry concerns outlined in this letter. Should you have any questions concerning our views and recommendations, please do not hesitate to contact me at 212.412.7107 or at [tdeutsch@americansecuritization.com](mailto:tdeutsch@americansecuritization.com) or our outside counsel on this matter, Giselle Barth of Sidley Austin LLP, at 212.839.6749 or at [gbarth@sidley.com](mailto:gbarth@sidley.com).

Sincerely,

A handwritten signature in black ink that reads "Tom Deutsch". The signature is written in a cursive, slightly slanted style.

Tom Deutsch  
Executive Director  
American Securitization Forum