

ClientAlert

Financial Markets Developments

July 2010

[Dodd-Frank Wall Street Reform and Consumer Protection Act](#)

Improvements to the Regulation of Credit Rating Agencies

Subtitle C of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") significantly expands the regulatory regime in place for nationally recognized statistical rating organizations (each such organization is referred to herein as a "Rating Agency") under the Securities and Exchange Act of 1934, as amended (the "Exchange Act"). The changes required by the Act are intended to address what are now considered to be two of the leading causes of the financial crisis: (1) the conflicts of interest that affect the Rating Agencies as a result of their reliance on compensation from issuers and the movement of employees from Rating Agencies to issuers and (2) the inaccuracy of credit ratings that existed because the ratings process itself did not provide sufficient procedural and substantive protection.

The Act addresses these conflicts of interest with a mix of new corporate governance requirements, an expansion of potential liability for Rating Agencies and mandatory public disclosure of reports and audits of a Rating Agency's compliance (or lack thereof) with applicable policies, procedures and securities laws. The Act attempts to address the weaknesses in the credit rating process that have led to inaccurate credit ratings by making the process more transparent to investors and by using the public disclosure of each Rating Agency's methodology and the historical accuracy of its ratings to increase competition among Rating Agencies and to improve the accountability of each Rating Agency for the performance of its ratings.

Will it work? As with other sections of the Act, a considerable amount of rulemaking is required to implement the directions of the Act, so we still do not know what shape many of the specific requirements will take. The increased regulation is also expected to introduce significant costs into the system, so it remains to be seen whether the benefits of the new regulatory regime will outweigh those costs. What is clear is that it will be more difficult to complete an issuance of rated asset-backed and structured finance securities, both for existing asset classes and even more so for new types of asset-backed and structured finance securities.

1. What conflicts of interest currently existing in the system does the Act address?

The two broad categories of conflicts of interest that the Act addresses for Rating Agencies relate to the fact that (1) the Rating Agencies are selected and compensated by the issuers whose securities are rated by the Rating Agencies, and (2) employees of the



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Rating Agencies may be involved in the rating process for an issuer at a time when such employees are considering employment by the issuer or the underwriter or sponsor of the transaction.

Conflicts of interest resulting from the issuer-pays model

The issuer-pays structure creates two problems that the Act seeks to address. First, as issuers are able to select the Rating Agency from which to obtain a rating, issuers are able to shop for ratings. This incentivizes Rating Agencies to provide more favorable ratings to win business from issuers. Second, as Rating Agencies rely on issuers for compensation, Rating Agencies are incentivized to increase revenue by rating more, and often increasingly complicated securities even when proper data does not exist for the structure of the deal or the collateral backing the securities. The Act seeks to address these conflicts with the following measures:

■ **Increased potential liability under the securities laws.**

The Act exposes Rating Agencies to investor lawsuits. This potential liability to investors may counter each Rating Agency's incentive to rate more issuances and create a focus on better ratings, as costs resulting from investor lawsuits would ultimately reduce a Rating Agency's profits. In other words, the Rating Agencies may be willing to sacrifice revenue from issuing ratings because of the increased risk of litigation and liability that accompanies such ratings—ideally causing each Rating Agency to choose its business, and perform its credit rating analysis, more carefully. New sources of liability include:

- **Registration statement liability.** Effective immediately upon its enactment, the Act nullifies Rule 436(g) of the Securities Act of 1933, as amended (the "Securities Act"), which provided that a rating was not considered part of a registration statement.¹ Consequently, any Rating Agency that consents to the inclusion of its rating of securities in the registration statement for such securities would be exposed to potential liability as an expert under Section 11 of the Securities Act. Although, as with other experts, an affirmative defense would be available to a Rating Agency under Section 11 of the Securities Act, the potential liability under Section 11 of the Securities Act is not a risk that previously applied to the Rating Agencies.
- The potential for increased liability has been taken seriously by the Rating Agencies. As of the date of the Act's enactment, the media has reported that three leading Rating Agencies have each indicated that they will not consent to the inclusion of their ratings in registration statements, at least until they have been able to conduct a thorough review of their new potential legal exposure under the Securities Act. Without the

consent of the Rating Agencies, issuers will not be able to include rating information in their registration statements; the short-term effect of which is likely to be a delay or withdrawal of registered offerings of securities that require credit ratings from one or more Rating Agencies.

- **Claims for securities fraud.** Although the Act does not modify the required elements of a securities fraud claim under Section 21D of the Exchange Act, it does specify that, in pleading the required state of mind in relation to any private action for damages against a credit rating agency, it is sufficient that the plaintiff set forth particular facts giving rise to **a strong inference that the credit rating agency knowingly or recklessly** failed (i) to conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or (ii) to obtain reasonable verification of such factual elements from other sources that the credit rating agency considered to be competent and that were independent of the issuer and underwriter.²
- **"Filing" vs. "furnishing" information.** The Act requires each Rating Agency to "file" (rather than furnish) certain information required under the Act with the SEC. Under Section 18 of the Exchange Act, any person who files a document with the SEC that contains a statement that is false or misleading with respect to a material fact is liable to any person who purchased or sold a security in reliance on such statement. Consequently, Rating Agencies could be subject to liability to investors for information filed with the SEC.
- **Clarification regarding accountability.** The Act amends Section 15E(m) of the Exchange Act to clarify that the enforcement and penalty provisions of the Exchange Act apply to statements made by a Rating Agency to the same extent as to statements of registered public accounting firms or securities analysts.³ The Act also amends Section 15E(m) of the Exchange Act to clarify that statements made by Rating Agencies will not be entitled to protection as forward-looking statements for the purposes of Section 21E of the Exchange Act.⁴
- **Separation of ratings from sales and marketing.** The Act directs the SEC to issue rules to prevent the sales and marketing businesses of a Rating Agency from influencing the Rating Agency's responsibility to issue a credit rating.⁵ In addition, the designated compliance officer of each Rating Agency is now expressly prohibited from performing sales or marketing functions, performing credit ratings, developing rating methodologies or models or establishing compensation levels for employees of the Rating Agency who do not report to such individual.⁶

- **Board of directors' independence and oversight.** The Act amends the Exchange Act to require each Rating Agency to have a board of directors. At least half of the directors (and no fewer than two of the directors) must be independent directors, at least one of whom must be a user of credit ratings from a Rating Agency.⁷ Such independent directors must be compensated in a manner not tied to the performance of the Rating Agency and cannot provide any additional consulting or advisory services for a separate fee or otherwise be associated with the Rating Agency or an affiliate thereof.⁸ The board is directed to oversee the establishment of policies and procedures for determining ratings and the effectiveness of internal controls with respect thereto, the establishment of policies and procedures with respect to conflicts of interest and the compensation and promotion policies of the Rating Agency.⁹ The board will also be required to approve the procedures and methodologies, including qualitative and quantitative data and models, that are used to assign credit ratings.¹⁰ The requirement of the board's involvement in the approval of procedures and methodologies is somewhat astonishing in itself. The Act's language could, on its face, be read to require board members to understand and approve highly complex mathematical and statistical models, as well as to understand and approve the qualitative factors that are most influential in determination of repayment for numerous types of financial assets. While board oversight seems like a good idea, the level of oversight implied by the Act is not practical and will likely need to be clarified in the rulemaking process.
- **Designated compliance officer.** The Act amends the Exchange Act to require the designated compliance officer of each Rating Agency to establish a procedure for the treatment of, and keep records with respect to, complaints regarding credit ratings, models, methodologies and compliance by the Rating Agency with the securities laws.¹¹ The designated compliance officer is required to prepare and cause to be filed with the SEC an annual report on the compliance of the Rating Agency with the securities laws and its internal policies and procedures and to include a description of any material changes to the Rating Agency's code of ethics and conflicts of interest policies.¹² To address a potential conflict of interests, the designated compliance officer of each Rating Agency will be prohibited from participating in certain activities of the Rating Agency, including performing credit ratings and participating in the development of ratings methodologies or models.¹³
- **Future rulemaking to assign Rating Agencies to rate structured finance products.** In connection with the two-year study with respect to structured finance products to be conducted by the SEC (described in Question 5 below), the Act requires the SEC to issue rules establishing a system in which a public or private utility or a self-regulatory organization assigns Rating Agencies to determine the credit ratings of structured

finance products.¹⁴ Although the establishment of such a system is subject to the results of the SEC's study, the fact that the Act requires the implementation of such a system so long as the SEC's study is not contradictory, provides some momentum for the adoption of such rules. Such a system would prevent prospective issuers from "shopping" for a favorable rating, as they would be required to use the Rating Agency selected by a third-party entity.

Conflicts of interest resulting from the movement of employees from Rating Agencies to issuers, underwriters and sponsors

The Act addresses potential conflicts of interest arising when an employee of a Rating Agency that later gains employment with an issuer participates in a rating action with respect to that issuer or one of its securities:

- **Look-back requirement.** The Act requires each Rating Agency to monitor any case in which an employee leaves the Rating Agency for a position at an entity subject to a credit rating or at an issuer, sponsor or underwriter of a rated security and, if such employee participated in any capacity in determining the rating of such entity or securities during the year preceding the date on which the Rating Agency took action with respect thereto, the Rating Agency is required to conduct a review to determine whether any conflict of interest of the employee influenced the credit rating and to take action to revise the rating if appropriate.¹⁵ The SEC is required to conduct periodic reviews of a Rating Agency's policies and procedures with respect to the foregoing.¹⁶ This provision attempts to address the personal conflict that a Rating Agency employee may face to preserve future employment opportunities by making it difficult for issuers, sponsors or underwriters to hire away Rating Agency employees and incentivizing the Rating Agencies to monitor this potential conflict.
- **Reporting of employee transitions.** Additionally, the Act requires each Rating Agency to report to the SEC (and the SEC is required to make such information publicly available) any known instance, or any instance which the Rating Agency can reasonably be expected to know, of a person associated with the Rating Agency over the past five years becoming employed at an issuer, sponsor or underwriter subject to a credit rating or at an issuer, sponsor or underwriter of a rated security, in each case for which the Rating Agency issued a credit rating during the 12-month period prior to the date the employee gained employment with such entity.¹⁷ By using the "can reasonably be expected to know" standard, the Act clearly requires a level of diligence on the part of each Rating Agency in monitoring its former employees' activities.

2. In addition to mitigating potential conflicts of interest, what steps does the Act take to improve the accuracy and reliability of credit ratings?

The Act seeks to improve the accuracy and reliability of credit ratings in a number of ways. As discussed above, the Act implements a number of checks on potential conflicts of interest that could unduly impact ratings. In addition, the Act mandates more transparency with respect to the process by which ratings are determined, takes steps to ensure all relevant information is used in determining a rating, encourages competition among rating agencies and provides methods for increased accountability among Rating Agencies, each as described below:

Improving transparency of the process by which ratings are determined

- **Explanation of methodology.** Each Rating Agency will be required to include certain information on a new form that will accompany the publication of each credit rating it issues. The specific information required will be prescribed by rules enacted by the SEC, but the Act requires that it include, among other things: (i) the main assumptions and principles underlying the credit rating procedures and methodologies; (ii) a discussion of potential limitations of credit ratings and any risks not covered by the rating; (iii) an assessment of the quality of information available and considered and the extent to which third party due diligence services were utilized;¹⁸ (iv) a description of the data relied upon; (v) information with respect to conflicts of interest; (vi) an explanation of the potential volatility of the rating including factors that could cause the rating to change and the magnitude of expected changes in the rating under different market conditions; and (vii) the sensitivity of the rating to the assumptions made by the Rating Agency, including an analysis of the five assumptions that would have the greatest impact on the rating if proven false.¹⁹

The requirement to disclose more detail on the rating process is consistent with the historical approach of US securities laws to provide investors with information to allow them to make their own assessments of a security. Such enhanced disclosure will allow investors to understand the type of analysis conducted by the Rating Agency. Investors familiar with the industry or underlying assets, particularly those capable of performing their own credit analysis, will be able to assess the adequacy of the methodology. The end result should be improved methodologies and more consistent application of rating agency methodologies, as the Rating Agencies work to address any deficiencies identified by investors. Ideally, the increased disclosure would also result in more competition and innovation, as third-parties may seek to improve existing methodologies and enter the ratings industry.²⁰

- **Updates regarding ratings methodology.** Each Rating Agency will be required to notify users of credit ratings of the versions of a procedure or methodology, including the qualitative methodology or quantitative inputs, used with respect to a particular credit rating.²¹ The extent to which such disclosure will be required will be determined by the rules enacted by the SEC. Rating Agencies will also be required to notify users of credit ratings of any significant errors that may be identified with respect to their methodologies and any changes to their methodology and the likelihood such changes will result in a material change to the rating.²² In addition, Rating Agencies will now be required to publically disclose the reason for any material change to their credit rating procedures and methodologies.²³

The requirement to disclose changes to the rating methodologies and to update ratings for those changes presents an interesting quandary for Rating Agencies. As new information becomes available, a Rating Agency will likely take more time to assess whether such information represents a long-term trend or a short-term “blip” in the data because any change to the current methodology could result in changes to their current ratings. On some level, the requirement to publish ratings migrations (*i.e.*, changes to a Rating Agency’s outstanding ratings over time) together with the requirement to update existing ratings for changes in methodologies, creates a disincentive for Rating Agencies to change and update their ratings.

- **Public disclosure of underlying data for certain issuers.** The Act directs the SEC to revise Regulation FD within 90 days of enactment of the Act to remove the exemption under Regulation FD for disclosures made to a rating agency solely for the purpose of providing or monitoring a rating of a security.

It is not clear what effect, if any, the amendment to Regulation FD will have on issuers subject to Regulation FD that provide information to the Rating Agencies since the Act does not limit the availability of other exemptions to the disclosure requirements of Regulation FD to such issuers. Consequently, if an issuer provides information to the Rating Agencies subject to a confidentiality agreement, the information would not be required to be disclosed under Regulation FD. A Rating Agency’s disclosure requirements under the Act and the impending regulations, however, might make it difficult for a Rating Agency to agree to a restrictive confidentiality agreement.

Improving the quality of information used

The Act requires Rating Agencies to consider information about an issuer that the Rating Agency obtains from a credible source other than the issuer during the course of producing a credit rating in order to help ensure that a Rating Agency will not turn a blind eye to such information during the ratings process.²⁵ This provision, together with others in the Act, places Rating Agencies in another unenviable dilemma. If new information,

from a credible source, is available, a Rating Agency may be required to update its methodology or refuse to rate new securities. If the new information requires an update to the methodology, then a Rating Agency must reassess and adjust ratings on currently outstanding rated securities thereby affecting such Rating Agency's rating migration statistics (i.e., changes to a Rating Agency's outstanding ratings over time). In essence, a Rating Agency is presented with a very difficult choice in determining whether new data should be utilized in rating a security: either (a) face the possibility of affecting all outstanding rating and ratings migration statistics or (b) face a possible investor lawsuit for failing to include information from a credible source.

Holding Rating Agencies publicly accountable

- **Public disclosure of comparative information, a ratings scorecard.** The SEC is required to issue rules mandating that each Rating Agency publicly disclose information related to each initial rating assigned by such Rating Agency and any changes to such rating.²⁶ The disclosure will be required to be freely available in a form that is usable to investors of all levels of sophistication and to show the historical performance of a rating and comparable ratings so that investors can track the accuracy of each rating assigned by a Rating Agency.²⁷ As a result, investors will be able to see how each Rating Agency's ratings for various asset classes have performed over time.
- **Internal control structure.** Each Rating Agency is required to establish an internal control structure to monitor how it complies with policies, procedures and methodologies for determining credit ratings.²⁸ The SEC is tasked with issuing rules requiring the chief executive officer of each Rating Agency to provide an annual attestation to the SEC covering a description of the responsibility of management in maintaining the internal control structure and the effectiveness of the internal control structure.

3. How will the SEC and other regulatory agencies oversee the activities of Rating Agencies?

The Act directs the SEC to establish an Office of Credit Ratings to be staffed with individuals with knowledge of, and expertise in, corporate, municipal, and structured debt finance.²⁹ The Office of Credit Ratings will administer the rules of the SEC and be responsible for examining each Rating Agency at least annually and compiling and making available to the public an annual report with respect to each Rating Agency.³⁰ The report is required to address the Office of Credit Ratings' findings with respect to, among other things, the practices of the Rating Agency in determining ratings, the management of conflicts of interest at such Rating Agency, the adequacy of internal supervisory controls and governance, the processing of complaints at such Rating Agency and the activities of its designated compliance officer.³¹

4. What additional enforcement and penalty remedies are available to the SEC for violations by Rating Agencies?

The Act expands the potential exposure of the Rating Agencies to enforcement actions by the SEC and provides the SEC with additional enforcement powers.

- **Expansion of SEC remedies.** The Act amends Section 15E(d) of the Exchange Act to expand the SEC's power to censure, limit, suspend or revoke the registration of a Rating Agency. The amendments will allow the SEC to also censure, place limitations on the activities of, suspend or bar any individual associated (or seeking to become associated) with the Rating Agency at the time of misconduct.³² In addition, the list of actions for which a Rating Agency or an individual may be subject to punishment by the SEC has been expanded to include a failure to reasonably supervise an individual who commits a violation of the securities laws.³³ The SEC will also be able to suspend or revoke the registration of a Rating Agency with respect to a particular class or subclass of securities if it finds that such Rating Agency does not have adequate financial and management resources to consistently produce credit ratings with integrity.³⁴ The ability to suspend or revoke registration with respect to specific asset classes may enable a quicker response to problematic asset types. For example, the SEC could suspend the registration of some or all Rating Agencies with respect to certain types of asset-backed securities (e.g., subprime mortgage-backed securities), which would make it more difficult for issuers to continue to issue securities that the SEC views as problematic. The SEC may be more likely to take such action given that suspension or revocation is no longer an "all or nothing" proposition, and that such action therefore would not impact issuances of other asset classes.
- **Limitation of defense.** The Act amends Section 15E(c)(2) of the Exchange Act to clarify that no Rating Agency may rely on the provisions of Section 15E(c)(2), which prohibits the SEC from regulating the substance of credit ratings or the procedures and methodologies by which any Rating Agency determines credit ratings, as a defense to an anti-fraud claim brought against the Rating Agency by the SEC.³⁵

5. What topics does the Act require agencies to study further?

Other topics which the SEC is required to study further include:

- **Standardization of credit ratings.** The SEC is required to conduct a study regarding the feasibility and desirability of standardizing certain practices among all credit rating agencies and report its findings within a year of passage of the Act.³⁶ In particular, the SEC will examine standardizing credit ratings terminology, standardizing market stress conditions under which ratings are evaluated, requiring quantitative correspondence

between credit rating agencies and a range of default probabilities and loss expectations under standardized conditions of economic stress, and standardizing terminology across asset classes so that each asset class does not have unique terminology.³⁷ Such standardization would be consistent with the goal of empowering investors to look beyond the rating itself and consider the underlying credit analysis in making their investment decision, by making it easier for an investor to compare and contrast the analysis of different rating agencies.

- **Independence of Rating Agencies.** The SEC is also required to study the independence of Rating Agencies and compile a report within three years of the passage of the Act.³⁸ If the provisions of the Act designed to mitigate conflicts of interest with respect to Rating Agencies and the rules enacted pursuant thereto prove to be insufficient, it is possible that Rating Agencies will be further limited in providing other services, including risk management advisory services, ancillary assistance, or consulting services, to the issuers of securities for which they provide a rating.³⁹
- **Structured finance products.** The Act directs the SEC to conduct a study with respect to structured finance products (defined in the Act to be the same as the “asset-backed security” definition to be added to the Exchange Act pursuant to another provision of the Act) and to report its recommendations within two years of the passage of the Act.⁴⁰ The study will cover the credit rating process for structured finance products and conflicts of interest resulting from the issuer-pay structure, the feasibility of self-regulatory organizations becoming providers of credit ratings, the range of metrics that could be used to determine the accuracy of credit ratings and alternative methods for compensating Rating Agencies to create incentives for accurate credit ratings.⁴¹

6. How will the regulation of Rating Agencies affect the credit markets?

Any regulation of markets results in additional costs, and the real effects of the regulation may depend upon the allocation of those costs across market participants. As always, there will be winners and losers in the allocation of costs. At the risk of oversimplification, set forth below are some thoughts on who will bear the burden and who might benefit.

Who loses?

In the short-run, the losers are the rating agencies themselves (stuck with the burden of compliance directly on their industry) and those who relied heavily upon the asset-backed securities market for access to funds. The “flow trades”—the big issuers of securities supported by mortgages, credit cards or auto loans—will face the higher cost of compliance, both directly and indirectly. While the coupon/spread on their bonds may not

increase significantly (and will likely decrease from today as the compliance and reporting make investors more comfortable), the regulations will increase transaction costs for Rating Agencies, third-party due diligence companies, law firms and the like. Thus, the overall cost (i.e., the all-in cost) of financing in the ABS market will be higher.

Issuers of more esoteric asset-backed securities will likely fare even worse. With the volume of work thrust upon the Rating Agencies, the SEC and the Federal banking agencies, establishing criteria (i.e., quantitative and qualitative methodologies and procedures) for the lesser known types of asset-backed securities is likely to remain on the “to-do” list for quite some time. In fact, many types of ABS will probably sit on the shelf indefinitely because the volume of transactions cannot support the amount of work required to set the public criteria required by the law and regulations.

Who wins?

Definite winners. Those capable of buying unrated credit have a clear advantage in the newly regulated market. Investors who are capable of performing their own credit analysis on pools of financial assets are likely to be able to charge additional consideration for the risk taken. The financiers (e.g., banks and hedge funds) can save issuers/borrowers the cost of compliance with Rating Agency criteria, the new regulations and the more stringent securities offering and reporting rules. Some of that savings is available to provide additional compensation to the persons providing the financing. Could we see a return to syndicated bank lending backed by financial assets? It depends whether the cost savings are significant enough to cover the additional capital banks would allocate to holding loans backed by financial assets. For the borrowers who may not have access to the newly regulated asset-backed market at all (or who have access at an extreme cost), they may be willing or even forced to pay up for bank capital.

Possible winners. Another possible winner is the covered bond issuers. If the standards of risk retention require a vertical slice of issuance on fairly safe assets, an originator of assets may be better off with a covered bond under proposed covered bond legislation. For example, a US\$1 billion issuance of non-qualifying residential mortgage ABS would require US\$50 million of capital if a five percent hold requirement is applied to the full portfolio. That US\$50 million may be in addition to the first-loss piece on the issuance that an originator normally retains (in the form overcollateralization holding the equity securities). A covered bond may, in effect, simply allow the issuer to retain the first loss position—without having to retain the five percent slice of the other tranches of debt.

1. §939G.
2. §933(b) (to be codified at Section 21D(b)(2)(B) of the Exchange Act).
3. §933(a) (to be codified at Section 15E(m) of the Exchange Act).
4. §933(a) (to be codified at Section 15E(m) of the Exchange Act).
5. §932(a)(4) (to be codified at Section 15E(h)(3)(A) of the Exchange Act). The Act provides that if a violation by a Rating Agency of such rules affected a rating issued by the Rating Agency, the registration of the Rating Agency will be suspended or revoked. §932(a)(4) (to be codified at Section 15E(h)(3)(B)(ii) of the Exchange Act).
6. §932(a)(5) (to be codified at Section 15E(j)(2)(A) of the Exchange Act).
7. §932(a)(8) (to be codified at Section 15E(t)(2)(A) of the Exchange Act). With respect to a Rating Agency that is a subsidiary of a parent entity, the independent director requirement can be satisfied by a committee of the parent's board of directors that meet such requirements. §932(a)(8) (to be codified at Section 15E(t)(4) of the Exchange Act).
8. §932(a)(8) (to be codified at Section 15E(t)(2)(B) of the Exchange Act).
9. §932(a)(8) (to be codified at Section 15E(t)(3) of the Exchange Act).
10. §932(a)(8) (to be codified at Section 15E(r)(1)(A) of the Exchange Act).
11. §932(a)(5) (to be codified at Section 15E(j)(3)(A) of the Exchange Act).
12. §932(a)(5) (to be codified at Section 15E(j)(5)(A) of the Exchange Act).
13. §932(a)(5) (to be codified at Section 15E(j)(2)(A) of the Exchange Act).
14. §939F(d).
15. §932(a)(4) (to be codified at Section 15E(h)(4)(A) of the Exchange Act).
16. §932(a)(4) (to be codified at Section 15E(h)(4)(B) of the Exchange Act).
17. Employees that are covered by this provision are limited to any person who (i) participated in any capacity in determining the rating of such entity or security while employed by the Rating Agency, (ii) supervised an employee who participated in determining such rating while employed by the Rating Agency or (iii) was a senior officer of such Rating Agency. §932(a)(4) (to be codified at Section 15E(h)(v)(a) of the Exchange Act).
18. The Rating Agency is required to obtain a written certification from any third-party due diligence service used in connection with a rating to ensure that a thorough review was conducted. Such certification will be publically disclosed in a manner to be determined by the SEC. In addition, the findings and conclusions of any third-party due diligence report in connection with the issuance of an asset-backed security must be made publically available by the issuer or underwriter of such security. §932(a)(8) (to be codified at Section 15E(s)(4) of the Exchange Act).
19. §932(a)(8) (to be codified at Section 15E(s)(3)(A) and (B) of the Exchange Act).
20. Though not a result of the Act, the SEC recently adopted an amendment to Rule 17g-5 under the Exchange Act, which will also encourage competition among Rating Agencies. The amendment to Rule 17g-5 requires, with respect to each Rating Agency that has been hired by an underwriter, sponsor or issuer in connection with the issuance of asset-backed securities, that all information provided to the Rating Agency in connection with rating such securities be simultaneously posted to a website available to other Rating Agencies meeting certain conditions. The availability of such information makes it possible for an investor to hire a Rating Agency to review the underlying data and confirm the accuracy of the existing rating and will thus encourage competition among Rating Agencies.
21. §932(a)(8) (to be codified at Section 15E(r)(3)(A) of the Exchange Act).
22. §932(a)(8) (to be codified at Section 15E(r)(3)(B), (C) and (D) of the Exchange Act).
23. §932(a)(8) (to be codified at Section 15E(r)(2)(C) of the Exchange Act).
24. §939B.
25. §935 (to be codified at Section 15E(v) of the Exchange Act).
26. §932(a)(8) (to be codified at Section 15E(q)(1) of the Exchange Act).
27. §932(a)(8) (to be codified at Section 15E(q)(2) of the Exchange Act).
28. §932(a)(2) (to be codified at Section 15E(c)(3) of the Exchange Act).
29. §932(a)(8) (to be codified at Section 15E(p)(1)(A) of the Exchange Act).
30. §932(a)(8) (to be codified at Section 15E(p)(3)(C) of the Exchange Act).
31. §932(a)(8) (to be codified at Section 15E(p)(3)(B) of the Exchange Act).
32. §932(a)(3)(A) (to be codified at Section 15E(d)(1) of the Exchange Act).
33. §932(a)(3)(I) (to be codified at Section 15E(d)(1)(F) of the Exchange Act).
34. §932(a)(3)(I) (to be codified at Section 15E(d)(2)(A) of the Exchange Act). In making any such determination the Act directs the SEC to consider the accuracy of ratings issued with respect to such asset class.
35. §932(a)(2) (to be codified at Section 15E(c)(2) of the Exchange Act).
36. §939(h).
37. §939(h).
38. §939C.
39. These types of services are listed as specific areas the SEC should study when considering the management of conflicts of interest at Rating Agencies. §939C.
40. See "Credit Risk Retention and Other Modifications Affecting Asset-Backed Securitizations."
41. §939F(b).

Client **Alert**

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