



## COMMITTEE ON STRUCTURED FINANCE

---

PATRICK DOLAN  
**CHAIR**  
1095 AVENUE OF THE AMERICAS  
NEW YORK, NY 10036  
Phone: (212) 698-3555  
Fax: (212) 698-3599  
patrick.dolan@dechert.com

KIRA BRERETON  
**SECRETARY**  
1095 AVENUE OF THE AMERICAS  
NEW YORK, NY 10036  
Phone: (212) 698-3574  
Fax: (212) 698-0695  
kira.brereton@dechert.com

October 20, 2016

Harriet Orol, Esq.  
Branch Chief  
U.S. Securities and Exchange Commission  
Office of Credit Ratings  
Brookfield Place  
200 Vesey Street, Suite 400  
New York, NY 10281-1022

**Re: Request for Permanent Extraterritoriality Exemption from  
Rule 17g-5(a)(3) Requirements under the Securities Exchange Act**

Dear Ms. Orol:

The Structured Finance Committee (the “Committee”) of The New York City Bar Association (the “Association”) respectfully requests that the Securities and Exchange Commission (the “Commission”) make permanent the exemption for extraterritorial ratings under Rule 17g-5(a)(3) under the Securities Exchange Act of 1934, as amended (the “Exchange Act”).<sup>1</sup>

The Association is an organization of over 24,000 lawyers. Most of its members practice in the New York City area; however, Association membership spans nearly every state and over 50 countries.

The Committee exists to address the unique set of legal, accounting and regulatory issues critical to structured finance. The Committee appreciates the opportunity to comment on this matter and stands ready to assist the Commission and its staff if further clarification is required on any of the points raised in this letter.

Rule 17g-5(a)(3) requires that when a nationally recognized statistical rating organization (an “NRSRO”) is hired by an arranger to determine an initial credit rating for a structured finance product, the NRSRO must “take certain steps designed to allow an NRSRO that is not hired by the arranger to nonetheless determine an initial credit rating – and subsequently monitor

---

<sup>1</sup> *The comments in this letter express solely the views of the Committee as a whole and do not necessarily reflect the views of any individual Member of the Committee. In addition, this letter does not represent the views of any of the law firms or companies with which the Members of the Committee are affiliated.*

that credit rating – for the structured finance product.”<sup>2</sup> The Rule, however, is silent as to whether the Rule applies to securities issued by non-U.S. issuers and does not distinguish between U.S. and foreign issuances of structured finance products.<sup>3</sup>

On May 19, 2010, the Commission issued a temporary conditional exemption (the “Temporary Conditional Exemption”), exempting NRSROs from compliance with Rule 17g-5(a)(3) with respect to credit ratings in situations in which: “(1) the issuer of the structured finance product is a non-U.S. person; and (2) the NRSRO has a reasonable basis to conclude that the structured finance product will be offered and sold upon issuance, and that any arranger linked to the structured finance product will effect transactions of the structured finance product after issuance, only in transactions that occur outside the U.S.”<sup>4</sup> Since then, the Commission has issued six orders extending the Temporary Conditional Exemption.<sup>5</sup> Pursuant to the most recent of these orders, the Commission extended the Temporary Conditional Exemption until December 2, 2017.

In response to these seven temporary conditional exemption orders, the Commission has received at least 25 public comments voicing concerns over Rule 17g-5(a)(3)’s extra-territorial application. The Committee writes now to join those commenters in requesting that the temporary conditional exemption from the requirements of Rule 17g-5(a)(3) for non-U.S. offered transactions be made permanent.

---

<sup>2</sup> *Order Granting Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations from Requirements of Rule 17g-5*, Release No. 34-62120, 75 Fed. Reg. 28825 (May 24, 2010) available at <https://www.gpo.gov/fdsys/pkg/FR-2010-05-24/pdf/2010-12373.pdf>.

<sup>3</sup> See 17 CFR 240.17g-5(a)(3) (2016) available at <https://www.gpo.gov/fdsys/pkg/CFR-2016-title17-vol4/pdf/CFR-2016-title17-vol4-sec240-17g-5.pdf>; see also *Amendments to Rules for Nationally Recognized Statistical Rating Organizations*, Release No. 34-61050, 74 Fed. Reg. 63832, 63844-45 (Dec. 4, 2009) available at <https://www.gpo.gov/fdsys/pkg/FR-2009-12-04/pdf/E9-28496.pdf>.

<sup>4</sup> *Order Granting Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations from Requirements of Rule 17g-5*, Release No. 34-62120, 75 Fed. Reg. 28825 (May 24, 2010) available at <https://www.gpo.gov/fdsys/pkg/FR-2010-05-24/pdf/2010-12373.pdf>.

<sup>5</sup> *Order Extending Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations From Requirements of Rule 17g-5*, Release No. 34-63363, 75 Fed. Reg. 73137 (Nov. 29, 2010) available at <https://www.gpo.gov/fdsys/pkg/FR-2010-11-29/pdf/2010-29929.pdf>; *Order Extending Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations from Requirements of Rule 17g-5*, Release No. 34-65765, 76 Fed. Reg. 72227 (Nov. 22, 2011) available at <https://www.gpo.gov/fdsys/pkg/FR-2011-11-22/pdf/2011-30053.pdf>; *Order Extending Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations from Requirements of Rule 17g-5*, Release No. 34-68286, 77 Fed. Reg. 71201 (Nov. 29, 2012) available at <https://www.gpo.gov/fdsys/pkg/FR-2012-11-29/pdf/2012-28900.pdf>; *Order Extending Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations from Requirements of Rule 17g-5*, Release No. 34-70919, 78 Fed. Reg. 70984 (Nov. 27, 2013) available at <https://www.gpo.gov/fdsys/pkg/FR-2013-11-27/pdf/2013-28464.pdf>; *Order Extending Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations from Requirements of Rule 17g-5*, Release No. 34-73649, 79 Fed. Reg. 70261 (Nov. 25, 2014) available at <https://www.gpo.gov/fdsys/pkg/FR-2014-11-25/pdf/2014-27846.pdf>; *Order Extending Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations from Requirements of Rule 17g-5*, Release No. 34-76183, 80 Fed. Reg. 64031 (Oct. 22, 2015) available at <https://www.gpo.gov/fdsys/pkg/FR-2015-10-22/pdf/2015-26820.pdf>.

Specifically, the Committee requests this permanent exemption because (1) there remains international uncertainty regarding the Rule, (2) permanent exemption is consistent with principles of international comity, and (3) the Rule has been largely ineffective in the U.S.

### **1. International Uncertainty**

Because the Commission has issued numerous temporary conditional exemption orders, we understand there remains lingering international uncertainty regarding the Rule's potential future applicability to extraterritorial transactions. Additionally, if the Rule were to be applied to non-U.S. issuers, there could be significant extra-territorial effects on non-U.S. issuers that may not even be aware of the Rule's existence.

### **2. International Comity**

Although the U.S. arguably has an interest in regulating the activities of NRSROs globally, Rule 17g-5(a)(3) creates atypical issues of international comity because it acts directly on not only the regulated entities (*i.e.*, the NRSROs) but also their customers. For transactions by a non-U.S. issuer occurring wholly outside the U.S. and not involving any U.S. persons, principles of international comity indicate that the U.S. should not interpose its legal norms but rather respect the legal standards of other nations.

The federal securities laws of the United States focus on the regulation of offerings to U.S. persons. This guiding principle of local investor protection is reflected in the preamble to, and the findings set out at the start of, the U.S. Credit Rating Reform Act of 2006<sup>6</sup> and in the general mandate of the Commission itself. This principle suggests the Commission has a limited interest in regulating securities offered solely outside the U.S. and this is evidenced by certain existing provisions and practices, including the Regulation S<sup>7</sup> safe harbor. Given this background, the application of the Rule to all credit ratings provided by an NRSRO or a registered affiliate, regardless of whether the relevant transaction involves a U.S. investor connection (*i.e.*, via a U.S. offering), would be inconsistent from a policy perspective with the wider U.S. legislative and regulatory framework as well as principles of international comity.

### **3. The Rule's Ineffectiveness in the United States**

Rule 17g-5(a)(3) has not been effective in achieving its stated goal of encouraging NRSROs to publish unsolicited ratings. According to many market participants, very few non-hired NRSROs had requested access to the websites that arrangers are required to maintain under the Rule.<sup>8</sup> We understand from our various contacts in the securitization industry that this has not changed over the following years. Despite the fact that Rule 17g-5(a)(3) has been largely ineffective to date, arrangers of ABS continue to be burdened by tens of millions of dollars in

---

<sup>6</sup> "Credit Rating Agency Reform Act of 2006," Pub. L. 109-291, 120 Stat. 1327, S. 3850 (Sept. 29, 2006).

<sup>7</sup> See 17 CFR 230.901 (2016).

<sup>8</sup> American Securitization Forum and Australian Securitization Forum Comment Letter on Order Extending Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations from Requirements of Rule 17g-5 Under the Securities Exchange Act of 1934 (Aug. 9, 2011).

initial and ongoing compliance costs in connection with the Rule. Such burden would have detrimental effects on foreign markets if Rule 17g-5(a)(3) is applied to non-U.S. issuers.

### **Conclusion**

We believe that making permanent the exemption for extraterritorial ratings under Rule 17g-5(a)(3) would advance the Commission's objectives and would provide sufficient certainty for market participants and regulators in other jurisdictions.

The Committee appreciates the opportunity to comment on this matter. It will be glad to respond with further information at your request.

Respectfully submitted,



Patrick D. Dolan  
Chair, Structured Finance Committee

The New York City Bar Association  
Committee on Structured Finance  
Patrick D. Dolan, Chair

Mark Adelson  
Howard Altarescu  
Kira Bereton  
Lewis Cohen  
Christopher J. DiAngelo  
Afsar Farman-Farmaian  
Shuoqiu Gu  
Greg Kahn  
Jamie Kocis  
Jason H. P. Kravitt  
Steve Levitan  
George P. Lindsay  
Jerry R. Marlatt  
Richard Mertl  
David Nirenberg  
Steve Plake  
Richard J. Reilly  
Paul R. St. Lawrence  
Craig Stein  
Gregory D. Walker\*  
Jordan Yarett

Cyavash N. Ahmadi  
Vincent Basulto  
Grant E. Buerstetta  
John M. Costello, Jr.  
Patrick D. Dolan  
Karen Fiorentino  
Anastasia Kaup  
Mark J. Kowal  
Ritika Lakhani  
Gregory T. Limoncelli  
Alexander G. Malyshev  
Lorraine Massaro  
Dina J. Moskowitz  
Christopher J. Papajohn  
Lauris G.L. Rall  
Y. Jeffrey Rotblat  
Adam Singer  
Jeffrey Stern  
Craig A. Wolson  
Boris Ziser

\* Primary draftsperson of this comment letter