SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 243

[Release No. 34–59343; File No. S7–04–09]

RIN 3235–AK14

Re-Proposed Rules for Nationally Recognized Statistical Rating Organizations

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Proposed rules.

SUMMARY: In conjunction with the publication today, in a separate release, of the Commission's final rule amendments to its existing rules governing the conduct of nationally recognized statistical rating organizations (''NRSROs''), the Commission is proposing amendments which would require the public disclosure of credit rating histories for all outstanding credit ratings issued by an NRSRO on or after June 26, 2007 paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. The Commission also is soliciting detailed information about the issues surrounding the application of a disclosure requirement on subscriber-paid credit ratings. The Commission is re-proposing for comment an amendment to its conflict or interest rule that would prohibit an NRSRO from issuing a rating for a structured finance product paid for by the product's issuer, sponsor, or underwriter unless the information about the product provided to the NRSRO to determine the rating and, thereafter, to monitor the rating is made available to other persons. The Commission is proposing these rules to address concerns about the integrity of the credit rating procedures and methodologies at NRSROs.

DATES: Comments should be received on or before March 26, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–04–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–04–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Assistant Director, at (202) 551–5521; Randall W. Roy, Branch Chief, at (202) 551–5522; Joseph I. Levinson, Special Counsel, at (202) 551–5598; Carrie A. O'Brien, Special Counsel, at (202) 551–5640; Sheila D. Swartz, Special Counsel, at (202) 551–5545; Rose Russo Wells, Special Counsel, at (202) 551–5527; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION:

I. Background

On June 16, 2008, the Commission, in the first of three related actions, proposed a series of amendments to its existing rules governing the conduct of NRSROs under the Credit Rating Agency Reform Act of 2006 (''Rating Agency Act'').[1] The proposed amendments were designed to address concerns about the integrity of the process by which NRSROs rate structured finance products, particularly mortgage related securities. Today, in a separate release, the Commission is adopting, with revisions, a majority of the proposed rule amendments.[2] In addition, in this release, the Commission is proposing additional amendments to paragraph (d) of Rule 17g–2 and re-proposing with substantial modifications amendments to paragraphs (a) and (b) of Rule 17g–5.

The proposed amendments to paragraph (d) of Rule 17g–2 would add public disclosure requirements to those that are being adopted today. Specifically, the amendments being adopted require an NRSRO to disclose, in eXtensible Business Reporting Language (''XBRL'') format and on a six-month delay, ratings action histories for a randomly selected 10% of the ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor being rated (''issuer-paid credit ratings'') for each rating class for which it has issued 500 or more issuer-paid credit ratings.[3] In this release, the Commission is proposing to further amend paragraph (d) of Rule 17g–2 to require NRSROs to disclose ratings actions histories for all credit ratings issued on or after June 26, 2007 at the request of the obligor being rated or of the issuer, underwriter, or sponsor of the security being rated. The proposed amendment would allow an NRSRO to delay for up to 12 months publicly disclosing a rating action.

The amendments to paragraphs (a) and (b) of Rule 17g–5 would substantially modify the previous proposal. As originally proposed, the amendments would have prohibited an NRSRO from issuing or maintaining a credit rating for a structured finance product paid for by the product's issuer, sponsor or underwriter unless the information provided to the NRSRO by the issuer, sponsor, or underwriter to determine the rating is disseminated to other persons. The intent behind the proposal was to provide the opportunity

[1] Exchange Act Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008) (''*June 16, 2008 Proposing Release*''). The Commission adopted the existing NRSRO rules in June 2007. *See Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564 (June 18, 2007) (''June 5, 2007 Adopting Release''). The second action taken by the Commission (also on June 16, 2008) was to propose a new rule that would require NRSROs to distinguish their ratings for structured finance products from other classes of credit ratings by publishing a report with the rating or using a different rating symbol. *See June 16, 2008 Proposing Release.* The third action taken by the Commission was to propose a series of amendments to rules under the Exchange Act, Securities Act of 1933 (''Securities Act''), and Investment Company Act of 1940 (''Investment Company Act'') that would end the use of NRSRO credit ratings in the rules. *See References to Ratings of Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 58070 (July 1, 2008), 73 FR 40088 (July 11, 2008); *Securities Ratings,* Securities Act Release No. 8940 (July 1, 2008), 73 FR 40106 (July 11, 2008); *References to Ratings of Nationally Recognized Statistical Rating Organizations,* Investment Company Act Release No. 28327 (July 1, 2008), 73 FR 40124 (July 11, 2008).

[2] *See Amendments to Rules for Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 59342 (February 2, 2009) (''Companion Adopting Release'').

[3] *See Companion Adopting Release.*

for other persons such as credit rating agencies and academics to perform independent analysis on the securities or money market instruments at the same time the hired NRSRO determines its rating. The goal was to increase competition among NRSROs for rating structured finance products by providing new entrants access to the information necessary to determine credit ratings for these products.

The Commission received 38 comment letters that addressed the Rule 17g–5 proposal on June 16, 2008.[4] While some commenters expressed support for it,[5] the majority of commenters raised significant legal and practical issues with the proposal.[6] The Commission is re-proposing the amendment, with substantial modifications, to solicit further comment.

II. Proposed Amendments to Rule 17g–2

A. Rule 17g–2

The Commission adopted Rule 17g–2, in part, pursuant to authority in Section 17(a)(1) of the Exchange Act requiring NRSROs to make and keep such records, and make and disseminate such reports, as the Commission prescribes by rule as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the Exchange Act.[7] Paragraph (a) of Rule 17g–2 requires an NRSRO to make and retain certain records relating to its business. For example, paragraph (a)(2) requires an NRSRO to make a number of different records with respect to each current credit rating such as the identity of any analyst that participated in determining the credit rating.[8] Paragraph (b) of Rule 17g–2 requires an NRSRO to retain certain other business records made in the normal course of business operations such as non-public information and work papers used to form the basis of credit rating.[9] Paragraph (c) of Rule 17g–2 requires that the records identified in paragraphs (a) and (b) be retained for three years.[10] Paragraph (d) of Rule 17g–2 prescribes the manner in which the records must be maintained by the NRSRO.[11] For example, it provides that the records must be maintained in a manner that makes the records easily accessible to the main office of the NRSRO.[12]

B. The Amendments to Rule 17g–2(a) and (d) Adopted Today

In the *June 16, 2008 Proposing Release,* the Commission proposed amendments to Rule 17g–2 which would create a new paragraph (a)(8) and amend paragraph (d). The new paragraph (a)(8) would require an NRSRO to make and retain a record of the ratings history of each outstanding credit rating it maintains showing all rating actions (initial rating, upgrades, downgrades, placements on watch for upgrade or downgrade, and withdrawals) and the date of such actions identified by the name of the security or obligor rated and, if applicable, the CUSIP for the rated security or the Central Index Key (CIK) number for the rated obligor. This full record of credit rating histories would be maintained by the NRSRO as part of its internal records that are available to Commission staff. In addition, the proposed amendments to paragraph (d) of Rule 17g–2 would require an NRSRO to make that record publicly available on its corporate Web site in XBRL format six months after the date of the current rating action.[13] Finally, the proposed amendments also would amend the instructions to Exhibit 1 to Form NRSRO to require the disclosure of the Web address where the XBRL Interactive Data File could be accessed in order to inform persons who use credit ratings where the ratings histories can be obtained.[14]

[4] Letter dated June 12, 2008 from G. Brooks Euler (''Euler Letter''); letter dated July 14, 2008 from Robert Dobilas, President, CEO, Realpoint LLC (''Realpoint Letter''); letter dated July 21, 2008 from Dottie Cunningham, Chief Executive Officer, Commercial Mortgage Securities Association (''CMSA Letter''); letter dated July 22, 2008 from Richard Metcalf, Director, Corporate Affairs Department, Laborers' International Union of North America (''LIUNA Letter''); letter dated July 23, 2008 from Kent Wideman, Group Managing Director, Policy & Rating Committee and Mary Keogh, Managing Director, Policy & Regulatory Affairs, DBRS (''DBRS Letter''); letter dated July 24, 2008 from Takefumi Emori, Managing Director, Japan Credit Rating Agency, Ltd. (''JCR Letter''); letter dated July 24, 2008 from Amy Borrus, Deputy Director, Council of Institutional Investors (''Council Letter''); letter dated July 24, 2008 from Joseph A. Hall and Michael Kaplan, Davis Polk, and Wardwell (''DPW Letter''); letter dated July 24, 2008 from Vickie A. Tillman, Executive Vice President, Standard & Poor's Ratings Services (''S&P Letter''); letter dated July 24, 2008 from Deborah A. Cunningham and Boyce I. Greer, Co-Chairs Company, Co-Chairs, SIFMA Credit Rating Agency Task Force (''Second SIFMA Letter''); letter dated July 25, 2008 from Sally Scutt, Managing Director, and Pierre de Lauzun, Chairman, Financial Markets Working Group, International Banking Federation (''IBFED Letter''); letter dated July 25, 2008 from Denise L. Nappier, Treasurer, State of Connecticut (''Nappier Letter''); letter dated July 25, 2008 from Suzanne C. Hutchinson, Mortgage Insurance Companies of America (''MICA Letter''); letter dated July 25, 2008 from Kieran P. Quinn, Chairman, Mortgage Bankers Association (''MBA Letter''); letter dated July 25, 2008 from Sean J. Egan, President, Egan-Jones Ratings Co. (''Egan-Jones Letter''); letter dated July 25, 2008 from Charles D. Brown, General Counsel, Fitch Ratings (''Fitch Letter''); letter dated July 25, 2008 from Bill Lockyer, State Treasurer, California (''Lockyer Letter''); letter dated July 25, 2008 from Jeremy Reifsnyder and Richard Johns, Co-Chairs, American Securitization Forum Credit Rating Agency Task Force (''ASF Letter''); letter dated July 25, 2008 from Annemarie G. DiCola, Chief Executive Officer, Trepp, LLC (''Trepp Letter''); letter dated July 25, 2008 from Kurt N. Schacht, Executive Director and Linda L. Rittenhouse, Senior Policy Analyst, CFA Institute Centre for Financial Market Integrity (''CFA Institute Letter''); letter dated July 25, 2008 from Karrie McMillan, General Counsel, Investment Company Institute (''ICI Letter''); letter dated July 25, 2008 from Michael Decker, Co-Chief Executive Officer and Mike Nicholas, Co-Chief Executive Officer, Regional Bond Dealers Association (''RBDA Letter''); letter dated July 25, 2008 from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable (''Roundtable Letter''); letter dated July 25, 2008 from James H. Gellert, Chairman and CEO and Dr. Patrick J. Caragata, Founder and Executive Vice Chairman, Rapid Ratings International Inc. (''Rapid Ratings Letter''); letter dated July 25, 2008 from Gregory W. Smith, General Counsel, Colorado Public Employees' Retirement Association (''Colorado PERA Letter''); letter dated July 25, 2008 from Cleary Gottlieb Steen & Hamilton LLP, (''CGSH Letter''); letter dated July 25, 2008 from Keith A. Styrcula, Chairman, Structured Products Association (''SPA Letter''); letter dated July 25, 2008 from Yasuhiro Harada, Chairman and Co-CEO, Rating and Investment Information, Inc. (''R&I Letter''); letter dated July 28, 2008 from Michel Madelain, Chief Operating Officer, Moody's Investors Service (''Moody's Letter''); letter dated July 28, 2008 from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities and Vicki O. Tucker, Chair, Committee on Securitization and Structured Finance, American Bar Association (''ABA Business Law Committees Letter''); letter dated July 29, 2008 from Glenn Reynolds, CEO and Peter Petas, President CreditSights, Inc. (''CreditSights Letter''); letter dated July 31, 2008 from Robert S. Khuzami Managing Director and General Counsel, Deutsche Bank Americas (''DBA Letter''); letter dated August 5, 2008 from John Taylor, President and CEO, National Community Reinvestment Coalition (''NCRC Letter''); letter dated August 8, 2008 from Jeffrey A. Perlowitz, Managing Director and Co-Head of Global Securitized Markets, and Myongsu Kong, Director and Counsel, Citigroup Global Markets Inc. (''Citi Letter''); letter dated August 12, 2008 from John J. Niebuhr, Managing Director, Lehman Brothers, Inc. (''Lehman Letter''); letter dated August 17, 2008 from Olivier Raingeard, Ph.D (''Raingeard Letter''); letter dated August 22, 2008 from Robert Dobilas, CEO and President, Realpoint LLC (''Second Realpoint Letter''); letter dated August 27, 2008 from Larry G. Mayewski, Executive Vice President & Chief Rating Officer, A.M. Best Company (''A.M. Best Letter''). These comments are available on the Commission's Internet Web site, located at *http://www.sec.gov/comments/s7-13-08/s71308.shtml,* and in the Commission's Public Reference Room in its Washington DC headquarters.

[5] *See, e.g.,* LIUNA Letter; Nappier Letter; ICI Letter; RBDA Letter; NCRC Letter.

[6] *See, e.g.,* ASF Letter; CFA Institute Letter; Roundtable Letter; ABA Business Law Committees Letter; Citi Letter; Lehman Letter; Moody's Letter; S&P Letter; DPW Letter; CGSH Letter; DBA Letter; A.M. Best Letter; Realpoint Letter; CMSA Letter; DBRS Letter; Second SIFMA Letter; MBA Letter; Fitch Letter; SPA Letter; R&I Letter; JCR Letter.

[7] *See* Section 5 of the Rating Agency Act and 15 U.S.C 78q(a)(1).

[8] 17 CFR 240.17g–2(a)(2)(i).

[9] 17 CFR 240.17g–2(b).

[10] 17 CFR 240.17g–2(c).

[11] 17 CFR 240.17g–2(d).

[12] *Id.*

[13] *See June 16, 2008 Proposing Release,* 73 FR at 36228–36230.

[14] *See id.*

The Commission noted in the *June 16, 2008 Proposing Release* that the purpose of this disclosure would be to provide users of credit ratings, investors, and other market participants and observers the raw data with which to compare how the NRSROs initially rated an obligor or security and, subsequently, adjusted those ratings, including the timing of the adjustments.[15] In order to expedite the establishment of a pool of data sufficient to provide a useful basis of comparison, the proposal would have applied this requirement to all outstanding credit ratings of securities and obligors as well as to all future credit ratings.

As discussed in more detail in the Companion Adopting Release,[16] several NRSROs offered comments to the proposed amendments to paragraph (d) of Rule 17g–2, raising two significant concerns. First, NRSROs that issue unsolicited ratings accessible only to subscribers (''subscriber-paid credit ratings'') and others stated that publicly disclosing all their ratings histories, even with a time delay of six months, would adversely impact their business and, therefore, could prove to be anti-competitive.[17] Second, NRSROs that issue ratings paid for by the obligor being rated or the issuer, underwriter or sponsor of the security being rated (''issuer-paid credit ratings'') stated that a requirement to make all ratings actions available free of charge in a machine readable format would cause them to lose revenues they derive from selling downloadable packages of their credit ratings.[18] These commenters also questioned whether the requirement would be permitted under the U.S. Constitution, arguing that it could be considered a taking of private property without just compensation.[19]

In the Companion Adopting Release, the Commission is adopting new paragraph (a)(8) as proposed but significantly modifying the proposed amendments to paragraph (d).[20] Specifically, the amendments to paragraph (d) as adopted will require an NRSRO to make publicly available, in an XBRL format and on a six-month delay, ratings action histories for 10% of the outstanding issuer-paid credit ratings required to be retained pursuant to paragraph (a)(8) for each class of credit rating for which it is registered and for which it has issued 500 or more issuer-paid credit ratings. Consequently, the public disclosure requirement only will apply to issuer-paid credit ratings.

As explained in the Companion Adopting Release, the Commission believes it is appropriate at this time to limit the rule's application to issuer-paid credit ratings. NRSROs that sell subscriber-paid credit ratings have suggested that requiring the histories of all these ratings to be publicly disclosed could seriously impact their businesses. This could reduce competition by causing NRSROs to withdraw registrations or discourage credit rating agencies from seeking registration. Accordingly, the Commission wants to gather more data on this issue before deciding on whether the rule should apply to subscriber-paid credit ratings. At the same time, the Commission does not want to delay adopting a final rule, particularly if it could begin providing meaningful information to users of credit ratings. In this regard, the Commission notes that issuer-paid credit ratings account for over 98% of the current credit ratings issued by NRSROs according to information furnished by NRSROs in Form NRSRO. Moreover, seven of the ten registered NRSROs currently maintain 500 or more credit ratings in at least one class of credit ratings for which they are registered. Consequently, applying this rule to issuer-paid credit ratings should result in a substantial amount of new information for users of credit ratings. It also will allow market observers to begin analyzing the information and developing performance metrics based on it.

The Commission is mindful of the potential impact on NRSROs that determine issuer-paid credit ratings and, therefore, the amendments being adopted contain modifications discussed above. The Commission believes that by limiting the ratings actions histories that need to be disclosed to a random selection of 10% of outstanding credit ratings, applying the requirement to issuer-paid credit ratings only, and allowing for a six-month delay before a ratings action is required to be disclosed, the amendment as adopted addresses the concerns among commenters that the rule would cause them to lose revenue. With respect to NRSROs that earn revenues from issuer-paid credit ratings but sell access to packages of the ratings as well, the Commission believes that customers that are willing to pay for full and immediate access to downloadable information for all of an NRSRO's ratings actions are unlikely to reconsider their purchase of that product due to the ability to access ratings histories for 10% of the NRSRO's outstanding issuer-paid credit ratings selected on a random basis and disclosed with a six-month time lag. As indicated below, the Commission is seeking detailed comment on how a ratings history public disclosure requirement can be tailored to address concerns that disclosing this information would adversely impact the businesses of NRSROs that primarily determine subscriber-paid credit ratings.

In this release, the Commission is seeking comment on whether the requirement to publicly disclose ratings action histories should be applied to subscriber-paid credit ratings. As indicated in questions below, the Commission is soliciting detailed information about the potential impact of applying the rule to subscriber-paid credit ratings. The responses to those questions will inform the Commission's deliberations as to whether this rule ultimately should be expanded to cover subscriber-paid credit ratings.

C. The Proposed Amendments

As discussed above, the Commission believes that the amendments to paragraph (d) of Rule 17g–2 being adopted today will provide users of credit ratings with information to begin assessing the performance of NRSROs subject to the rule. At the same time, the Commission continues to believe that its original proposal to require public disclosure of ratings action histories for all current credit ratings could provide substantial benefits to users of credit ratings. The Commission, therefore, is proposing to amend paragraph (d) of Rule 17g–2. Specifically, the Commission would add subparagraphs (1), (2) and (3) to paragraph (d). Paragraph (d)(1) would contain the record retention requirements of paragraph (d) as it was originally adopted by the Commission on June 5, 2007.[21] Paragraph (d)(2) would contain the ratings history disclosure requirements being adopted by the

[15] *See id.*

[16] *See Companion Adopting Release.*

[17] *See* ABA Business Law Committee Letter; Realpoint Letter; Pollock Letter; Egan-Jones Letter; Multiple-Markets Letter; Rapid Ratings Letter; AFP Letter; R&I Letter; Moody's Letter.

[18] *See* S&P Letter; Moody's Letter.

[19] *See* S&P Letter; Egan-Jones Letter; Fitch Letter; R&I Letter;

[20] *See Companion Adopting Release.*

[21] *See June 5, 2007 Adopting Release.* As originally adopted, paragraph (d) provided that ''[a]n original, or a true and complete copy of the original, of each record required to be retained pursuant to paragraphs (a) and (b) of [Rule 17g–2] must be maintained in a manner that, for the applicable retention period specified in paragraph (c) of [Rule 17g–2], makes the original record or copy easily accessible to the principal office of the [NRSRO] and to any other office that conducted activities causing the record to be made or received.'' *See June 5, 2007 Adopting Release*, 72 FR at 33622.

Commission in the Companion Adopting Release.[22]

Paragraph (d)(3) would contain the disclosure requirements the Commission is proposing in this release. These proposed amendments would require that NRSROs disclose ratings history information for 100% of their current issuer-paid credit ratings in an XBRL format. Further, they only would apply to issuer-paid credit ratings determined on or after June 26, 2007 (the effective date of the Rating Agency Act). Therefore, under new paragraph (d)(3), an NRSRO would not need to disclose ratings action histories for issuer-paid credit ratings that were determined prior to that date (though NRSROs would continue to be required to publicly disclose ratings action histories provided for the randomly selected 10% of outstanding issuer-paid credit ratings in each registration class where there are 500 or more outstanding credit ratings). The prospective nature of the proposed rule is designed to ease the burden of compliance. In addition, to mitigate concerns regarding the loss of revenues NRSROs derive from selling downloads and data feeds to their current outstanding issuer-paid credit ratings, a credit rating action would not need to be disclosed until 12 months after the action is taken.

The purpose of this proposed amendment is to provide users of credit ratings, investors, and other market participants and observers with the maximum amount of raw data with which to compare how NRSROs subject to the rule initially rated an obligor or security and, subsequently, adjusted those ratings, including the timing of the adjustments. The Commission believes that requiring the disclosure of the ratings action history of each issuer-paid credit rating would create the opportunity for market participants to use the information to develop performance measurement statistics that would supplement those required to be published by the NRSROs themselves in Exhibit 1 to Form NRSRO. The intent is to tap into the expertise and flexibility of credit market observers and participants to create better and more useful means to compare issuer-paid credit ratings. In addition, the Commission believes that the proposed amendment would foster greater accountability for NRSROs that determine issuer-paid credit ratings as well as competition among such NRSROs by making it easier for persons to analyze the actual performance of credit ratings in terms of accuracy in assessing creditworthiness. This could make NRSROs subject to the rule more accountable for their ratings by enhancing the transparency of the results of their rating processes for particular securities and obligors and classes of securities and obligors and encourage competition within the industry by making it easier for users of credit ratings to judge the output of such NRSROs.

The Commission recognizes that releasing information on all ratings actions could cause financial loss for some firms. For that reason, the proposed amendment would provide that a ratings action need not be made publicly available until twelve months after the date of the rating action.

The Commission is proposing these amendments, in part, under authority to require NRSROs to make and keep for prescribed periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[23] The Commission preliminarily believes the proposed new public disclosure requirements are necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. Specifically, the proposed amendments would allow market participants to compare credit rating histories for issuer-paid credit ratings on an obligor-by-obligor or instrument-by-instrument basis. Users of credit ratings would be able to compare side-by-side how two or more NRSROs subject to the rule initially rated a particular obligor or security, when the NRSROs took actions to adjust the rating upward or downward, and the degree of those adjustments. Furthermore, users of credit ratings, academics and information venders could use the raw data to perform analyses comparing how the NRSROs subject to the rule differ in initially determining issuer-paid credit ratings and in their monitoring of these ratings. This could identify an NRSRO that is an outlier because it determines particularly high or low issuer-paid credit ratings or is slow or quick to re-adjust outstanding ratings. It also could help identify which NRSROs subject to the rule tend to be more accurate in their issuer-paid credit ratings. This information also may identify NRSROs subject to the rule whose objectivity may be impaired because of the conflicts of interest surrounding issuer-paid credit ratings.

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following questions related to the proposal.

- Is the proposed application of the rule to prospective credit ratings, *i.e.*, credit ratings that are initially determined on or after June 26, 2007, appropriate and do commenters believe it would provide meaningful information if the rule was limited to credit ratings made on or after that date? Should the Commission adopt a final rule that uses another date such as the date the Rating Agency Act was enacted? If June 26, 2007 is the appropriate date, how long would it take for NRSROs to build up ratings history information to permit meaningful comparisons between NRSROs? What are the advantages and disadvantages of applying a disclosure rule on a prospective basis?
- Should the Commission adopt a final rule that applies retrospectively to all outstanding credit ratings? Commenters should explain the benefits of retrospective application and how they would justify the costs.
- Is the twelve-month delay before publicly disclosing a rating action sufficiently long to address concerns regarding the revenues NRSROs derive from selling downloads of, and data feeds to, their current issuer-paid credit ratings? Should the delay be for a longer period such as 18 months, 24 months, 30 months or 36 months or longer? Alternatively, should the Commission adopt a final rule that has a shorter time lag such as three months or six months or no time lag in place?
- In addition to revenues derived from selling data feeds to current issuer-paid credit ratings, do NRSROs derive revenues from selling access to their

[22] *See Companion Adopting Release.* These amendments provide: ''[An NRSRO] must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information for ten percent of the outstanding credit ratings required to be retained pursuant to paragraph (a)(8) of [Rule 17g–2] and which were paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more outstanding credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d) need not be made public less than six months from the date such ratings action is taken. If a credit rating made public pursuant to this paragraph is withdrawn or the instrument rated matures, the [NRSRO] must randomly select a new outstanding credit rating from that class of credit ratings in order to maintain the 10 percent disclosure threshold. In making the information available on its corporate Internet Web site, the [NRSRO] shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site.''

[23] *See* Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

ratings histories? If so, how material are these revenues when compared to revenues earned by NRSROs from selling downloads of, and data feeds to, current issuer-paid credit ratings and revenues earned from fees paid by obligors, issuers, underwriters and sponsors to determine and monitor credit ratings? Commenters providing information should quantify and breakout the amount of revenues earned by NRSROs issuer-paid credit ratings in dollars and/or percentages for each of the following categories: (1) Revenues from fees for determining and monitoring issuer-paid credit ratings; (2) revenues from selling access (by download, data feed or other method) to all current issuer-paid credit ratings; and (3) revenues from selling information about ratings actions histories of issuer-paid credit ratings.

• Should the proposed amendments apply equally to issuer-paid and subscriber-paid credit ratings? For example, in what ways and to what extent might the objectivity of NRSROs in determining subscriber-paid credit ratings be impaired because of conflicts of interest? What would be the benefits for applying the rule's requirements to subscriber-paid credit ratings? What would be the costs of applying the rule's requirements to subscriber-paid credit ratings?

• Are the goals of the rule—greater accountability of NRSROs and promotion of competition—achievable if subscriber-paid credit ratings are not subject to the rule's requirements? How would these goals be enhanced if subscriber-paid credit ratings were subject to the rule's requirements?

• Do NRSROs derive revenues from selling information about ratings action histories for subscriber-paid credit ratings? If so, are those revenues material as compared to revenues they receive from selling subscriptions to current subscriber-paid credit ratings? Commenters providing information should quantify and breakout the amount of revenues earned by NRSROs in dollars and/or percentages for each of the following: (1) Selling subscriptions to all current subscriber-paid credit ratings; and (2) selling information about ratings actions histories of subscriber-paid credit ratings.

• Similarly, do subscribers value ratings action histories for subscriber-paid credit ratings? Do subscribers value the in-depth analysis that is delivered with a rating action? How material is the value that subscribers place on the historical rating action itself as compared to the value they place on the in-depth analysis or materials that are delivered along with the rating action? Do commenters believe that the business of an NRSRO that determines subscriber-paid credit ratings would be materially compromised if the ratings action histories for the ratings were required to be publicly disclosed (but not the in-depth analysis or other materials)?

• Do persons who subscribe to NRSROs' subscriber-paid credit ratings value the current ratings only? Alternatively, do they subscribe to the ratings because subscriber-paid credit ratings identify trends sooner than issuer-paid credit ratings as some suggest? For example, do commenters believe the fact that the determination and monitoring of subscriber-paid credit ratings are funded by subscribers mean the NRSROs act more quickly to adjust the credit ratings? If so, would disclosing a rating action one year after it occurred reveal information that a subscriber otherwise would pay for in order to make a credit assessment or has the rating action become sufficiently stale that its value, if any, is limited to it being an item of historical information. If a credit rating action with respect to a subscriber-paid credit rating has intrinsic value beyond providing historical perspective, would this intrinsic value still exist two years after the rating action? If so, what length of delay would be sufficient to address NRSROs' concerns regarding the loss of revenues from subscribers for access to their subscriber-paid credit ratings, while also achieving the Commission's goals, among others, of increasing accountability and promoting competition among NRSROs? What effect would subjecting subscriber-paid credit ratings to the rule's requirements have on competition? Would it compromise the viability of NRSROs that determine subscriber-paid credit ratings? For example, to what extent, if any, would subjecting subscriber-paid credit ratings to the rule's requirements undercut competition by erecting barriers to entry or otherwise compromise the viability of NRSROs that determine subscriber-paid credit ratings?

• If there is a length of time greater than one year that would better address concerns regarding the revenues NRSROs derive from subscriber-paid credit ratings (*e.g.*, 18 months, 24 months, 30 months, 36 months or longer), should that time lag only apply to subscriber-paid credit ratings or should it apply to both issuer-paid and subscriber-paid credit ratings?

• As an alternative to adopting a final rule that applies to subscriber-paid credit ratings (along with issuer-paid credit ratings), should the Commission adopt a final rule amending paragraph (d) of Rule 17g–2 to require that an NRSRO publicly disclose credit rating actions for a random sample of 10% of the current subscriber-paid credit ratings for each class of credit rating for which they are registered and have issued 500 or more ratings? If the Commission were to adopt such an amendment, would the time lag of six months in the rule being adopted today be sufficient to address concerns regarding the revenues NRSROs earn from selling subscriptions to their subscriber-paid credit ratings. If not, should the Commission adopt an amendment to paragraph (d) of Rule 17g–2 that extends the time lag to a longer period of time for subscriber-paid credit ratings (*e.g.*, 12 months, 18 months, 24 months, 30 months, or 36 months or longer)? Are there other ways that the Commission could adjust the requirements of the proposed rule to apply a public disclosure requirement to ratings action histories of subscriber-paid credit ratings? Commenters should provide reasons and/or data for why a certain time lag is appropriate.

• Similarly, if commenters believe that some form of public disclosure requirement should be applied to the histories of both issuer-paid and subscriber-paid credit ratings, what percentage of the histories should each type of credit rating be required to be disclosed and what time lag should be granted? For example, should both types of credit ratings be subject to the requirement that ratings action histories be publicly disclosed for a random sample of 10% of the outstanding credit ratings in each class of credit ratings with a six month time lag? Alternatively, should ratings action histories of issuer-paid credit ratings be disclosed at a higher percentage with a longer time lag, *e.g.*, 20%, 50% or 100% of the outstanding credit ratings and a 12, 16, or 24 month time lag? Should ratings action histories for subscriber-paid credit ratings be disclosed at a different percentage than issuer-paid credit ratings, *e.g.*, 10%, 20%, or 50%? Commenters should provide reasons and/or data in their responses.

• What diligence do potential subscribers to subscriber-paid credit ratings perform in deciding whether to subscribe to such ratings of a particular NRSRO? To what extent do NRSROs make ratings histories of subscriber-paid credit ratings available to potential subscribers? To what extent and in what ways are NRSROs that determine subscriber-paid credit ratings subject to competitive pressures? To what extent does the interest in developing a reputation for accuracy discipline the

accuracy of an NRSRO that determines subscriber-paid credit ratings?

• Do NRSROs issue unsolicited credit ratings that are not paid for by selling subscriptions to access the ratings? For example, do NRSROs that primarily determine issuer-paid credit ratings for most, but not all, securities issued by companies in a particular industry group determine unsolicited ratings for securities issued by the remaining companies to round out coverage of the industry? Do NRSROs issue such unsolicited ratings to establish a track record for rating particular types of obligors or securities?

• If NRSROs issue unsolicited (and not subscriber-paid for) credit ratings, to what extent are these ratings issued relative issuer-paid or subscriber-paid credit ratings? For example, what percentage of an NRSRO's outstanding credit ratings are comprised of unsolicited (and not subscriber paid for) credit ratings?

• Do NRSROs that issue unsolicited (and not subscriber-paid for) credit ratings make the ratings publicly available for free?

• What types of conflicts arise from determining unsolicited (and not subscriber-paid for) credit ratings? For example, is there the potential that an NRSRO would issue a lower than warranted credit rating in order to pressure an obligor or issuer to pay the NRSRO for the rating? Would the public disclosure of ratings histories for unsolicited (but not subscriber-paid for) credit ratings help to mitigate this conflict?

• Should the Commission adopt a final rule that requires the disclosure of the ratings histories of unsolicited (and not subscriber-paid for) credit ratings along with the issuer-paid for credit ratings? What would be the benefits and costs of requiring the disclosure of such credit ratings?

• Should the Commission adopt a final rule that requires unsolicited (and not subscriber-paid for) credit ratings to be included for the purposes of determining whether an NRSRO has issued 500 or more credit ratings in a particular class of credit rating under Rule 17g–2(d) adopted today? What would be the benefits and costs of such a requirement?

• Should the Commission adopt a final rule that requires unsolicited (and not subscriber paid for) credit ratings to be included in the publicly disclosed ratings histories for a random sample of 10% of the credit ratings in a particular class of credit ratings under Rule 17g–2(d) adopted today? What would be the benefits and costs of such a requirement?

• Should the Commission adopt a final rule that requires a sample of unsolicited (and not subscriber paid for) credit ratings to be separately disclosed from issuer-paid credit ratings? If so, what should be the number of credit ratings in a particular class of credit ratings triggering that public disclosure? What percentage of unsolicited rating should be disclosed? What, if any, time delay should apply to the disclosure of a random sample of unsolicited ratings?

III. Re-Proposed Amendments to Rule 17g–5

A. Rule 17g–5

Section 15E(h)(1) of the Exchange Act requires an NRSRO to establish, maintain, and enforce policies and procedures reasonably designed, taking into consideration the nature of its business, to address and manage conflicts of interest.[24] Section 15E(h)(2) of the Exchange Act requires the Commission to adopt rules to prohibit or require the management and disclosure of conflicts of interest relating to the issuance of credit ratings.[25] The statute also identifies certain types of conflicts relating to the issuance of credit ratings that the Commission may include in its rules.[26] Furthermore, it contains a catchall provision for any other potential conflict of interest that the Commission deems is necessary or appropriate in the public interest or for the protection of investors to include in its rules.[27] The Commission implemented these statutory provisions through the adoption of Rule 17g–5, which prohibits the conflicts identified in the statute and certain additional conflicts either outright or if the NRSRO has not disclosed them and established policies and procedures to manage them.[28]

Paragraph (a) of Rule 17g–5 [29] prohibits a person within an NRSRO from having a conflict of interest relating to the issuance of a credit rating that is identified in paragraph (b) of the rule *unless* the NRSRO has disclosed the type of conflict of interest in its application for registrations with the Commission in compliance with Rule 17g–1 (*i.e.*, on Form NRSRO) and has implemented policies and procedures to address and manage the type of conflict of interest in accordance with Section 15E(h)(1) of the Exchange Act.[30] Paragraph (b) of Rule 17g–5 currently identifies nine types of conflicts that are subject to the provisions of paragraph (a):

• Being paid by issuers or underwriters to determine credit ratings with respect to securities or money market instruments they issue or underwrite; [31]

• Being paid by obligors to determine credit ratings with respect to the obligors; [32]

• Being paid for services in addition to determining credit ratings by issuers, underwriters, or obligors that have paid the NRSRO to determine a credit rating; [33]

• Being paid by persons for subscriptions to receive or access the credit ratings of the NRSRO and/or for other services offered by the NRSRO where such persons may use the credit ratings of the NRSRO to comply with, and obtain benefits or relief under, statutes and regulations using the term ''NRSRO;'' [34]

• Being paid by persons for subscriptions to receive or access the credit ratings of the NRSRO and/or for other services offered by the NRSRO where such persons also may own investments or have entered into transactions that could be favorably or adversely impacted by a credit rating issued by the NRSRO; [35]

• Allowing persons within the NRSRO to directly own securities or money market instruments of, or having other direct ownership interests in, issuers or obligors subject to a credit rating determined by the NRSRO; [36]

• Allowing persons within the NRSRO to have a business relationship that is more than an arms length ordinary course of business relationship with issuers or obligors subject to a credit rating determined by the NRSRO; [37]

• Having a person associated with the NRSRO that is a broker or dealer engaged in the business of underwriting securities or money market instruments; [38] and

• Any other type of conflict of interest relating to the issuance of credit ratings by the NRSRO that is material to the NRSRO and that is identified by the NRSRO in Exhibit 6 to Form NRSRO in accordance with section 15E(a)(1)(B)(vi) of the Act (15 U.S.C. 78o–7(a)(1)(B)(vi)) and Rule 17g–1.[39]

[24] 15 U.S.C. 78o–7(h)(1).
[25] 15 U.S.C. 78o–7(h)(2).
[26] *See* 15 U.S.C. 78o–7(h)(2)(A)–(D).
[27] *See* 15 U.S.C. 78o–7(h)(2)(E).
[28] *See* 17 CFR 240.17g–5.
[29] 17 CFR 240.17g–5(a).
[30] 15 U.S.C. 78o–7(h)(1).
[31] 17 CFR 240.17g–5(b)(1).
[32] 17 CFR 240.17g–5(b)(2).
[33] 17 CFR 240.17g–5(b)(3).
[34] 17 CFR 240.17g–5(b)(4).
[35] 17 CFR 240.17g–5(b)(5).
[36] 17 CFR 240.17g–5(b)(6).
[37] 17 CFR 240.17g–5(b)(7).
[38] 17 CFR 240.17g–5(b)(8).
[39] 17 CFR 240.17g–5(b)(9).

Paragraph (c) of Rule 17g–5 specifically prohibits outright four types of conflicts of interest.[40] Consequently, an NRSRO would violate the rule regardless of whether it had disclosed them and established procedures reasonably designed to address them. The four prohibited conflicts are:

- The NRSRO issues or maintains a credit rating solicited by a person that, in the most recently ended fiscal year, provided the NRSRO with net revenue (as reported under Rule 17g–3) equaling or exceeding 10% of the total net revenue of the NRSRO for the fiscal year;[41]
- The NRSRO issues or maintains a credit rating with respect to a person (excluding a sovereign nation or an agency of a sovereign nation) where the NRSRO, a credit analyst that participated in determining the credit rating, or a person responsible for approving the credit rating, directly owns securities of, or has any other direct ownership interest in, the person that is subject to the credit rating;[42]
- The NRSRO issues or maintains a credit rating with respect to a person associated with the NRSRO;[43] or
- The NRSRO issues or maintains a credit rating where a credit analyst who participated in determining the credit rating, or a person responsible for approving the credit rating is an officer or director of the person that is subject to the credit rating.

B. The Amendments to Paragraphs (a) and (b) of Rule 17g–5 Proposed in the June 16, 2008 Release

In the *June 16, 2008 Proposing Release,* the Commission proposed to amend paragraph (b) of Rule 17g–5[44] to add to the list of conflicts that must be disclosed and managed the additional conflict of repeatedly being paid by certain issuers, sponsors, or underwriters (hereinafter collectively ''arrangers'') to rate structured finance products.[45] This conflict is a subset of the broader conflict of interest already identified in paragraph (b)(1) of Rule 17g–5; namely, ''being paid by issuers and underwriters to determine credit ratings with respect to securities or money market instruments they issue or underwrite.''[46] Specifically, the proposed amendment would have re-designated paragraph (b)(9) of Rule 17g–5 as paragraph (b)(10) and in new paragraph (b)(9) identified the following conflict: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[47]

Furthermore, the Commission proposed amendments to paragraph (a) of Rule 17g–5 that would have established additional conditions—beyond disclosing the conflict and establishing procedures to manage it—that would need to be met for an NRSRO to issue or maintain a credit rating subject to this conflict.[48] Specifically, the Commission proposed a new paragraph (a)(3) that would have required, as a condition to the NRSRO rating a structured finance product, that the information provided to the NRSRO and used by the NRSRO in determining an initial credit rating and, thereafter, performing surveillance on the credit rating be disclosed through a means designed to provide reasonably broad dissemination of the information.[49] The proposed amendments did not specify which entity—the NRSRO or the arranger—would need to disclose the information.

The proposed amendments would have required further that, for offerings not registered under the Securities Act, the information would need to be disclosed only to investors and credit rating agencies on the day the offering price is set and, subsequently, publicly disclosed on the first business day after the offering closes. These additional conditions in new paragraph (a)(3) only would have applied to the conflict identified in proposed new paragraph (b)(9). The conflicts currently identified in paragraph (b) of Rule 17g–5 would have continued to be subject only to the conditions set forth in paragraphs (a)(1) and (a)(2).

The Commission also provided in the *June 16, 2008 Proposing Release* three proposed interpretations of how the information could be disclosed under the requirements of the proposed rule in a manner consistent with the provisions of the Securities Act.[50] These interpretations addressed disclosure under the proposed amendment in the context of public, private, and offshore securities offerings.[51]

C. The Comments on the June 16, 2008 Proposed Amendments

The Commission received 38 comment letters in response to the *June 16, 2008 Proposing Release* that addressed these proposed amendments to Rule 17g–5. The majority of commenters opposed the amendment or raised substantial practical and legal questions about how it would operate when it became effective.[52] Many of these commenters questioned whether the rule would achieve its goal of increasing competition.[53] For example, some stated that it would not provide credit rating agencies the opportunity to determine unsolicited ratings because they would receive the information too late to issue a timely rating or that they would have a lesser understanding of the transaction and would, therefore, be unable to produce an accurate rating.[54] One commenter stated that the surveillance information called for under the proposed amendment is already available to the public for a fee through third party vendors.[55]

Many commenters were concerned with the disclosure of proprietary information.[56] These commenters were concerned that if issuers and underwriters were forced to disclose proprietary information, they would instead choose not to share this information with the NRSROs, which could affect the accuracy of the rating.[57] Commenters also were concerned that disclosing the information could create liability issues under Sections 11 and 12 of the Securities Act, particularly if the disclosing party is not the issuer or

[40] 17 CFR 240.17g–5(c)(1)–(4).

[41] 17 CFR 240.17g–5(c)(1).

[42] 17 CFR 240.17g–5(c)(2). In the *June 5, 2007 Adopting Release,* the Commission stated that the prohibition applied to ''direct'' ownership of securities and, therefore, would not apply to indirect ownership interests, for example, through mutual funds or blind trusts. *See, June 5, 2007 Adopting Release,* 72 FR at 33598.

[43] 17 CFR 240.17g–5(c)(3).

[44] 17 CFR 240.17g–5.

[45] *June 16, 2008 Proposing Release,* 73 FR at 36219–36226, 36251.

[46] 17 CFR 240.17g–5(b)(1). As the Commission noted when adopting Rule 17g–5, the concern with conflict identified in paragraph (b)(1) ''is that an NRSRO may be influenced to issue a more favorable credit rating than warranted in order to obtain or retain the business of the issuer or underwriter.'' *June 5, 2007 Adopting Release,* 72 FR at 33595.

[47] *June 16, 2008 Proposing Release,* 73 FR at 36251.

[48] *June 16, 2008 Proposing Release,* 73 FR at 36219–36226, 36251.

[49] *See id.* This proposed requirement would have been in addition to the current requirements of paragraph (a) that an NRSRO disclose the type of conflict of interest in Exhibit 6 to Form NRSRO; and establish, maintain and enforce written policies and procedures to address and manage the conflict of interest. 17 CFR 240 17g–5(a)(1) and (2).

[50] *See June 16, 2008 Proposing Release,* 73 FR at 36222–36226.

[51] *Id.*

[52] *See id.*

[53] *See* A.M. Best Letter; Raingeard Letter; Citi Letter; DBA Letter; ABA Business Law Committees Letter; SPA Letter; CHSG Letter.

[54] *See, e.g.,* CGSH Letter; Citi Letter; DBA Letter; Egan-Jones Letter; LIUNA Letter; Realpoint Letter.

[55] Trepp Letter.

[56] *See* CMSA Letter; IBFED Letter; MICA Letter; MBA Letter; ASF Letter; Roundtable Letter; SPA Letter; Citi Letter; Lehman Letter.

[57] *See, e.g.* Citi Letter; DBA Letter; Lehman Letter; Moody's Letter; ASF Letter.

originator or if the information disclosed was not prepared for the purpose of being used as offering materials.[58] At least one commenter was concerned that if the information was presented to investors outside the context of a disclosure document, there would be significant risk that investors might misinterpret the data.[59] Other commenters raised concerns that disclosing the information could violate foreign law or, at the very least, put U.S. credit rating agencies at a disadvantage to compete in foreign markets where other credit rating agencies are not subject to the same disclosure requirements.[60] One NRSRO stated that if it were forced to disclose information on offshore offerings, it would have to withdraw from registration as an NRSRO in certain classes.[61] Some commenters suggested that instead of requiring the information to be disclosed to a range of market participants, it should only be disclosed to other NRSROs that seek to undertake an unsolicited rating.[62] The commenters stated that NRSROs would be subject to the same confidentiality agreements that arrangers make with NRSROs they hire to rate structured finance products.[63]

The Commission specifically asked for comments on which party should be required to disclose the information given to an NRSRO. Some commenters believed that the NRSRO was in the best position to disclose this information.[64] However, many of the NRSROs stated that requiring them to disclose the information would put them at risk and they requested that another party be required to make the disclosure or that NRSROs be given a safe harbor if they were required to disclose the information.[65] Commenters also were split about the type of information that should be disclosed. Some commenters believed that all the information an NRSRO receives from an arranger should be required to be disclosed,[66] while other commenters wanted to prevent a ''data dump'' and believed only the information the NRSRO uses to determine a rating should be disclosed.[67] At least one commenter wanted the disclosure to include the methodologies and underlying assumptions used by the NRSRO.[68]

Comments supporting the proposal generally argued that the Commission should go farther to address the conflict by, for example, considering whether it should be prohibited outright,[69] extending its application to other classes of ratings such as those for municipal securities,[70] or requiring the dissemination of more information such as each loan pool submitted to the NRSRO regardless of whether it is the ultimate pool used in determining the final rating.[71]

Several commenters offered technical suggestions as to how the rule should be modified. For example, two commenters requested that the timing of the disclosure of information used to determine a credit rating be made prior to the pricing date—one suggested six weeks and the other two weeks—to provide sufficient time to determine an unsolicited rating.[72] Another commenter suggested that the definition of ''security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage backed securities transaction'' was overly broad and should be clarified.[73]

D. The Re-Proposed Amendments

After reviewing these comments, the Commission has made significant changes to the proposed amendments and is re-proposing them, as modified, for further comment. As discussed in more detail below, under the re-proposed amendments: (1) NRSROs that are hired by arrangers to perform credit ratings for structured finance products would need to disclose to other NRSROs (and only other NRSROs) the deals for which they were in the process of determining such credit ratings; (2) the arrangers would need to provide the NRSROs they hire to rate structured finance products with a representation that they will provide information given to the hired NRSRO to other NRSROs (and only other NRSROs); and (3) NRSROs seeking to access information maintained by the NRSROs and the arrangers would need to furnish the Commission an annual certification that they are accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using the information.

More specifically, under the re-proposed amendments, NRSROs that are paid by arrangers to determine credit ratings for structured finance products would be required to maintain a password protected Internet Web site that lists each deal they have been hired to rate. They also would be required to obtain representations from the arranger hiring the NRSRO to determine the rating that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password protected Internet Web site. NRSROs not hired to determine and monitor the ratings would be able to access the NRSRO Internet Web sites to learn of new deals being rated and then access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the entire initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites would be limited to NRSROs that certify to the Commission on an annual basis, among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and that they will determine credit ratings for at least 10% of the deals for which they obtain information. They also would be required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification.

The Commission is re-proposing these amendments to Rule 17g–5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.[74] The provisions in this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.[75] The Commission preliminarily believes the re-proposed amendments are necessary and appropriate in the public interest and for the protection of investors because they are designed to address conflicts of interest and improve the

[58] *See* ICI Letter; R&I Letter; Moody's Letter; Fitch Letter; S&P Letter; DBRS Letter; ASF Letter; CGSH Letter; ABA Business Law Committees Letter; DBA Letter; Citi Letter; Lehman Letter.

[59] *See* CGSH Letter.

[60] *See* S&P Letter; Moody's Letter; Fitch Letter; R&I Letter.

[61] R&I Letter.

[62] *See* DBRS Letter; ASF Letter; CreditSights Letter.

[63] *See* DBRS Letter; ASF Letter; CreditSights Letter.

[64] *See* Second SIFMA Letter; ICI Letter; Rapid Ratings Letter.

[65] *See* A.M. Best Letter; DBRS Letter; Fitch Letter; S&P Letter; R&I Letter; Moody's Letter. At least one commenter opposed a safe harbor for NRSROs. *See* Rapid Ratings Letter.

[66] *See* Fitch Letter; ICI Letter; CreditSights Letter; S&P Letter.

[67] *See* ASF Letter; CFA Institute Letter.

[68] *See* Council Letter.

[69] *See* RBDA Letter.

[70] *See e.g.,* Lockyer Letter; Nappier Letter; ICI Letter.

[71] *See e.g.,* LIUNA Letter.

[72] *See* Egan-Jones Letter and Realpoint Letter.

[73] ICI Letter; A.M. Best Letter; S&P Letter.

[74] 15 U.S.C. 78o–7(h)(2).

[75] *Id.*

quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products. Generally, the information relied on by the hired NRSROs to rate structured finance products is non-public. This makes it difficult for other NRSROs to rate these securities and money market instruments. As a result, the products frequently are issued with ratings from only one or two NRSROs and only by NRSROs that are hired by the issuer, sponsor, or underwriter (*i.e.*, NRSROs that are subject to the conflict of being repeatedly paid by certain arrangers to rate these securities and money market instruments).

The goal is to increase the number of ratings extant for a given structured finance security or money market instrument and, in particular, promote the issuance of ratings by NRSROs that are not hired by the arranger. This would provide users of credit ratings with a broader range of views on the creditworthiness of the security or money market instrument and potentially expose an NRSRO that was unduly influenced by the ''issuer-pay'' conflict into issuing higher than warranted ratings. Furthermore, the proposal also is designed to make it more difficult for arrangers to exert influence over the NRSROs they hire to determine ratings for structured finance products. Specifically, by opening up the rating process to more NRSROs, the proposal could make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the ratings issued by other NRSROs.

A paragraph-by-paragraph description of the proposed amendments follows.

1. Proposed New Paragraph (b)(9)

As re-proposed, new paragraph (b)(9) of Rule 17g–5 would be the same as proposed in the *June 16, 2008 Proposing Release*.[76] Specifically, the amendment would add the following conflict to the types of conflicts identified in paragraph (b) of the rule: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[77] An NRSRO having this conflict would be subject to the provisions in new paragraph (a)(3) of Rule 17g–5 (as well as the existing disclosure and management provisions in paragraphs (a)(1) and (a)(2)).

Under the proposed rule text, the type of security or money market instrument subject to the conflict would be one that is ''issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction.'' The Commission's intent is to have the definition be sufficiently broad to cover all structured finance products and, therefore, not limit the rule's scope to structured finance products that meet narrower definitions such as the one in Section 3(a)(62)(B)(iv) of the Exchange Act.[78] Moreover, the Commission notes that Section 15E(i)(1)(B) of the Exchange Act (adopted as part of the Rating Agency Act) uses identical language to describe a potentially unfair, coercive or abusive practice relating the ratings of securities or money market instruments.[79] The Commission adopted Rule 17g–6(a)(4), in part, under this statutory authority.[80] This paragraph uses the same language—securities or money market instruments ''issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction''—to describe the prohibited practice. As used in Rule 17g–6 and proposed in new paragraph (b)(9) to Rule 17g–5, the Commission intends this definition to cover the broad range of structured finance products, including, but not limited to, securities collateralized by pools of loans or receivables (*e.g.*, mortgages, auto loans, school loans credit card receivables, leases), collateralized debt obligations, synthetic collateralized debt obligations that reference debt securities or indexes, and hybrid collateralized debt obligations.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g–5. In addition, the Commission requests comment on the following question related to the proposal.

- Would the definition of the securities and money market instruments covered by this conflict—namely, ones ''issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction''—apply to all types of structured finance products? Should the definition be made broader or narrowed?

2. Proposed New Paragraph (a)(3)

As re-proposed, paragraph (a)(3) would be substantially different than proposed in the *June 16, 2008 Proposing Release*.[81] Specifically, an NRSRO subject to the conflict identified in new paragraph (b)(9)—issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument—would have to take a number of actions described in the following sections.

a. Proposed New Paragraph (a)(3)(i)

Under proposed new paragraph (a)(3)(i) of Rule 17g–5, the NRSRO would be required to maintain on a password-protected Internet Web site a list of each structured finance security or money market instrument for which it currently is in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) (see below discussion) can be accessed. The NRSRO would need to post this information no later than when the arranger first transmits information to the NRSRO that is to be used in the rating process. Further, the list would need to be maintained in chronological order so NRSROs accessing the Internet Web site would be able to determine the most recently initiated rating processes.

The text of proposed paragraph (a)(3)(i) only refers to transactions where the NRSRO is in the process of determining an ''initial'' credit rating. The Commission does not intend that the rule require the NRSRO to include on the Internet Web site information about securities or money market instruments for which the NRSRO has issued a final rating and now is monitoring the rating. The proposed amendment is designed to alert other NRSROs about new deals and direct them to the Internet Web site of the arranger where information to determine initial ratings and monitor the ratings can be accessed.

[76] *See June 16, 2008 Proposing Release,* 73 FR at 36251.

[77] *Id.*

[78] 15 U.S.C. 78c(a)(62)(B)(iv). This provision—a component of the definition of ''NRSRO''—refers to issuers of asset-backed securities (as that term is defined in Section 1101(c) of part 229 of Title 17 of the Code of Federal Regulations, as in effect on the date of enactment of this paragraph. *Id.*

[79] 15 U.S.C. 78o–7(i)(1)(B).

[80] 17 CFR 240.17g–6(a)(4).

[81] *See June 16, 2008 Proposing Release,* 73 FR at 36219–36226, 36251.

Consequently, once a final rating is issued, the NRSRO can remove the information about the security or money market instrument from the list it maintains on the Internet Web site. Similarly, if the arranger decides to terminate the rating process without having a final rating issued, the NRSRO would be permitted to remove the information from the list.

Finally, the Commission intends that the address for the Internet Web site contained in the list would be the portal for accessing information the arranger would be making available for all securities and money market instruments subject to this proposed rule. For example, a particular arranger might be disclosing information about hundreds of different structured finance securities and money market instruments on the Internet Web site it maintains for the purposes of this proposed requirement. The NRSRO only would need to disclose the address of this Internet Web site and not the actual link to the information, provided an NRSRO using the arranger's Internet Web site can navigate to the specific deal information it is seeking after entering the site.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g–5. In addition, the Commission requests comment on the following questions related to the proposal.

- Would the information required to be maintained on the NRSRO's Internet site be sufficient to alert other NRSROs that the rating process has commenced and where they can locate information to determine an unsolicited rating? For example, should the rule require the NRSRO to alert by e-mail all NRSROs that obtain a password to access the site when new information is posted to the site? Would such a requirement be feasible?
- Are there specific requirements that the Commission could put into the rule text to clarify how the information should be presented on the NRSRO's Internet Web site?

b. Proposed New Paragraph (a)(3)(ii)

Under proposed new paragraph (a)(3)(ii) of Rule 17g–5, the NRSRO would be required to provide free and unlimited access to the password-protected Internet Web site it maintains during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in proposed new paragraph (e) of Rule 17g–5 (see below discussion) that covers that calendar year. The Commission intends that the only prerequisite to an NRSRO obtaining access to the Internet Web site is that the NRSRO execute the certification described below and furnish it to the Commission. Nonetheless, it would be appropriate for the NRSRO maintaining the Internet Web site to require an NRSRO seeking access to the site to represent that the copy of the certification being submitted to obtain access was a true copy of the certification and that it was, in fact, furnished to the Commission.

Proposed paragraphs (a)(3)(i) and (ii) are designed to create a mechanism to alert other NRSROs seeking to rate finance products that an arranger has initiated the rating process and to inform the other NRSROs where information being provided by the arranger to the hired NRSRO to determine the credit rating may be obtained. The goal is to provide the other NRSROs with the information being provided to the hired NRSRO on a real-time basis so they have sufficient time to develop initial ratings contemporaneously with the hired NRSRO. It would be incumbent on the other NRSROs to routinely monitor the Internet Web sites of the issuer-pay NRSROs to ascertain when new structured finance securities or money market instruments were in the process of being rated.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g–5. In addition, the Commission requests comment on the following question related to the proposal.

- Should the NRSRO maintaining the Internet Web site be permitted to charge a fee for other NRSROs to access it? For example, should they be permitted a fee to recover some or all of their costs for maintaining the Internet Web site?

c. Proposed New Paragraph (a)(3)(iii)

Under proposed paragraph (a)(3)(iii), the NRSRO would be required to obtain from the arranger of each structured finance security or money market instrument four representations described below. The rule would provide that NRSRO could rely on the representations if the reliance was reasonable. Obtaining the representations would provide the NRSRO with a safe harbor if the arranger did not act in accordance with a representation. However, the NRSRO would need to demonstrate that its reliance on the representation was reasonable. For example, if the NRSRO became aware that an arranger breached prior representations a number of times, it would not be reasonable to rely on a future representation.

The four representations are discussed in the sections below.

i. Proposed New Paragraph (a)(3)(iii)(A)

Under proposed new paragraph (a)(3)(iii)(A), the arranger would need to represent that it will maintain the information described in proposed paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of Rule 17g–5 available on an identified password protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating. Under this representation, the arranger would agree, in effect, to make the information it provides to the hired NRSRO available to any other NRSRO at the same time. Thus, the arranger would need to post the information on the Internet Web site at the same time the information is given to the hired NRSRO. Any time this information is updated or new information is given to the hired NRSRO, the information would need to be posted on the Internet Web site contemporaneously.

Furthermore, the arranger must tag the information in a manner that informs NRSROs accessing the Internet Web site which information currently is operative for the purpose of determining the credit rating. The purpose of this ''current'' requirement is to ensure that NRSROs accessing the Internet Web site would be using the correct information to determine their credit ratings. For example, the Commission understands that the composition of the pool of assets underlying a structured finance product may change during the rating process as some assets are removed from the pool and replaced with other assets. The Internet Web site would need to include each asset pool provided to the NRSRO hired to rate the security or money market instrument. If more than one loan tape has been provided, the arranger would need to identify which loan tape was currently being relied on to determine the credit rating. Moreover, the arranger would need to indicate which information is final and will be used by the NRSRO to determine the credit rating that is published. It would be in the interest of the arranger to ensure that the NRSROs developing credit ratings through accessing the Internet Web site rely on up-to-date and final information. Otherwise, their credit ratings may be based on erroneous information, which could impact the final rating.

The Commission considered only requiring that the final information be posted on the Internet Web site. However, this could put the NRSROs developing ratings using the Internet Web sites at a disadvantage since they might be getting the information shortly

before the hired NRSRO issues its initial rating. The Commission preliminarily believes that the inclusion of all iterations of the various components of information (*e.g.*, loan tapes, legal documents) used to determine the credit rating would allow the NRSROs accessing the Internet Web site to more actively participate in the rating process as they could follow the progression of changes that lead to the final information upon which the credit rating should be based. This could make it easier for them to more quickly issue an initial credit rating when the loan pool, legal documentation and other relevant information is finalized. The goal is to have them issue credit ratings contemporaneously with the hired NRSRO so investors can have the benefit of these ratings before purchasing the securities or money market instruments.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g–5. In addition, the Commission requests comment on the following question related to the proposal.

• Should the Commission only require that final information be posted on the Internet Web site to avoid the potential that an NRSRO would use erroneous information to determine a credit rating?

ii. Proposed New Paragraph (a)(3)(iii)(B)

Under proposed new paragraph (a)(3)(iii)(B), the arranger would need to represent that it will provide access to its password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in proposed paragraph (e) of Rule 17g–5 that covers that calendar year. The Commission is proposing to limit the access to this information to other NRSROs. The intent is to address concerns that disclosing this information to a broader array of entities would implicate disclosure requirements under the Securities Act. The Commission acknowledges that investors and other market participants may benefit from greater disclosure of this information. However, the Commission believes that the more appropriate mechanism to enhance such disclosure would be to amend rules under the Securities Act. The Commission notes in particular that Regulation AB, which is a principles-based rule, requires among other things, disclosure of the material characteristics of the asset pool, the structure of the transaction and of any material credit enhancements.[82] When adopting Regulation AB in 2004, the Commission noted that a determination that information would be provided to a credit rating agency should be considered in determining whether information is not material under Regulation AB:

> If an issuer concludes that it need not disclose information in response to a particular disclosure line item because the issuer determines that the information is not material, but agrees to provide the information to credit rating agencies, the issuer should consider its determination regarding materiality in the context of the decision to provide the information to rating agencies.[83]

The amendment, as proposed in the *June 16, 2008 Proposing Release,* would have allowed credit rating agencies not registered with the Commission to obtain the information about the structured finance products necessary to determine ''unsolicited'' credit ratings.[84] The Commission preliminarily believes that allowing these entities to access the information could be problematic because the Commission has no authority to examine them and, thereby, review whether they are using the information solely to develop credit ratings. Preliminarily, the Commission believes that the better approach is to limit access to NRSROs. Furthermore, this could provide an incentive for credit rating agencies to register with the Commission, which would benefit users of credit ratings by increasing the number of NRSROs.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g–5. In addition, the Commission requests comment on the following question related to the proposal.

• Should other entities besides NRSROs be permitted to access the arrangers' Internet Web sites? For example, should credit rating agencies not registered with the Commission be permitted to access the sites? If so, how could the amendment be crafted to ensure that only entities meeting the definition of ''credit rating agency'' in Section 3(a)(61) of the Exchange Act be permitted to access the arrangers' Internet Web sites?

iii. Proposed New Paragraph (a)(3)(iii)(C)

Under proposed new paragraph (a)(3)(iii)(C), the arranger would need to represent that it will post on its password-protected Internet Web site all information the arranger provides to the NRSRO for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the NRSRO.

The Commission anticipates that the information that would be disclosed (*i.e.*, the information provided to the hired NRSRO to determine the initial rating) generally would include the characteristics of the assets in the pool underlying or referenced by the structured finance product and the legal documentation setting forth the capital structure of the trust, payment priorities with respect to the tranche securities issued by the trust (the waterfall), and all applicable covenants regarding the activities of the trust. For example, for an initial rating for an RMBS, this information generally would include the loan tape (frequently a spreadsheet) that identifies each loan in the pool and its characteristics such as type of loan, principal amount, loan-to-value ratio, borrower's FICO score, and geographic location of the property. In addition, the disclosed information also would include a description of the structure of the trust, the credit enhancement levels for the tranche securities to be issued by the trust, and the waterfall cash flow priorities.

The Commission intends that the proposed amendment only apply to written information provided to the hired NRSRO. However, if the amendment is adopted, the Commission would review whether arrangers started providing information about the structured finance product orally to avoid having to disclose it on their Internet Web sites. The Commission believes that ultimately this would not benefit the arranger since the NRSROs developing credit ratings through using the Internet Web sites would be basing their ratings without the benefit of all of the information. This could adversely impact the ratings and lead to more frequent rating actions during the surveillance process when the securities or money market instruments do not perform as anticipated. Moreover, because the information would be disclosed only to other NRSROs,

[82] *See* Items 1111, 1113 and 1114 of Regulation AB.

[83] Securities Act Release No. 8518 (December 22, 2004).

[84] *June 16, 2008 Proposing Release,* 73 FR at 36251.

concerns of arrangers about releasing proprietary information should be mitigated.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g–5. In addition, the Commission requests comment on the following question related to the proposal.

• Should the amendment require the arranger to represent that it will not provide any information to the hired NRSRO that is material without also disclosing that information on the Internet Web site?

• For the purposes of this amendment, should the Commission provide a standardized list of information that, at a minimum, should be disclosed? If so, what information should the list include? Do any commenters believe that this would have the effect of impermissibly regulating the substance of credit ratings and the methodologies used to determine credit ratings?

iv. Proposed New Paragraph (a)(3)(iii)(D)

Under proposed new paragraph (a)(3)(iii)(D), the arranger would need to represent that it will post on the password-protected Internet Web site all information the arranger provides to the NRSRO for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the NRSRO. This would be the information, if any, that the arranger provides to the hired NRSRO to perform any ratings surveillance.[85] The Commission anticipates that generally this information would consist of reports from the trustee describing how the assets in the pool underlying the structured finance product are performing. For an RMBS credit rating, this information likely would include the ''trustee report'' customarily generated to reflect the performance of the loans constituting the collateral pool. For example, an RMBS trustee may generate reports describing the percentage of loans that are 30, 60, and 90 days in arrears, the percentage that have defaulted, the recovery of principal from defaulted loans, and information regarding any modifications to the loans in the asset pool.

The disclosure of this information would allow NRSROs that determined unsolicited initial ratings to monitor on a continuing basis the creditworthiness of the tranche securities issued by the trust. Under the representation, the arranger would need to provide this information at the time it is provided to the NRSRO hired to perform the rating. The Commission notes that the representation only relates to information provided by the arranger to the hired NRSRO. If the hired NRSRO conducts surveillance using information provided by third-party vendors, this information would not need to be disclosed. Instead, the NRSROs monitoring ''unsolicited'' ratings would need to contract with the third-party vendor to obtain the information.

As with the initial rating information provided under proposed paragraph (a)(3)(iii)(C), the Commission does not intend the rule to require the disclosure of oral communications between the NRSRO and the issuer, sponsor, or underwriter. The information provided on the issuer's Web site only would need to be the written information given to the NRSRO.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g–5. In addition, the Commission requests comment on the following question related to the proposal.

• What type of information for monitoring ratings of structured finance products is typically provided by arrangers to NRSROs? What type of information is typically obtained by NRSROs contracting with third-party vendors?

• For the purposes of this amendment, should the Commission provide a standardized list of information that, at a minimum, should be disclosed? If so, what information should the list include? Do any commenters believe that this would have the effect of impermissibly regulating the substance of credit ratings and the methodologies used to determine credit ratings?

3. Proposed New Paragraph (e)

An NRSRO, in order to access the Internet Web sites maintained by other NRSROs and the arrangers, would need to annually execute and furnish to the Commission the following certification:

> The undersigned hereby certifies that it will access the Internet Web sites described in § 240.17g–5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to § 240.17g–5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 78o–7(g)(1)) and § 240.17g–4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to § 240.17g–5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by the certification. Further, the undersigned certifies one of the following as applicable: (1) In the most recent calendar year during which it accessed information pursuant to § 240.17g–5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in § 240.17g–5(a)(3) and determined and maintained credit ratings for [Insert Number] of such securities and money market instruments; or (2) The undersigned previously has not accessed information pursuant to § 240.17g–5(a)(3) 10 or more times in a calendar year.

The NRSRO would need to furnish this certification to the Commission each calendar year that the NRSRO seeks access to the NRSRO and arranger Internet Web sites. In addition, the NRSRO would be required to certify that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments if it accesses information pursuant to the proposed rule 10 or more times in a calendar year. The use of the term ''issued securities and money market instruments'' is intended to address potential deals that are posted on the Internet Web sites but that ultimately do not result in final ratings because the arranger decides not to issue the securities or money market instruments. An NRSRO that accessed such information would not need to count it among the final deals that would be used to determine whether it met the 10% threshold.

The 10% threshold is designed to require the NRSRO to determine a meaningful amount of credit ratings without forcing it to undertake work that it may not have the capacity or resources to perform. For example, the NRSRO may access information about a proposed deal that involves a structure or a type of assets that are new and that the NRSRO has not developed a methodology to incorporate into its ratings. It would not be appropriate or prudent to require the NRSRO to determine a credit rating in this case. At the same time, the Commission believes there should be some minimum level of credit ratings issued to demonstrate that the NRSRO is accessing the information for the purpose of determining credit ratings.

An NRSRO that has accessed information under this program for one calendar would be required to report in

[85] Re-proposed paragraph (a)(3)(iii)(D) of Rule 17g–5.

its next certification the number of times it accessed the information for issued securities and money market instruments and the number of credit ratings determined using that information. This is designed to provide a level of verification that the NRSRO is, in fact, accessing the information for purposes of determining credit ratings.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g–5. In addition, the Commission requests comment on the following questions related to the proposal.

• Should the minimum requirement for the number of credit ratings that must be determined using the information posted on arranger Internet Web sites be higher than 10% of the deals reviewed? For example, should it be 15%, 20%, 50% or a larger percentage? Alternatively, should the requirement be less than 10%? For example, should it be 5% or 2%?

• If an NRSRO accesses information 10 or more times in a calendar year and does not determine credit ratings for 10% or more of the deals reviewed, should the NRSRO be prohibited from accessing the NRSRO and sponsor information in the future? If so, should the NRSRO be prohibited from accessing the information for a prescribed period of time (*e.g.*, 6 months, 12 months, 18 months, 24 months or some longer period)?

E. Proposed Amendment to Regulation FD

The Commission is proposing to amend Regulation FD [86] to accommodate the information disclosure program that would be established under the re-proposed amendments to paragraphs (a) and (b) of Rule 17g–5. Regulation FD requires that an issuer or any person acting on an issuer's behalf publicly disclose material non-public information if the information is disclosed to certain persons.[87] Under Rule 100(b)(2)(iii) of Regulation FD, the issuer or person acting on the issuer's behalf need not make the public disclosure if the disclosure of material non-public information is made to an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available.[88] Thus, under this provision, the information can be disclosed to a credit rating agency if: (1) It is being disclosed for the purpose of developing a credit rating; and (2) the credit rating agency makes the rating publicly available. The Commission is proposing to amend Rule 100(b)(2)(iii) of Regulation FD to permit the disclosure of material non-public information to NRSROs irrespective of whether they make their ratings publicly available. This would accommodate subscriber-based NRSROs that do not make their ratings publicly available for free and it would accommodate NRSROs that access the information under the proposed Rule 17g–5 disclosure program but ultimately do not issue a credit rating using the information.

Under the re-proposed amendments to paragraphs (a) and (b) of Rule 17g–5, arrangers would agree to disclose information to any credit rating agency registered with the Commission as an NRSRO. The information disclosed likely would include material non-public information and, consequently, the arranger would need to rely on the exclusions to Regulation FD in order to disclose it to NRSROs without simultaneously making a public disclosure of the information. Currently, the exclusions in Regulation FD include disclosing material non-public information ''to an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available.'' [89] NRSROs that operate under the issuer-pays model make their ratings available to the public for free because they typically are compensated by the issuer or arranger whose security is being rating. Subscriber-based NRSROs are not compensated by the issuer or arrangers but, rather, by subscribers who pay for access to their ratings. Consequently, their credit ratings are not disclosed to the public free of charge but, instead, only to those persons who agree to pay them for access to the credit ratings.

The Commission preliminarily believes that credit rating agencies that are registered with the Commission as NRSROs should be able to receive material non-public information from arrangers for the purpose of developing unsolicited credit ratings for structured finance products. The Commission recognizes that their credit ratings are not as broadly disseminated as the credit ratings of the issuer-pays credit rating agencies. However, because the proposed amendment would limit the exclusion to NRSROs, the entities receiving the material non-public information would be subject to Section 15E(g) of the Exchange Act and Rule 17g–4 thereunder.[90] These statutory and regulatory provisions require NRSROs to establish, maintain and enforce policies and procedures reasonably designed to prevent the misuse of material non-public information. Furthermore, the Commission has examination authority with respect to NRSROs. Moreover, the proposed disclosure program for Rule 17g–5 would be triggered only when an issuer-pay NRSRO is hired to perform a credit rating. Therefore, a publicly disclosed credit rating for the structured finance product likely would be issued along with any unsolicited ratings from subscriber-based NRSROs. For these reasons, the Commission preliminarily believes it would be appropriate to eliminate the requirement in Regulation FD to make the ratings public for credit rating agencies that are registered with the Commission as NRSROs and who receive the information under the proposed disclosure program under Rule 17g–5.

Finally, the Commission also is proposing to amend the current text in Rule 100(b)(2)(iii) of Regulation FD that identifies credit rating agencies as ''an entity whose primary business is the issuance of credit ratings.'' [91] Since the adoption of Regulation FD, Congress, through the Rating Agency Act, enacted a statutory definition of ''credit rating agency.'' [92] The definition is in Section 3(a)(61) of the Exchange Act.[93] The Commission, therefore, proposes to use the statutory definition of ''credit rating agency'' in Rule 100(b)(2)(iii) of Regulation FD.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g–5. In addition, the Commission requests comment on the following questions related to the proposal.

• Is the proposed change to Regulation FD necessary or appropriate? Would a different approach work better? For instance, would it be better to revise the exception in Regulation FD to apply to any information given to any NRSRO so long as the ratings of at least one NRSRO are publicly available.

• Should the Commission broaden the exclusion to information that is provided to NRSROs beyond the proposed Rule 17g–5 disclosure program (*e.g.*, information provided to develop ratings for corporate issuers)?

[86] 17 CFR 243.100, 243.101, 243.102 and 243.103.

[87] *See* 17 CFR 243.100(a).

[88] *See* 17 CFR 243.100(b)(2)(iii).

[89] 17 CFR 243.100(b)(2)(iii).

[90] 15 U.S.C. 78o–7(g).

[91] 17 CFR 243.100(b)(2)(iii).

[92] *See* 15 U.S.C. 78c(a)(61).

[93] 15 U.S.C. 78c(a)(61).

• Does disclosure of this information to all NRSROs raise any concerns that Regulation FD was designed to address?

• Would the Commission's use of the statutory definition of ''credit rating agency'' in Section 3(a)(61) of the Exchange Act in Rule 100(b)(2)(iii) of Regulation FD prevent entities that currently receive information under the exclusion from continuing to receive such information? Commenters that believe it would prevent entities from continuing to receive the information should specifically describe how the entities in question would not meet the statutory definition of ''credit rating agency.''

IV. General Request for Comment

The Commission invites interested persons to submit written comments on any aspect of the proposed amendments, in addition to the specific requests for comments. Further, the Commission invites comment on other matters that might have an effect on the proposals contained in the release, including any competitive impact.

V. Paperwork Reduction Act

Certain provisions of the proposed amendment to Rule 17g–2 and the re-proposed amendment to Rule 17g–5 (collectively, the ''Proposed Rule Amendments'') contain a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA''). The Commission is submitting these proposed amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:

(1) Rule 17g–2, Records to be made and retained by nationally recognized statistical rating organizations (OMB Control Number 3235–0628); and

(2) Rule 17g–5, Conflicts of interest (a proposed new collection of information).

A. Collections of Information Under the Proposed Rule Amendments

The Commission is proposing for comment rule amendments to prescribe additional requirements for NRSROs. The proposed amendments to Rule 17g–2 would require NRSROs to make publicly available ratings action histories for certain issuer-paid credit ratings. In addition, the re-proposed amendments to Rule 17g–5 would modify rules the Commission adopted in 2007 to implement conflicts of interest requirements under the Rating Agency Act. Both sets of amendments would contain recordkeeping and disclosure requirements that would be subject to the PRA. The collection of information obligations imposed by the Proposed Rule Amendments would be mandatory. The Proposed Rule Amendments, however, would apply only to credit rating agencies that are registered with the Commission as NRSROs. Such registration is voluntary.[94]

In summary, the Proposed Rule Amendments would require an NRSRO to publicly disclose certain ratings actions histories and would require an NRSRO and an issuer to disclose to other NRSROs certain information required to determine and monitor a credit rating for a structured finance security or money market instrument.[95]

B. Proposed Use of Information

The collections of information in the Proposed Rule Amendments are designed to provide users of credit ratings with information upon which to evaluate the performance of NRSROs and to enhance the accuracy of credit ratings for structured finance products by increasing competition among NRSROs who rate these products.

C. Respondents

In adopting the final rules under the Rating Agency Act, the Commission estimated that approximately 30 credit rating agencies would be registered as NRSROs.[96] The Commission believes that this estimate continues to be appropriate for identifying the number of respondents for purposes of the amendments. Since the initial set of rules under the Rating Agency Act became effective in June 2007, ten credit rating agencies have registered with the Commission as NRSROs.[97] The registration program has been in effect for over a year; consequently, the Commission expects additional entities will register. While 20 more entities may not ultimately register, the Commission believes the estimate is within reasonable bounds and appropriate given that it adds an element of conservatism to its paperwork burden estimates as well as cost estimates.

In addition, under the re-proposed amendments to Rule 17g–5, arrangers of structured finance products would need to disclose certain information to NRSROs. For purposes of the PRA estimate, based on staff information gained from the NRSRO examination process, the Commission estimates that there would be approximately 200 respondents, which is the same number of respondents the Commission originally proposed would be affected by the amendments. The Commission received no comments on this estimate when originally proposed.

The Commission generally requests comment on all aspects of these estimates for the number of respondents and the number of arrangers. In addition, the Commission requests specific comment on the following items related to these estimates.

• Should the Commission use the number of credit rating agencies currently registered as NRSROs rather than the estimated number of 30 ultimate registrants? Alternatively, is there a basis to estimate a different number of likely registrants?

• Should the Commission use different estimates for the number of NRSROs that would be subject to the proposed amendments to Rule 17g–2 and re-proposed amendments to Rule 17g–5. For example, should the Commission develop estimates based on the number of NRSROs that determine issuer-paid credit ratings as opposed to subscriber-paid credit ratings?

• Are there sources that could provide credible information that could be used to determine the number of issuers that would be subject to the proposed paperwork burdens? Commenters should identify any such sources and explain how a given source could be used to either support the Commission's estimate or arrive at a different estimate.

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

D. Total Annual Recordkeeping and Reporting Burden

As discussed in further detail below, the Commission estimates the total recordkeeping burden resulting from the Proposed Rule Amendments would be approximately 169,045 hours on an

[94] *See* Section 15E of the Exchange Act (15 U.S.C. 78o–7).

[95] *See* proposed Rule 17g–2(d) and re-proposed Rule 17g–5(a)(3), (b)(9) and (e).

[96] *See June 5, 2007 Adopting Release*, 72 FR at 33607.

[97] A.M. Best Company, Inc.; DBRS Ltd.; Fitch; Japan Credit Rating Agency, Ltd.; Moody's; Rating and Investment Information, Inc.; S&P; LACE Financial Corp.; Egan-Jones Rating Company; and Realpoint LLC.

annual basis [98] and 69,315 hours on a one-time basis.[99]

The total annual and one-time hour burden estimates described below are averages across all types of NRSROs expected to be affected by the Proposed Rule Amendments. The size and complexity of NRSROs range from small entities to entities that are part of complex global organizations employing thousands of credit analysts. Consequently, the burden hour estimates represent the average time across all NRSROs. The Commission further notes that, given the significant variance in size between the largest NRSROs and the smallest NRSROs, the burden estimates, as averages across all NRSROs, are skewed higher because the largest firms currently predominate in the industry.

1. Proposed Amendments to Rule 17g–2

Rule 17g–2 requires an NRSRO to make and keep current certain records relating to its business and requires an NRSRO to preserve those and other records for certain prescribed time periods.[100] The version of Rule 17g–2 adopted today (''New Rule 17g–2'') requires an NRSRO to make and retain a record showing the ratings action histories and with respect to each current credit rating.[101] New Rule 17g–2 also requires an NRSRO to make public, in XBRL format and with a six-month grace period, the ratings action histories required under new paragraph (a)(8) for a random sample of 10% of the issuer-paid credit ratings for each ratings class for which it has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated.[102]

When adopting New Rule 17g–2, the Commission determined that, on average, an NRSRO subject to the requirements will spend approximately 30 hours to publicly disclose the rating action histories in XBRL format and, thereafter, 10 hours per year to update this information.[103] Accordingly, the total aggregate one-time burden to the industry to make the rating action histories publicly available in XBRL format will be 210 hours,[104] and the total aggregate annual burden hours will be 70 hours.[105] The Commission based the total estimates on the fact that based on information furnished on Form NRSRO, seven of the ten currently registered NRSROs issue 500 or more ratings under the issuer-pay model in at least one of the classes of ratings for which they are registered. The Commission believed that even as the number of registered NRSROs expands to the 30 ultimately expected to register, this number will remain constant, as new entrants are likely to operate on a subscriber-pay basis, at least in the near future. In addition, the Commission believed that each of the NRSROs affected by this new requirement already has, or will have, an Internet Web site.

The proposed amendments to Rule 17g–2(d) would require NRSROs to publicly disclose ratings action histories of all outstanding issuer-paid credit ratings with up to a 12-month time lag before a new rating action must be disclosed. The Commission estimates, based on staff experience, that the hour burdens for an NRSRO to publicly disclose this information would increase 50% from the current estimates for disclosing ratings action histories for a randomly selected sample of 10% of the outstanding issuer-paid credit ratings. Therefore, the Commission estimates that the one-time annual hour burden will increase from 30 hours to 45 hours [106] and the annual hour burden will increase from 10 hours to 15 hours.[107] Accordingly, the Commission estimates that the total aggregate one-time burden for NRSROs to comply with this requirement would be approximately 315 hours,[108] and the total aggregate annual burden hours would be approximately 105 hours.[109]

The Commission requests comment on all aspects of these burden estimates for the proposed amendments to Rule 17g–2(d). In addition, the Commission requests specific comment on the following items related to these estimates:

- If the Commission were to adopt a final rule that subjected subscriber-paid credit ratings to the public disclosure requirement, would the hour burden estimates per firm be the same as estimated by the Commission above or would they change. Commenters should give specific hour estimates in their comments.
- If the Commission were to adopt a final rule subjecting subscriber-paid credit ratings to the public disclosure requirements being adopted today (the random sample of 10% of issuer-paid credit ratings in a class of rating), would the hour burden estimates per firm be the same as estimated by the Commission in the Adopting Release or would they change. Commenters should give specific hour estimates in their comments.
- Are there publicly available reports or other data sources the Commission should consider in arriving at these burden estimates?
- Are the estimates of the one-time and recurring burdens of the re-proposed additional disclosures accurate? If not, should they be higher or lower?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

2. Re-Proposed Rule 17g–5

Rule 17g–5 requires an NRSRO to manage and disclose certain conflicts of interest.[110] The rule also prohibits specific types of conflicts of interest.[111] The re-proposed amendments to Rule 17g–5 would add an additional conflict to paragraph (b) of Rule 17g–5 for NRSROs to manage. This re-proposed conflict of interest would be issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[112] Under the re-proposal, an NRSRO would be prohibited from issuing a credit rating for a structured finance product, unless certain information about the transaction and the assets underlying the structured finance product are disclosed.[113]

Specifically, an NRSRO rating such products would need to disclose to other NRSROs the following information on a password protected Internet Web site:

- A list of each such security or money market instrument for which it is currently in the process of determining

[98] This total is derived from the total annual hours set forth in the order that the totals appear in the text: 105 + 14,880 + 4,000 + 150,000 + 60 = 169,045.

[99] This total is derived from the total one-time hours set forth in the order that the totals appear in the text: 315 + 9,000 + 60,000 = 69,315.

[100] 17 CFR 240.17g–2.

[101] Paragraph (a)(8) of Rule 17g–2.

[102] Amendment to Rule 17g–2(d).

[103] The Commission also based this estimate on the current one-time and annual burden hours for an NRSRO to publicly disclose its Form NRSRO. No alternatives to these estimates as proposed were suggested by commenters and the Commission adopted these hour burdens. *See Companion Adopting Release.*

[104] 30 hours × 7 NRSROs = 210 hours.

[105] 10 hours × 7 NRSROs = 70 hours.

[106] 50% of 30 hours = 15 hours + 30 hours = 45 hours.

[107] 50% of 10 hours = 5 hours + 10 hours = 15 hours.

[108] 45 hours × 7 NRSROs = 315 hours.

[109] 15 hours × 7 NRSROs = 105 hours.

[110] 17 CFR 240.17g–5.

[111] 17 CFR 240.17g–5(c).

[112] *See* re-proposed Rule 17g–5(b)(9). The current paragraph (b)(9) would be renumbered as (b)(10).

[113] *See* re-proposed Rule 17g–5(a)(3).

an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of re-proposed Rule 17g–5 can be accessed.[114]

For purposes of this PRA, the Commission estimates that it would take an NRSRO approximately 300 hours to develop a system, as well as policies and procedures, for the disclosures required by the re-proposed rule. This estimate is based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.[115] Accordingly, the Commission believes, based on staff experience, an NRSRO would take approximately 300 hours on a one-time basis to implement a disclosure system to comply with the proposal in that a respondent would need a set of policies and procedures for disclosing the information, as well as a system for making the information publicly available. This would result in a total one-time hour burden of 9,000 hours for 30 NRSROs.[116]

In addition to the one-time hour burden, the re-proposed amendments would result in an annual hour burden to the NRSRO arising from the requirement to make disclosures for each deal being rated. In the June 18 Proposing Release, the Commission estimated that a large NRSRO would have rated approximately 2,000 new RMBS and CDO transactions in a given year. The Commission based this estimate on the number of new RMBS and CDO deals rated in 2006 by two of the largest NRSROs which rated structured finance transactions. The Commission adjusted this number to 4,000 transactions in order to account for other types of structured finance products, including commercial real estate MBS and other consumer assets. Accordingly, the Commission estimated that a large NRSRO would rate approximately 4,000 new structured finance transactions during a calendar year. The Commission did not receive any comments with respect to that estimate. The Commission recognizes that the number of new structured finance transactions has dropped precipitously since 2006 because of the credit market turmoil. Nonetheless, the Commission preliminarily is retaining the estimate of 4,000 new deals per year as an element of conservatism and to account for future market developments.

Based on the number of outstanding structured finance ratings submitted by the ten registered NRSROs on their Form NRSROs, the Commission estimates that the three largest NRSROs account for 97% of the market for structured finance ratings. Therefore, the Commission estimates that each of the NRSROs in this category would be hired to rate 97% of the 4,000 new deals per year for a total of 11,640 ratings.[117] The Commission further estimates that the NRSROs that are not in this category would each rate 3% of the 4,000 new deals for a total of 3,240 ratings.[118] Thus, the Commission estimates that the total structured finance ratings issued by all NRSROs in a given year would be 14,880.[119] Based on staff experience, the Commission estimates that it would take approximately 1 hour per transaction for the NRSRO to update the lists maintained on the NRSROs' password protected Internet Web sites. Therefore, the Commission estimates for purposes of the PRA that the total annual hour burden for the industry would be 14,880 hours.[120]

The re-proposed amendments also would require that the arranger disclose the following information:

- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and
- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.[121]

The Commission estimates that there would be approximately 200 such respondents. For purposes of this PRA, the Commission estimates that it would take a respondent approximately 300 hours to develop a system, as well as policies and procedures, for the disclosures required by the re-proposed rule. This estimate is based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.[122] Accordingly, the Commission believes, based on staff experience, an arranger would take approximately 300 hours on a one-time basis to implement a disclosure system to comply with the proposal, which includes the estimate that a respondent would need a set of policies and procedures for disclosing the information, as well as a system for making the information publicly available. This would result in a total one-time hour burden of 60,000 hours for 200 respondents.[123] The Commission received no comments on an identical burden estimate in the original proposing release.

In addition to the one-time hour burden, the re-proposed amendments would result in an annual hour burden for arrangers. Specifically, the re-proposed amendments would require disclosure of information on a transaction-by-transaction basis when an initial rating process is commenced. Based on staff experience, the Commission estimates that each respondent would disclose information for approximately 20 new transactions per year and that it would take approximately 1 hour per transaction to post the information to the password protected Internet Web sites. The Commission estimates that a large NRSRO would have rated approximately 2,000 new RMBS and CDO transactions in a given year. The Commission is basing this estimate on the number of new RMBS and CDO deals rated in 2006 by two of the largest NRSROs that rated structured finance transactions. The Commission is adjusting this number to 4,000 transactions in order to include other types of structured finance products, including commercial MBS and other consumer assets. Therefore, the Commission estimates for purposes of the PRA that each respondent would arrange approximately 20 new

[114] *See* re-proposed Rule 17g–5(a)(3)(i).

[115] *See June 5, 2007 Adopting Release*, 72 FR at 33609.

[116] 300 hours × 30 NRSROs = 9,000 hours.

[117] (4,000 ratings × .97) × 3 = 11,640.

[118] (4,000 ratings × .03) × 27 = 3,240.

[119] (3,880 × 3) + (120 × 27) = 14,880 transactions.

[120] 14,880 ratings × 1 hour = 14,880 hours.

[121] *See* re-proposed Rule 17g–5(a)(3)(iii).

[122] *See June 5, 2007 Adopting Release*, 72 FR at 33609.

[123] 300 hours × 200 respondents = 60,000 hours.

transactions per year.[124] The Commission notes that the number of new transactions per year would vary by the size of issuer and that this estimate would be an average across all respondents. Larger respondents may arrange in excess of 20 new deals per year, while a smaller arranger may only initiate one or two new deals on an annual basis. Based on this analysis, the Commission estimates that it would take a respondent approximately 20 hours [125] to disclose this information under the re-proposed rule, on an annual basis, for a total aggregate annual hour burden of 4,000 hours.[126] The Commission received no comments on an identical burden estimate in the original proposing release.

In addition, re-proposed Rule 17g–5(a)(3)(iii)(D) would require disclosure of information provided to an NRSRO to be used for credit rating surveillance on a security or money market instrument. Because surveillance would cover more than just initial ratings, the Commission, in the original proposing release, estimated based on staff information gained from the NRSRO examination process that monthly disclosure would be required with respect to approximately 125 transactions on an ongoing basis. Also based on staff information gained from the NRSRO examination process, the Commission estimated that it would take a respondent approximately 0.5 hours per transaction to disclose the information. Therefore, the Commission estimates that each respondent would spend approximately 750 hours [127] on an annual basis disclosing information under re-proposed Rule 17g–5, for a total aggregate annual burden hours of 150,000 hours.[128] The Commission received no comments on an identical estimate in the original proposing release.

Finally, an NRSRO that wishes to access information on another NRSRO's Web site or on an arranger's Web site would need to provide the Commission with an annual certification described in proposed new paragraph (e) to Rule 17g–5. The Commission estimates that this annual certification would become a matter of routine over time and should take less time than it takes an NRSRO to submit its annual certification under Rule 17g–1(f).[129] The annual certification required under Rule 17g–1(f) involves the disclosure of substantially more information than the certification in proposed paragraph (e) of Rule 17g–5. The Commission estimated that it would take an NRSRO approximately 10 hours to complete the Rule 17g–1(f) annual certification.[130] Given that the proposed paragraph (e) certification would require much less information, the Commission estimates, based on staff experience, that it would take an NRSRO approximately 20% of the time it takes to do the Rule 17g–5 annual certification. Further, for the purposes of the estimate, the Commission is assuming that all 30 NRSROs ultimately registered with the Commission would complete the certification. For these reasons, the Commission estimates it would take an NRSRO approximately 2 hours [131] to complete the proposed paragraph (e) certification for an aggregate annual hour burden to the industry of 60 hours.[132]

The Commission again requests comment on all aspects of these burden estimates for the amendments to Rule 17g–5 as re-proposed. In addition, the Commission requests specific comment on the following items related to these estimates:

- Are there publicly available reports or other data sources the Commission should consider in arriving at these burden estimates?
- Are the estimates of the one-time and recurring burdens of the re-proposed additional disclosures accurate? If not, should they be higher or lower?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

E. Collection of Information Is Mandatory

The recordkeeping and notice requirements for the Proposed Rule Amendments would be mandatory.

F. Confidentiality

The disclosures that would be required under the proposed amendments to Rule 17g–2(d) would be public. The disclosures that would be required under the re-proposed amendments to Rule 17g–5 would be made available to other NRSROs. The NRSROs would need to provide certifications agreeing to keep the propose Rule 17g–5 information confidential.

G. Record Retention Period

There is no record retention period for the Proposed Rule Amendments.

H. Request for Comment

The Commission requests comment on the proposed collections of information in order to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (2) evaluate the accuracy of the Commission's estimates of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (4) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and (5) evaluate whether the Proposed Rule Amendments would have any effects on any other collection of information not previously identified in this section.

Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, and refer to File No. S7–04–09. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this document in the **Federal Register**; therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. Requests for the materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–04–09, and be submitted to the Securities and Exchange Commission, Records Management Office, 100 F Street, NE., Washington, DC 20549.

VI. Costs and Benefits of the Re-Proposed Rules

The Commission is sensitive to the costs and benefits that result from its rules. The Commission has identified certain costs and benefits of the Proposed Rule Amendments and requests comment on all aspects of this cost-benefit analysis, including

[124] 4,000 new transactions/200 issuers = 20 new transactions.

[125] 20 transactions × 1 hour = 20 hours.

[126] 20 hours × 200 respondents = 4,000 hours.

[127] 125 transactions × 30 minutes × 12 months = 45,000 minutes/60 minutes = 750 hours.

[128] 750 hours × 200 respondents = 150,000 hours.

[129] 17 CFR 240.17g–1(f).

[130] *See June 5, 2007 Adopting Release*, 72 FR at 33609.

[131] 20% of 10 hours = 2 hours.

[132] 2 hours × 30 NRSROs = 60 hours.

identification and assessment of any costs and benefits not discussed in the analysis.[133] The Commission seeks comment and data on the value of the benefits identified. The Commission also welcomes comments on the accuracy of its cost estimates in each section of this cost-benefit analysis, and requests those commenters to provide data so the Commission can improve the cost estimates, including identification of statistics relied on by commenters to reach conclusions on cost estimates. Finally, the Commission seeks estimates and views regarding these costs and benefits for particular types of market participants, as well as any other costs or benefits that may result from the adoption of these Proposed Rule Amendments.

A. Benefits

The purposes of the Rating Agency Act, as stated in the accompanying Senate Report, are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.[134] As the Senate Report states, the Rating Agency Act establishes ''fundamental reform and improvement of the designation process'' with the goal that ''eliminating the artificial barrier to entry will enhance competition and provide investors with more choices, higher quality ratings, and lower costs.'' [135]

The Proposed Rule Amendments are designed to improve the transparency of credit ratings performance by making credit ratings actions publicly available and the accuracy of credit ratings for structured finance products by increasing competition among the NRSROs that rate these securities and money market instruments.

The proposed amendment to Rule 17g–2(d) would require NRSROs to publicly disclose all of their ratings actions histories for issuer-paid credit ratings, in XBRL format and with a one-year grace period. This disclosure would allow the marketplace to better compare the performance of NRSROs determining issuer-paid credit ratings. The Commission preliminarily believes that making this information publicly available will provide users of credit ratings with innovative and potentially more useful metrics with which to compare NRSROs.

In addition, under the re-proposed amendments to Rule 17g–5, NRSROs that are paid by arrangers to determine credit ratings for structured finance products would be required to maintain a password-protected Internet Web site that lists each deal they have been hired to rate. They also would be required to obtain representations from the arranger hiring the NRSRO to determine the rating that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password-protected Internet Web site. NRSROs not hired to determine and monitor the ratings would be able to access the NRSRO Internet Web sites to learn of new deals being rated and then access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the entire initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites would be limited to NRSROs that certify to the Commission on an annual basis, among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and that they will determine credit ratings for at least 10% of the deals for which they obtain information. They also would be required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification.

The Commission is re-proposing these amendments to Rule 17g–5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.[136] The provisions in this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.[137] The Commission preliminarily believes the re-proposed amendments are necessary and appropriate in the public interest and for the protection of investors because they are designed to address conflicts of interest and improve the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products. Generally, the information relied on by the hired NRSROs to rate structured finance products is non-public. This makes it difficult for other NRSROs to rate these securities and money market instruments. As a result, the products frequently are issued with ratings from only one or two NRSROs and only by NRSROs that are hired by the issuer, sponsor, or underwriter (*i.e.*, NRSROs that are subject to the conflict of being repeatedly paid by certain arrangers to rate these securities and money market instruments).

The goal is to increase the number of ratings extant for a given structured finance security or money market instrument and, in particular, promote the issuance of ratings by NRSROs that are not hired by the arranger. This would provide users of credit ratings with a broader range of views on the creditworthiness of the security or money market instrument and potentially expose an NRSRO that was unduly influenced by the ''issuer-pay'' conflict into issuing higher than warranted ratings. Furthermore, the proposal also is designed to make it more difficult for arrangers to exert influence over the NRSROs they hire to determine ratings for structured finance products. Specifically, by opening up the rating process to more NRSROs, the proposal could make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the ratings issued by other NRSROs.

The Commission generally requests comment on all aspects of these Proposed Rule Amendment benefits. In addition, the Commission requests specific comment on the following items related to these benefits.

- Are there metrics available to quantify these benefits and any other benefits the commenter may identify, including the identification of sources

[133] For the purposes of this cost/benefit analysis, the Commission is using salary data from the Securities Industry and Financial Markets Association (''SIFMA'') Report on Management and Professional Earnings in the Securities Industry 2007, which provides base salary and bonus information for middle-management and professional positions within the securities industry. The Commission believes that the salaries for these securities industry positions would be comparable to the salaries of similar positions in the credit rating industry. Finally, the salary costs derived from the report and referenced in this cost benefit section are modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The Commission used comparable assumptions in adopting the final rules implementing the Rating Agency Act in 2007, requested comments on such assumptions, and received no comments in response to its request. *See June 5, 2007 Adopting Release,* 72 FR at 33611, note 576. Hereinafter, references to data derived from the report as modified in the manner described above will be cited as ''SIFMA 2007 Report as Modified.''

[134] *Senate Report,* p. 2.

[135] *Id,* p. 7.

[136] 15 U.S.C. 78o–7(h)(2).

[137] *Id.*

of empirical data that could be used for such metrics?

Commenters should provide specific data and analysis to support any comments they submit with respect to these benefit estimates.

B. Costs

The cost of compliance with the Proposed Rule Amendments to a given NRSRO would depend on its size and the complexity of its business activities. The size and complexity of NRSROs vary significantly. Therefore, the cost could vary significantly across NRSROs. The Commission is providing estimates of the average cost per NRSRO taking into consideration the variance in size and complexity of NRSROs. The cost of compliance would also vary depending on which classes of credit ratings an NRSRO issues and how many outstanding ratings it has in each class. NRSROs which issue credit ratings for structured finance products would incur higher compliance costs than those NRSROs which do not issue such credit ratings or issue very few credit ratings in that class. For these reasons, the cost estimates represent the average cost across all NRSROs.

1. Proposed Amendment to Rule 17g–2

The proposed amendment to Rule 17g–2 would require NRSROs to make 100% of their ratings action histories for issuer-paid credit ratings publicly available in an XBRL Interactive Data File, with a one year grace period.[138] As discussed with respect to the PRA, the Commission estimates that, on average, an NRSRO would spend approximately 45 hours to publicly disclose this information in an XBRL Interactive Data File and, thereafter, 15 hours per year to update the information.[139] Furthermore, as discussed in the PRA the Commission estimates that although there will be 30 NRSROs, this amendment only applies to seven NRSROs. For these reasons, the total aggregate one-time burden to the industry to make the history of its rating actions publicly available in an XBRL Interactive Data File would be 315 hours[140] and the total aggregate annual burden hours would be 105 hours.[141] For cost purposes, the Commission preliminarily believes that a senior programmer would perform these functions. Accordingly, the Commission estimates that an NRSRO would incur an average one-time cost of $13,005 and an average annual cost of $4,335, as a result of the proposed amendment.[142] Consequently, the total aggregate one-time cost to the industry would be $91,035[143] and the total aggregate annual cost to the industry would be $30,345.[144]

In addition, the proposed rules may impose other costs. For example, making some information about ratings action histories available to the public for free may have some impact on the business models of NRSROs, although the proposed rules are designed to minimize any impact. Further, the rule may affect NRSROs with different business models differently, although the Commission seeks comment on how best to promote competition among NRSROs. The rule also may impose costs to purchase software to make this information publicly available.

The Commission notes that in the *Companion Adopting Release* the Commission provided cost estimates for complying with all the final amendments to Rule 17g–2 being adopted. In that release, the Commission used a different methodology based on cost data provided by one large NRSRO.[145] The Commission is not relying exclusively on cost data for the purposes of these amendments to Rule 17g–2 because the NRSRO was discussing cost estimates for complying with all the proposed amendments to Rule 17g–2 (not just the amendment relating to the requirement to publicly disclose certain ratings action histories in an XBRL format).

The Commission generally requests comment on all aspects of these cost estimates for the proposed amendments to Rule 17g–2. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- What costs would result from lost revenues incurred because NRSROs subject to the rule may not be able to sell ratings action histories if they are publicly disclosed under the proposed rule?
- If the Commission were to adopt a final rule that subjected subscriber-paid credit ratings to the public disclosure requirement, would the cost estimates per firm be the same as estimated by the Commission above or would they change. Commenters should give specific cost estimates in their comments.
- If the Commission were to adopt a final rule subjecting subscriber-paid credit ratings to the public disclosure requirements being adopted today (the random sample of 10% of issuer-paid credit ratings in a class of credit rating), would the cost estimates per firm be the same as estimated by the Commission in the Adopting Release or would they change. Commenters should give specific cost estimates in their comments.
- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?
- Would there be costs in addition to those identified above, such as costs arising from systems changes and restructuring business practices to account for the new reporting requirement?
- Should the Commission rely more on the cost data provided by the large NRSRO in its comments to the amendments to Rule 17g–2 proposed in the *June 16, 2008 Proposing Release*? If so, how should the Commission modify that cost data to reflect that the *June 16, 2008 Proposing Release* proposed several different amendments to Rule 17g–2?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

2. Re-Proposed Rule 17g–5

Rule 17g–5 requires an NRSRO to manage and disclose certain conflicts of interest.[146] The rule also prohibits specific types of conflicts of interest.[147] The re-proposed amendments to Rule 17g–5 would add an additional conflict to paragraph (b) of Rule 17g–5 for NRSROs to manage. This re-proposed conflict of interest would be issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[148] Under the re-proposal, an NRSRO

[138] *See* proposed amendment to Rule 17g–2(d).

[139] The Commission also bases this estimate on the estimated one time and annual burden hours it would take an NRSRO to publicly disclose its Form NRSRO on its Web site. No comments were received on these estimates in the final rule release. *See June 5, 2007 Adopting Release,* 72 FR at 33609.

[140] 45 hours × 7 NRSROs = 315 hours.

[141] 15 hours × 7 NRSROs = 105 hours.

[142] The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Senior Programmer is $289. Therefore, the average one-time cost would be $13,005 [(45 hours) × ($289 per hour)] and the average annual cost would be $4,335 [(15 hours per year) × ($289 per hour)].

[143] 315 hours × $289 per hour.

[144] 105 hours × $289 per hour.

[145] *See* letter dated July 28, 2008 from Michel Madelain, Chief Operating Officer, Moody's Investors Service.

[146] 17 CFR 240.17g–5.

[147] 17 CFR 240.17g–5(c).

[148] *See* re-proposed Rule 17g–5(b)(9). The current paragraph (b)(9) would be renumbered as (b)(10).

would be prohibited from issuing a credit rating for a structured finance product, unless certain information about the transaction and the assets underlying the structured finance product are disclosed.[149]

Specifically, an NRSRO rating such products would need to disclose to other NRSROs the following information on a password protected Internet Web site:

- A list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of re-proposed Rule 17g–5 can be accessed.[150]

The Commission estimates that the average one-time cost to each NRSRO to establish the Internet Web site would be $65,850 [151] and the total aggregate one-time cost to all NRSROs would be $1,975,500.[152] Further, as discussed with respect to the PRA, the Commission estimates that it would take a large NRSRO approximately 3,880 hours [153] and a small NRSRO approximately 120 hours [154] to disclose the information under re-proposed Rule 17g–5(a)(3)(i), on an annual basis, for a total aggregate annual hour burden of 14,880 hours.[155] For these reasons, the Commission estimates that the average annual cost to a large NRSRO would be $795,400, the average annual cost to NRSROs not in that category would be $24,600 [156] and the total annual cost to the NRSROs would be $3,050,400.[157]

The Commission received one comment on the proposed costs in the *June 16, 2008 Proposing Release*.[158] The commenter stated that if the amendments to Rule 17g–5(a)(3) were adopted, as proposed, it would cost the NRSRO approximately $29,750,000 to build, test, and deploy a system to comply with the June proposed amendments, and that the annual ongoing costs would be approximately $8,224,700. These estimates were based on the NRSRO being the entity that is required to disclose the information. The commenter stated it would need to disclose information that came to it in electronic, e-mail, paper, and voice formats, to sort through which information was used to determine the rating, and to then disclose this information. The re-proposed amendments do not require the NRSRO to disclose the information provided to it to determine initial ratings and subsequently monitor those ratings (the arranger would need to disclose this information).

In addition, the proposed rule requiring NRSROs and arrangers to share information with other NRSROs may affect the quantity and quality of information they provide. Moreover, the requirement to disclose ratings actions histories for a random sample of 10% of certain outstanding credit ratings may create an incentive not to access the information. The Commission seeks comments on the possible effects and alternatives to mitigate them. The proposed rule also could require an NRSRO to purchase software to implement the public disclosure of the ratings action histories.

The re-proposed amendments also would require that the arranger to disclose the following information:

- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and
- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.[159]

For purposes of the PRA, the Commission estimates that it would take a respondent approximately 300 hours to develop a system, as well as policies and procedures to disclose the information as required under the re-proposed rule. This would result in a total one-time hour burden of 60,000 hours for 200 respondents.[160] For these reasons, the Commission estimates that the average one-time cost to each respondent would be $65,850 [161] and the total aggregate one-time cost to the industry would be $13,116,000.[162]

As discussed with respect to the PRA, in addition to the one-time hour burden, respondents also would be required to disclose the required information under re-proposed Rule 17g–5(a)(3) on a transaction by transaction basis. Based on staff information gained from the NRSRO examination process, the Commission estimates that the re-proposed amendments would require each respondent to disclose information with respect to approximately 20 new transactions per year and that it would take approximately 1 hour per transaction to make the information publicly available.[163] Therefore, as

[149] *See* re-proposed Rule 17g–5(a)(3).

[150] *See* re-proposed Rule 17g–5(a)(3)(i).

[151] The Commission estimates an NRSRO would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Compliance Manager is $245 and the average hourly cost for a Programmer Analyst is $194. Therefore, the average one-time cost to an NRSRO would be ($150 hours × $245) + (150 hours × $194) = $65,850.

[152] $65,850 × 30 NRSROs = $1,975,500

[153] 3,880 transactions × 1 hour = 3,880 hours.

[154] 120 transactions × 1 hour = 120 hours.

[155] (3,880 hours × 3) + (120 hours × 27) = 14,880 hours.

[156] The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is $205. Therefore, the average one-time cost to a large NRSRO would be 3,880 hours × $205 = $795,400 and the average one-time cost to NRSROs not in that category would be 120 hours × $205 = $24,600.

[157] ($795,400 × 3) + ($24,600 × 27) =$3,050,400.

[158] S&P Letter.

[159] *See* re-proposed Rule 17g–5(a)(3)(iii).

[160] 300 hours × 200 respondents = 60,000 hours.

[161] The Commission estimates an issuer would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Compliance Manager is $245 and the average hourly cost for a Programmer Analyst is $194. Therefore, the average one-time cost to an issuer would be (150 hours × $245) + (150 hours × $194) = $65,850.

[162] $65,580 × 200 respondents = $13,116,000.

[163] This estimate assumes the respondent has already implemented the system and policies and procedures for disclosure. The Commission cannot estimate the number of initial transactions per year with certainty. The Commission believes that the number of deals that each respondent will disclose information on will vary widely based on the size of the entity. In addition, the Commission preliminarily believes that the number of asset-backed or mortgage-backed issuances being rated by

discussed with respect to the PRA, the Commission estimates that it would take a respondent approximately 20 hours [164] to disclose this information under re-proposed Rule 17g–5(a)(3)(iii), on an annual basis, for a total aggregate annual hour burden of 4,000.[165] For these reasons, the Commission estimates that the average annual cost to a respondent would be $4,100 [166] and the total annual cost to the industry would be $820,000.[167]

Re-proposed Rule 17g–5(a)(3)(iii)(D) would require respondents to disclose information provided to an NRSRO to undertake credit rating surveillance on a structured product. Because surveillance would cover more than just initial ratings, the Commission estimates that a respondent would be required to disclose information with respect to approximately 125 transactions on an ongoing basis and that the information would be provided to the NRSRO on a monthly basis. As discussed with respect to the PRA, the Commission estimates that each respondent would spend approximately 750 hours [168] on an annual basis disclosing the information for a total aggregate annual burden hours of 150,000 hours.[169] For these reasons, the Commission estimates that the average annual cost to a respondent would be $153,750 [170] and the total annual cost to the industry would be $30,750,000.[171]

Finally, an NRSRO that wishes to access information on another NRSRO's Web site or on an arranger's Web site would need to provide the Commission with an annual certification described in proposed new paragraph (e) to Rule 17g–5. In the PRA, the Commission estimates it would take an NRSRO approximately 2 hours [172] to complete the proposed paragraph (e) certification for an aggregate annual hour burden to the industry of 60 hours.[173] For these reasons, the Commission estimates it would cost an NRSRO approximately $490 dollars per year [174] and the industry $14,700 per year to comply with the proposed requirement.[175]

The Commission generally requests comment on all aspects of these cost estimates for the re-proposed amendments to Rule 17g–5. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?
- Would there be costs in addition to those identified above, such as costs arising from systems changes and restructuring business practices to account for the new reporting requirement?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

C. Total Estimated Costs of This Rulemaking

Based on the figures discussed above, the Commission estimates that the total one-time costs related to this re-proposed rulemaking would be approximately $15,182,535 [176] and the total annual costs would be $34,665,445.[177]

VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Under Section 3(f) of the Exchange Act,[178] the Commission shall, when engaging in rulemaking that requires the Commission to consider or determine if an action is necessary or appropriate in the public interest, consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act [179] requires the Commission to consider the anticompetitive effects of any rules the Commission adopts under the Exchange Act. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. As discussed below, the Commission's preliminary view is that the Proposed Rule Amendments should promote efficiency, competition, and capital formation.

The proposed amendment to paragraph (d) of Rule 17g–2 is designed to provide the marketplace with additional information for comparing the ratings performance of NRSROs that determine issuer-paid credit ratings and, therefore, provide users of credit ratings with more useful metrics with which to compare these NRSROs. Increased disclosure of ratings history for issuer-paid credit ratings could make the performance of the NRSROs more transparent to the marketplace and, thereby, highlight those firms that do a better job analyzing credit risk. This could cause users of credit ratings to give greater weight to credit ratings of NRSROs that distinguish themselves by determining more accurate credit ratings than their peers. Moreover, to the extent this improves the quality of the credit ratings, persons that use credit ratings to make investment or lending decisions would have better information upon which to base their decisions. As a consequence, the rule could result in a more efficient allocation of capital and loans to issuers and obligors based on the risk appetites of the investors and lenders. The Commission believes that this enhanced disclosure would benefit smaller NRSROs that determine issuer-paid credit ratings to the extent they do a better job of assessing creditworthiness.

The Commission is not proposing to require the public disclosure of ratings action histories for subscriber-paid credit ratings at this time out of competitive concerns. However, as indicated by the detailed solicitations of comment above, the Commission is considering how to make more information publicly available and accessible about the performance of these ratings. The Commission believes that the proposed rule would address concerns about the competitive impact of the public disclosure requirement and at the same time foster greater accountability of NRSROs with respect to their issuer-paid credit ratings as well as increase competition among NRSROs by making it easier for persons to analyze the actual performance of their credit ratings.

The re-proposed amendments to paragraphs (a) and (b) of Rule 17g–5 could enhance competition among NRSROs. The goal of these proposals is

NRSROs in the next few years would be difficult to predict given the recent credit market turmoil.

[164] 20 transactions × 1 hour = 20 hours.

[165] 20 hours × 200 respondents = 4,000 hours.

[166] The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is $205. Therefore, the average one-time cost to a respondent would be 20 hours × $205 = $4,100.

[167] $4,100 × 200 respondents = $820,000.

[168] 125 transactions × 30 minutes × 12 months = 45,000 minutes / 60 minutes = 750 hours.

[169] 750 hours × 200 respondents = 150,000 hours.

[170] The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is $205. Therefore, the average one-time cost to a respondent would be 750 hours × $205 = $153,750.

[171] $153,750 × 200 respondents = $30,750,000.

[172] 20% of 10 hours = 2 hours.

[173] 2 hours × 30 NRSROs = 60 hours.

[174] The Commission estimates that an NRSRO would have a Compliance Manager prepare the annual certification. The 2007 SIFMA Report as Modified indicates that the average hourly cost for a Compliance Manager is $245. Therefore, the average annual cost to an NRSRO would be: 2 hours × $245 = $490.

[175] 30 NRSROs × $490 = $14,700.

[176] $91,035 + $1,975,500 + $13,116,000 = $15,182,535.

[177] $30,345 + $3,050,400 + $820,000 + $30,750,000 + $14,700 = $34,665,445.

[178] 15 U.S.C. 78c(f).

[179] 15 U.S.C. 78w(a)(2).

to provide a mechanism for NRSROs to determine unsolicited credit ratings, which would provide users of credit ratings with more assessments of the creditworthiness of a structured finance product. This mechanism could expose NRSROs whose procedures and methodologies for determining credit ratings are less conservative in order to gain business. It also could mitigate the impact of rating shopping, since NRSROs not hired to rate a deal could nonetheless issue a credit rating. These potential impacts of the re-proposed amendments could help to restore confidence in credit ratings and, thereby, promote capital formation. They also could promote the more efficient allocation of capital by investors to the extent the quality of credit ratings is improved. In addition, by creating a mechanism for determining unsolicited ratings, they could increase competition by allowing smaller NRSROs to demonstrate proficiency in rating structured products.

The Commission generally requests comment on all aspects of this analysis of the burden on competition and promotion of efficiency, competition, and capital formation. In addition, the Commission requests specific comment on the following items related to this analysis:

- Would the Proposed Rule Amendments have an adverse effect on efficiency, competition, and capital formation that is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

VIII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [180] the Commission must advise OMB whether a proposed regulation constitutes a major rule. Under SBREFA, a rule is ''major'' if it has resulted in, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- A significant adverse effect on competition, investment, or innovation.

If a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. The Commission requests comment on the potential impact of the Proposed Rule Amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

IX. Initial Regulatory Flexibility Analysis

The Commission has prepared the following Initial Regulatory Flexibility Analysis (''IRFA''), in accordance with the provisions of the Regulatory Flexibility Act,[181] regarding the Proposed Rule Amendments to Rules 17g–2 and 17g–5 under the Exchange Act.

The Commission encourages comments with respect to any aspect of this IRFA, including comments with respect to the number of small entities that may be affected by the Proposed Rule Amendments. Comments should specify the costs of compliance with the Proposed Rule Amendments and suggest alternatives that would accomplish the goals of the amendments. Comments will be considered in determining whether a Final Regulatory Flexibility Analysis is required and will be placed in the same public file as comments on the Proposed Rule Amendments. Comments should be submitted to the Commission at the addresses previously indicated.

A. Reasons for the Proposed Action

The Proposed Rule Amendments would prescribe additional requirements for NRSROs to address concerns relating to the transparency of ratings actions and the conflicts of interest at NRSROs.

B. Objectives

The objectives of the Rating Agency Act are ''to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.'' [182] The Proposed Rule Amendments are designed to improve the transparency of credit ratings performance by making credit ratings actions publicly available and the accuracy of credit ratings for structured finance products by increasing competition among the NRSROs that rate these securities and money market instruments.

C. Legal Basis

Pursuant to the Sections 3(b), 15E, 17(a), 23(a) and 36 of the Exchange Act.[183]

D. Small Entities Subject to the Rule

Paragraph (a) of Rule 0–10 provides that for purposes of the Regulatory Flexibility Act, a small entity ''[w]hen used with reference to an 'issuer' or a 'person' other than an investment company'' means ''an 'issuer' or 'person' that, on the last day of its most recent fiscal year, had total assets of $5 million or less.'' [184] The Commission believes that an NRSRO with total assets of $5 million or less would qualify as a ''small'' entity for purposes of the Regulatory Flexibility Act.

As noted in the Adopting Release,[185] the Commission believes that approximately 30 credit rating agencies ultimately would be registered as an NRSRO. Of the approximately 30 credit rating agencies estimated to be registered with the Commission, the Commission estimates that approximately 20 may be ''small'' entities for purposes of the Regulatory Flexibility Act.[186]

E. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendment would revise paragraph (d) of Rule 17g–2 to require NRSROs to publicly disclose, in XBRL format and with a one-year delay, ratings action histories for all outstanding issuer-paid credit ratings.[187] The disclosure of this information could enhance the metrics by which users of credit ratings evaluate the performance of NRSROs determining issuer-paid credit ratings.

The re-proposal would amend paragraphs (a) and (b) of Rule 17g–5 and add new paragraph (e) to the rule. Under the re-proposed amendments, NRSROs that are paid by arrangers to determine credit ratings for structured finance products would be required to maintain a password protected Internet Web site that lists each deal they have been hired to rate. They also would be required to obtain representations from the arranger hiring the NRSRO to determine the rating that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password protected Internet Web site.

[180] Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[181] 5 U.S.C. 603.

[182] *See Senate Report.*

[183] 15 U.S.C. 78c(b), 78o–7, 78q(a), and 78w.

[184] 17 CFR 240.0–10(a).

[185] *June 5, 2007 Adopting Release,* 72 FR at 33618.

[186] *See* 17 CFR 240.0–10(a).

[187] Proposed amendment to paragraph (d) of Rule 17g–2.

NRSROs not hired to determine and monitor the ratings would be able to access the NRSRO Internet Web sites to learn of new deals being rated and then access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the entire initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites would be limited to NRSROs that certify to the Commission on an annual basis, among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and that they will determine credit ratings for at least 10% of the deals for which they obtain information. They also would be required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification.

F. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no federal rules that duplicate, overlap, or conflict with the Proposed Rule Amendments.

G. Significant Alternatives

Pursuant to Section 3(a) of the Regulatory Flexibility Act,[188] the Commission must consider certain types of alternatives, including: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The Commission is considering whether it is necessary or appropriate to establish different compliance or reporting requirements or timetables; or clarify, consolidate, or simplify compliance and reporting requirements under the rule for small entities. Because the Proposed Rule Amendments are designed to improve the overall quality of ratings and enhance the Commission's oversight, the Commission preliminarily believes that small entities should be covered by the rule.

H. Request for Comments

The Commission encourages the submission of comments to any aspect of this portion of the IRFA. Comments should specify costs of compliance with the Proposed Rule Amendments and suggest alternatives that would accomplish the objective of the Proposed Rule Amendments.

X. Statutory Authority

The Commission is proposing amendments to Rule 17g–5 pursuant to the authority conferred by the Exchange Act, including Sections 3(b), 15E, 17, 23(a) and 36.[189]

List of Subjects in 17 CFR Parts 240 and 243

Brokers, Reporting and recordkeeping requirements, Securities.

Text of Re-Proposed Rules

In accordance with the foregoing, the Commission proposes to amend Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Section 240.17g–2, as amended by a final rule published elsewhere in this issue of the **Federal Register**, is amended by revising paragraph (d) to read as follows:

§ 240.17g–2 Records to be made and retained by nationally recognized statistical rating organizations.

* * * * *

(d)(1) *Manner of retention.* An original, or a true and complete copy of the original, of each record required to be retained pursuant to paragraphs (a) and (b) of this section must be maintained in a manner that, for the applicable retention period specified in paragraph (c) of this section, makes the original record or copy easily accessible to the principal office of the nationally recognized statistical rating organization and to any other office that conducted activities causing the record to be made or received.

(2) A nationally recognized statistical rating organization must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information for ten percent of the outstanding credit ratings required to be retained pursuant to paragraph (a)(8) of this section and which were paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more outstanding credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d)(2) need not be made public less than six months from the date such ratings action is taken. If a credit rating made public pursuant to this paragraph (d)(2) is withdrawn or the instrument rated matures, the nationally recognized statistical rating organization must randomly select a new outstanding credit rating from that class of credit ratings in order to maintain the 10 percent disclosure threshold. In making the information available on its corporate Internet Web site, the nationally recognized statistical rating organization shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site.

(3) A nationally recognized statistical rating organization must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information required to be retained pursuant to paragraph (a)(8) of this section for any rating initially rated by the nationally recognized statistical rating organization on or after June 26, 2007 paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d)(3) need not be made public less than twelve months from the date such ratings action is taken. In making the information available on its corporate Internet Web site, the nationally recognized statistical rating organization shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site.

* * * * *

3. Section 240.17g–5 is amended by:

[188] 5 U.S.C. 603(c).

[189] 15 U.S.C. 78c(b), 78o–7, 78q, 78w(a), and 78mm.

a. Removing the word ''and'' at the end of paragraph (a)(1);

b. Removing the period at the end of paragraph (a)(2) and in its place adding ''; and'';

c. Adding paragraph (a)(3);

d. Redesignating paragraph (b)(9) as paragraph (b)(10); and

e. Adding new paragraph (b)(9) and paragraph (e);

The additions read as follows:

§ 240.17g–5 Conflicts of interest.

(a) * * *

(3) In the case of the conflict of interest identified in paragraph (b)(9) of this section relating to issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction, the nationally recognized statistical rating organization:

(i) Maintains on a password-protected Internet Web site a list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of this section can be accessed;

(ii) Provides free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any nationally recognized statistical rating organization that provides it with a copy of the certification described in paragraph (e) of this section that covers that calendar year;

(iii) Obtains from the issuer, sponsor, or underwriter of each such security or money market instrument a representation that can reasonably be relied upon that the issuer, sponsor, or underwriter will:

(A) Maintain the information described in paragraphs (a)(3)(iii)(C) and (D) of this section available at an identified password-protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating;

(B) Provide access to such password-protected Internet Web site during the applicable calendar year to any nationally recognized statistical rating organization that provides it with a copy of the certification described in paragraph (e) of this section that covers that calendar year;

(C) Post on such password-protected Internet Web site all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and

(D) Post on such password-protected Internet Web site all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.

* * * * *

(b) * * *

(9) Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.

* * * * *

(e) *Certification.* In order to access a password-protected Internet Web site described in paragraph (a)(3) of this section, a nationally recognized statistical rating organization must furnish to the Commission, for each calendar year for which it is requesting a password, the following certification, signed by a person duly authorized by the certifying entity:

The undersigned hereby certifies that it will access the Internet Web sites described in § 240.17g–5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to § 240.17g–5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 78o–7(g)(1)) and § 240.17g–4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to § 240.17g–5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by the certification. Further, the undersigned certifies one of the following as applicable: (1) In the most recent calendar year during which it accessed information pursuant to § 240.17g–5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in § 240.17g–5(a)(3) and determined and maintained credit ratings for [Insert Number] of such securities and money market instruments; or (2) The undersigned previously has not accessed information pursuant to § 240.17g–5(a)(3) 10 or more times in a calendar year.

PART 243—REGULATION FD

4. The authority citation for part 243 continues to read as follows:

Authority: 15 U.S.C. 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a–29, unless otherwise noted.

5. Section § 243.100 is amended by revising paragraph (b)(2)(iii) to read as follows:

§ 243.100 General rule regarding selective disclosure.

* * * * *

(b) * * *

(2) * * *

(iii) If the information is disclosed solely for the purpose of developing a credit rating, to:

(A) Any nationally recognized statistical rating organization, as that term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(62)), pursuant to § 240.17g–5(a)(3) of this chapter; or

(B) Any credit rating agency as that term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(62)) that makes its credit ratings publicly available; or

* * * * *

By the Commission.

Dated: February 2, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–2514 Filed 2–6–09; 8:45 am]

BILLING CODE 8011–01–P