Americans for Financial Reform Education Fund

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The following 10 undersigned organizations and individuals are calling for the Securities and Exchange Commission ("the Commission") to hold credit rating agencies responsible for false ratings by reversing the exemptions from legal liability the Commission gave them in 2010.

Section 939G of Dodd Frank required each NRSRO, such as S&P Global, Moody's Corporation, and Fitch Ratings, to consent as an expert to include their credit ratings in the registration statements for rated securities. Such inclusion would subject them to legal liability under Section 11 of the Securities Act of 1933.[1] The Division of Corporation Finance's no-action letter to Ford Motor Credit Company LLC on November 23, 2010,[2] contravened the unambiguous language of Section 939G of Dodd-Frank and Congress's clear intent. Due to the Ford Motor Credit no-action letter, NRSROs remain one of the only participants in the financial system that benefit from being exempt from Section 11 liability.

Section 939G was a specific response to the pervasive failures, profoundly misleading ratings, and conflicts-of-interest at the credit rating agencies that enabled and helped drive $1 trillion in losses on residential mortgage loans and related securities between 2006 and 2016.[3] Estimates of the full cost of the Great Financial Crisis of 2008 range between $5 trillion and $15 trillion.[4] The Financial Crisis Inquiry Commission (FCIC) specifically singled out the NRSROs for their responsibility in those losses, calling them "essential cogs in the wheel of financial destruction."[5] By the end of 2017, around 30% to 35% of

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[1] Seward & Kissel. Rule 436(g) Repeal and Response of the Securities and Exchange Commission. Jul 26, 2010. Rule 436(g) Repeal and Response of the Securities and Exchange Commission - Seward & Kissel LLP (sewkis.com)

[2] Hsu, Katherine. Securities and Exchange Commission. Response to the Office of Chief Counsel re: Ford Motor Credit Company LLC. Nov 23, 2010. No-Action Letter: Ford Motor Credit Company LLC (November 22, 2010) (sec.gov)

[3] Adelson, Mark. The Journal of Structured Finance. The Mortgage Meltdown and the Failure of Investor Protection. Spring 2020. The Mortgage Meltdown and the Failure of Investor Protection | The Journal of Structured Finance (pm-research.com)

[4] Adelson, Mark. The Journal of Portfolio Management. The Deeper Causes of the Financial Crisis: Mortgages Alone Cannot Explain It. Spring 2013. https://doi.org/10.3905/jpm.2013.39.3.016

[5] The Financial Crisis Inquiry Report. January 2011. untitled (govinfo.gov)

residential mortgage backed securities issued over a 10-year period originally rated AAA, the very highest rating on par with the US government, ended up defaulting.[6]

Numerous defendants including Goldman Sachs, Bank of America, J.P. Morgan, Credit Suisse, and others have paid significant settlements in litigation related to these securities, with estimates of financial institutions paying an astounding $250 billion since 2009.[7] Yet the NRSROs largely escaped liability from investor lawsuits.

There are several indications that NRSROs are engaging in similar practices to those that were so disastrous in the lead up they did to 2008, with commercial considerations driving changes to ratings criteria.[8]

The possibility of private litigation is a vitally important avenue of recourse for investors against artificially inflated ratings that cause serious harm, and it would aid the transparent and efficient functioning of capital markets.[9] But it is blocked by the Ford Motor Credit no-action letter.

The Commission should rescind the Ford Motor Credit no-action letter from 2010 and reinstate this important path to accountability for NRSROs consistent with the intentions of Congress in Dodd-Frank.

Signed

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20/20 Vision

Better Markets

CreditSpectrum

Croatan Institute

Daniel Cash, Senior Lecturer in Law, Aston Law School

Dean Leistikow, Professor of Finance, Fordham Gabelli School of Business

Frank Partnoy, Adrian A. Kragen Professor of Law, Berkeley School of Law

Higher Education Inquirer

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[6] Adelson, Mark. The Journal of Structured Finance. Credit Rating Failures in the Aftermath of the Mortgage Meltdown. November 2021. Commentary: Credit Rating Failures in the Aftermath of the Mortgage Meltdown | The Journal of Structured Finance (pm-research.com)

[7] Samuelson, Tracy. Marketplace. Following the money: What happened to a nearly $17 billion bank settlement? Sep 19, 2018. https://www.marketplace.org/2018/09/19/17-billion-bank-settlement-where-did-money-go/

[8] Tempkin, Adam. Bloomberg News. Ratings Shopping Never Died in CMBS Market Now Facing Crisis. Oct 1, 2020. Ratings Shopping Never Died in CMBS Market Now Facing Crisis - Bloomberg

[9] Partnoy, Frank. Washington Law Review. What's (Still) Wrong with Credit Ratings? Oct 1, 2017. https://digitalcommons.law.uw.edu/wlr/vol92/iss3/6

Institute for Agriculture & Trade Policy