

Congress Reconsiders Securities Act Expert Liability Rule for Rating Agencies

Congressman Steve Stivers (R-OH), a member of the House Committee on Financial Services, introduced H.R. 1539, a bill to repeal Section 939G of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) on April 14, 2011. Section 939G of Dodd-Frank repealed Rule 436(g) of the Securities Act of 1933 (the “Securities Act”), a rule which excluded Nationally Recognized Statistical Rating Organizations (“NRSROs”) from being treated as “experts” when their ratings were included in a registration statement. Dodd-Frank’s repeal of Rule 436(g) exposed rating agencies to potential “expert liability” under Section 11 of the Securities Act. If enacted, H.R. 1539 would revive Rule 436(g) and allow rating agencies to permit ratings disclosure to appear in registration statements without concern for incurring expert liability under the Securities Act.

With the passage of Dodd-Frank in July 2010, the repeal of Rule 436(g) caused controversy among securitization market participants. With the exemption for credit ratings removed, rating agencies feared exposure to the same degree of expert liability under the Securities Act as accountants and other parties that participate in bond sales.¹ In anticipation of the bill’s passage, Fitch Ratings issued a release withdrawing its consent to allow any Fitch ratings from appearing in prospectuses and registration statements.² The American Securitization Forum (“ASF”) asked the

Securities and Exchange Commission (“SEC”) to permit Regulation AB (“Reg AB”) filings to omit any ratings disclosure, and the SEC responded with a No-Action Letter allowing issuers to omit credit ratings from Reg AB disclosure for six months.³ The SEC later extended the disclosure exemption indefinitely,⁴ avoiding a potential shut-down of the securitization market.⁵

¹ Phil Mattingly and Jesse Hamilton, *U.S. House Republicans Aim to Rescind Dodd-Frank Provisions*, BLOOMBERG.COM, (Mar. 16, 2011), available at <http://www.bloomberg.com/news/2011-03-16/u-s-house-republicans-aim-to-rescind-dodd-frank-provisions.html>

² Tara Perkins, *Rating Agencies Go Back to the Drawing Board*, THEGLOBEANDMAIL.COM (July 20, 2010), available at <http://www.theglobeandmail.com/globe-investor/investment-ideas/streetwise/rating-agencies-go-back-to-the-drawing-board/article1645991/>

³ Ford Motor Credit Company LLC, SEC No-Action Letter, Item No. 1120 (Regulation AB) (Nov. 23, 2010), available at <http://sec.gov/divisions/corpfin/cf-noaction/2010/ford072210-1120.htm>

⁴ *Id.*

⁵ Testimony of ASF Executive Director Tom Deutsch Before the House Financial Services Committee, Subcommittee on Capital Markets and Government Sponsored Enterprises, (Mar. 16, 2011), available at http://asf.informz.net/ASF/data/images/emailattachments/advocacy/asf_hfsc_df_legislation_hearing_3_16_11.pdf

With the regulatory climate still uncertain, H.R. 1539, if enacted, would create a permanent statutory fix to the regulatory problem caused by Section 936G by restoring the pre-Dodd-Frank status quo. The two-page bill would restore Rule 436(g) entirely, as if “[Section 936G of Dodd-Frank] had not been enacted.”⁶ With costly expert liability avoided, rating agencies would most likely continue to permit the credit ratings they issue in connection with securitization to be included in

Reg AB filings and other disclosure. H.R. 1539 is co-sponsored by Congressmen Jim Renacci (R-OH) and Hansen Clarke (D-MI).



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⁶ H.R. 1539, 112th Cong. § 2 (2011).

Practice group contacts

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