

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 Section 939G of Dodd-Frank repealed Rule 436(g) of the Securities Act of 1933 (the "Securities Act"), a rule which excluded Nationally Recognized Statistical Rating Organizations ("NRSROs") from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).



This update was authored by Patrick D. Dolan (+1 212 698 3555; patrick.dolan@dechert.com) and Robert F. Alleman (+1 212 698 3565; robert.alleman@dechert.com).

⁶ H.R. 1539, 112th Cong. § 2 (2011).

Practice group contacts

If you have questions regarding the information in this legal update, please contact one of the authors or any Dechert attorney with whom you regularly work. Visit us at www.dechert.com/finance&realestate.

If you would like to receive any of our other *DechertOnPoints*, please [click here](#).

Timothy J. Boyce

Charlotte
+1 704 339 3129
timothy.boyce@dechert.com

Malcolm S. Dorris

New York
+1 212 698 3519
malcolm.dorris@dechert.com

Bruce D. Hickey

Boston
+1 617 654 8602
bruce.hickey@dechert.com

Lewis A. Burleigh

Boston
+1 617 654 8601
lewis.burleigh@dechert.com

Dr. Olaf Fasshauer

Munich
+49 89 21 21 63 28
olaf.fasshauer@dechert.com

Geoffrey K. Hurley

New York
+1 212 698 3598
geoffrey.hurley@dechert.com

Katherine A. Burroughs

Hartford
+1 860 524 3953
katherine.burroughs@dechert.com

Steven A. Fogel

London
+44 20 7184 7444
steven.fogel@dechert.com

Andrew Hutchinson

London
+44 20 7184 7428
andrew.hutchinson@dechert.com

Laura G. Ciabarra

Hartford
+1 860 524 3926
laura.ciabarra@dechert.com

David W. Forti

Philadelphia
+1 215 994 2647
david.forti@dechert.com

Richard D. Jones

Philadelphia
+1 212 698 3844
richard.jones@dechert.com

Matthew T. Clark

Boston
+1 617 728 7118
matthew.clark@dechert.com

William Fryzer

London
+44 20 7184 7454
william.fryzer@dechert.com

David M. Linder

San Francisco
+1 415 262 4511
david.linder@dechert.com

Patrick D. Dolan

New York
+1 212 698 3555
patrick.dolan@dechert.com

Joseph B. Heil

San Francisco
+1 415 262 4510
joseph.heil@dechert.com

Ralph R. Mazzeo

Philadelphia
+1 215 994 2417
ralph.mazzeo@dechert.com

Jason S. Rozes
Philadelphia
+1 215 994 2830
jason.rozes@dechert.com

Barry J. Thorne
London
+44 20 7184 7413
barry.thorne@dechert.com

Jay Zagoren
Philadelphia
+1 215 994 2644
jay.zagoren@dechert.com

Timothy A. Stafford
New York
+1 212 698 3504
timothy.stafford@dechert.com

John M. Timperio
Charlotte
+1 704 339 3180
john.timperio@dechert.com

Laura Swihart
New York
+1 212 698 3644
laura.swihart@dechert.com

Cynthia J. Williams
Boston
+1 617 654 8604
cindy.williams@dechert.com

Dechert
LLP

www.dechert.com

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

© 2011 Dechert LLP. All rights reserved. Materials have been abridged from laws, court decisions, and administrative rulings and should not be considered as legal opinions on specific facts or as a substitute for legal counsel. This publication, provided by Dechert LLP as a general informational service, may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

U.S. Austin • Boston • Charlotte • Hartford • Los Angeles • New York • Orange County • Philadelphia
Princeton • San Francisco • Silicon Valley • Washington, D.C. • **EUROPE** Brussels • Dublin • London
Luxembourg • Moscow • Munich • Paris • **ASIA** Beijing • Hong Kong