

As Passed
by the Senate
Conferees

**** Draft Senate Counteroffer ****

Title: Title IX, Subtitle C

Matter: Improvements to the Regulation of Credit Rating Agencies

1. Add House provision to strike references to 'furnish' and replace with 'file' (and their derivations) in existing statute. Information that is "furnished" to the SEC is subject to a lower standard of accuracy and liability than information that is "filed" with the SEC (e.g. liability for misleading statements only attaches to those who 'file' documents with the SEC. (House bill § 6002, page 1219, lines 3-10, etc.)

Accept

2. Add House provisions concerning conflicts of interest. Provisions include an explicit prohibition of an NRSRO advising the issuer and rating that issuer's securities, a look-back requirement at the ratings of an analyst that switches jobs, and public notification of a job change by an analyst. (House bill pages 1231-1234 and page 1251)

2A (conflicts on consulting) *Counteroffer – Sense of the Senate that SEC should use its authority in Title 15E of the Exchange Act "to prohibit, or require the management and disclosure of, any conflicts of interest relating to the issuance of credit ratings by a nationally recognized statistical rating organization, including, without limitation, conflicts of interest relating to . . . the provision of consulting, advisory, or other services by a nationally recognized statistical rating organization, or any person associated with such nationally recognized statistical rating organization, to the obligor, or any affiliate of the obligor."*

2B (Look back)

Accept

2C (SEC Employee Notification)

Accept

3. **Strike and replace Senate provision** for state of mind in private actions of 'knowing and reckless'. **Replace with House provision** that states a gross negligence requirement for cases brought against NRSROs in violating the anti-fraud provisions of the securities laws and that standard is to be applied to NRSROs in the same manner as it is applied to other defendants in the same lawsuits under the securities laws. Statements made by NRSROs shall not be deemed forward-looking statements. An investor in a rated security can recover damages if the process of determining ratings is deemed grossly negligent and a substantial factor in the economic loss of the investor. (Strike Senate bill § 933, page 1171 and replace with House bill § 6003, page 1252).

Reject.

4. **Strike and replace Senate provision** that creates an SRO under the SEC that would assign responsibility for initial ratings of structured securities to a "qualified" NRSRO. **Replace with House provision** that commissions an SEC study to evaluate conflicts of interest, the metrics applied to determine the 'accuracy' of ratings, the use of an independent utility that assigns ratings for structured finance, and ability of an SRO-type entity to set appropriate fees to

compensate and provide incentives for accurate ratings. The SEC will have 1 year to conduct the study. The SEC will present to Congress recommendations for either regulatory or statutory changes that the SEC believes should be made to implement the findings. (Senate bill § 939D, page 1184 and replace with House bill § 6003, page 1252)

Counteroffer – study plus directing the SEC to set up a mechanism that would have credit rating assignments made without inappropriate influence arising from conflicts of interest present in the issuer pay model

5. Add House provision that eliminates the credit rating agency exemption from the Fair Disclosure rule when working with issuers. Reg FD mandates the full disclosure of material non-public information. (House bill § 6007, page 1254)

Reject.

7. Add House provision that eliminates the NRSRO exemption from expert liability under Section 11 of the securities laws (Rule 436(g)). (House bill § 6012, page 1264)

Reject.

HOUSE PROPOSED AMENDMENTS TO SUBTITLE C
OF TITLE IX

Page 1145, after line 11, insert the following (and redesignate succeeding paragraphs accordingly):

- 1 (1) in subsection (b)—
2 (A) in paragraph (1)(A), by striking “fur-
3 nished” and inserting “filed” and by striking
4 “furnishing” and inserting “filing”;
5 (B) in paragraph (1)(B), by striking “fur-
6 nishing” and inserting “filing”; and
7 (C) in the first sentence of paragraph (2),
8 by striking “furnish to” and inserting “file
9 with”;

Page 1147, after line 23, insert the following new subparagraph (and redesignate succeeding subparagraphs accordingly);

- 10 (C) in paragraph (2), by striking “fur-
11 nished to” and inserting “filed with”;

Page 1148, beginning on line 11, strike “redesignated,” and all that follows through line 12, and insert “redesignated—

#1 ACCEPT

#1
ACCEPT

- 1 (i) by striking "furnish" and inserting
- 2 "file"; and
- 3 (ii) by striking "or" at the end.

Page 1151, line 3, strike the closed quotation mark and following period and after such line insert the following:

4 "(4) LOOK-BACK REQUIREMENT.—

5 "(A) REVIEW BY THE NATIONALLY RECOG-

6 NIZED STATISTICAL RATING ORGANIZATION.—

7 Each nationally recognized statistical rating or-

8 ganization shall establish, maintain, and enforce

9 policies and procedures reasonably designed to

10 ensure that, in any case in which an employee

11 of a person subject to a credit rating of the na-

12 tionally recognized statistical rating organiza-

13 tion or the issuer, underwriter, or sponsor of a

14 security or money market instrument subject to

15 a credit rating of the nationally recognized sta-

16 tistical rating organization was employed by the

17 nationally recognized statistical rating organiza-

18 tion and participated in any capacity in deter-

19 mining credit ratings for the person or the se-

20 curities or money market instruments during

21 the 1-year period preceding the date an action

22 was taken with respect to the credit rating, the

#2a
ACCEPT

1 nationally recognized statistical rating organiza-
2 tion shall—

3 “(i) conduct a review to determine
4 whether any conflicts of interest of the em-
5 ployee influenced the credit rating; and

6 “(ii) take action to revise the rating if
7 appropriate, in accordance with such rules
8 as the Commission shall prescribe.

9 “(B) REVIEW BY COMMISSION.—

10 “(i) IN GENERAL.—The Commission
11 shall conduct periodic reviews of the poli-
12 cies described in subparagraph (A) and the
13 implementation of the policies at each na-
14 tionally recognized statistical rating orga-
15 nization to ensure they are reasonably de-
16 signed and implemented to most effectively
17 eliminate conflicts of interest.

18 “(ii) TIMING OF REVIEWS.—The Com-
19 mission shall review the code of ethics and
20 conflict of interest policy of each nationally
21 recognized statistical rating organization—

22 “(I) not less frequently than an-
23 nually; and

24 “(II) whenever such policies are
25 materially modified or amended.

1 “(5) REPORT TO COMMISSION ON CERTAIN EM-
2 PLOYMENT TRANSITIONS.—

3 “(A) REPORT REQUIRED.—Each nationally
4 recognized statistical rating organization shall
5 report to the Commission any case such organi-
6 zation knows or can reasonably be expected to
7 know where a person associated with such orga-
8 nization within the previous 5 years obtains em-
9 ployment with any obligor, issuer, underwriter,
10 or sponsor of a security or money market in-
11 strument for which the organization issued a
12 credit rating during the 12-month period prior
13 to such employment, if such employee—

14 “(i) was a senior officer of such orga-
15 nization;

16 “(ii) participated in any capacity in
17 determining credit ratings for such obligor,
18 issuer, underwriter, or sponsor; or

19 “(iii) supervised an employee de-
20 scribed in clause (ii).

21 “(B) PUBLIC DISCLOSURE.—Upon receiv-
22 ing such a report, the Commission shall make
23 such information publicly available.”

Page 1153, line 11, strike “and” and insert the fol-
lowing:

#2
ACCEPT

- 1 (5) in subsection (k), by striking "furnish to"
- 2 and inserting "file with";
- 3 (6) in subsection (l)(2)(A)(i), by striking "fur-
- 4 nished" and inserting "filed"; and

Page 1153, line 12, strike "(5)" and insert "(7)".

Page 1171, line 9, strike the closed quotation mark and following period and insert after such line the following:

#2
REJECT
OFFER
ANNEX A

- 5 "(u) PROHIBITED ACTIVITIES.—Beginning 180 days
- 6 from the date of enactment of the Investor Protection and
- 7 Securities Reform Act of 2010, it shall be unlawful for
- 8 a nationally recognized statistical rating organization, or
- 9 an affiliate of a nationally recognized statistical rating or-
- 10 ganization, or any person associated with a nationally rec-
- 11 ognized statistical rating organization, that provides a
- 12 credit rating for an issuer, underwriter, or placement
- 13 agent of a security to provide any non-rating service to
- 14 that issuer, underwriter, or placement agent in deter-
- 15 mining a credit rating, including—
- 16 "(1) risk management advisory services;
- 17 "(2) advice or consultation relating to any
- 18 merger, sales, or disposition of assets of the issuer;

ANNEX A
(House #2)

**FINANCIAL REFORM CONFERENCE:
SENATE COUNTEROFFER FOR SUBTITLE C OF
TITLE IX**

[Page and line numbers refer to Conference Base Text]

Page 1203, after line 17 insert the following:

1 SEC. 939E. SENSE OF CONGRESS.

2 It is the sense of Congress that the Commission
3 should exercise the rulemaking authority of the Commis-
4 sion under section 15E(h)(2)(B) of the Securities Ex-
5 change Act of 1934 (15 U.S.C. 78o-7(h)(2)(B)) to pre-
6 vent improper conflicts of interest arising from employees
7 of nationally recognized statistical rating organizations
8 providing services to issuers of securities that are unre-
9 lated to the issuance of credit ratings, including con-
10 sulting, advisory, and other services.

☒

#2
REJECT

1 “(3) ancillary assistance, advice, or consulting
 2 services unrelated to any specific credit rating
 3 issuance; and
 4 “(4) such further activities or services as the
 5 Commission may determine as necessary or appro-
 6 priate in the public interest or for the protection of
 7 investors.”.

Page 1171, strike line 10 through page 1173, line 4, and insert the following:

#3
REJECT

(KEEP
SENATE
SECTION,
FROM SEN.
REED)

8 **SEC. 933. STANDARDS FOR PRIVATE ACTIONS.**

9 (a) **IN GENERAL.**—Section 21D(b)(2) of the Securi-
 10 ties Exchange Act of 1934 (15 U.S.C. 78u-4(b)(2)) is
 11 amended by inserting before the period at the end of the
 12 following: “), and in the case of an action brought under
 13 this title for money damages against a credit rating agen-
 14 cy, it shall be sufficient for purposes of pleading any re-
 15 quired state of mind for purposes of such action that the
 16 complaint shall state with particularity facts giving rise
 17 to a strong inference that the credit rating agency was
 18 grossly negligent in violating the securities laws”.

19 (b) **PLEADING STANDARD.**—Section 15E(m) of the
 20 Securities Exchange Act of 1934 (15 U.S.C. 78o-7(m))
 21 amended to read as follows:

22 “(m) **APPLICATION OF ENFORCEMENT PROVISIONS;**
 23 **PLEADING STANDARD IN PRIVATE RIGHTS OF ACTION.**—

1 Statements made by credit rating agencies shall not be
2 deemed forward looking statements for purposes of section
3 21E. In any private right of action commenced against
4 a credit rating agency under the securities laws, the same
5 pleading standards with respect to gross negligence shall
6 apply to the credit rating agency as would apply to any
7 other person in the same private right of action against
8 such person.”.

9 (c) REQUIREMENTS FOR LIABILITY.—Section 21D of
10 the Securities Exchange Act of 1934 (15 U.S.C. 78u-4)
11 is amended—

#3
REJECT

12 (1) by redesignating subsections (c) through (f)
13 as subsections (d) through (g), respectively; and

14 (2) by inserting after subsection (b) the fol-
15 lowing:

16 “(c) REQUIREMENTS FOR LIABILITY.—A purchaser
17 of a security given a rating by a credit rating agency shall
18 have the right to recover for damages if the process of
19 determining the credit rating was—

20 “(1) grossly negligent, based on the facts and
21 circumstances at the time the rating was issued; and

22 “(2) a substantial factor in the economic loss
23 suffered by the investor.

24 No action shall be maintained to enforce any liability cre-
25 ated under this subsection unless brought within 2 years

~~1 after the discovery of the facts constituting the violation
2 and within 3 years after the initial issuance of the rat-
3 ing."~~

Page 1181, after line 17, insert the following new sections (and redesignate succeeding sections and conform the table of contents accordingly):

#5
REJECT

~~22 SEC. 939B. ELIMINATION OF EXEMPTION FROM FAIR DIS-
23 CLOSURE RULE.
24 Not later than 90 days after the date of enactment
25 of this subtitle, the Securities Exchange Commission shall~~

#5
REJECT

- 1 revise Regulation FD (17 C.F.R. 243.100) to remove from
- 2 such regulation the exemption for entities whose primary
- 3 business is the issuance of credit ratings (17 C.F.R.
- 4 243.100(b)(2)(iii)).

Page 1184, strike line 20 through page 1203, line
 17, and insert the following (and conform the table of
 contents accordingly):

#4
REJECT

5 SEC. 939D. STUDY ON ASSIGNED CREDIT RATINGS.

FRANKEN

6 (a) STUDY.—The Securities and Exchange Commis-
 7 sion shall undertake a study of the—

8 (1) ratings process for structured products and
 9 the associated conflicts of interest in both the issuer-
 10 pay and subscriber-pay models;

11 (2) feasibility of establishing a public or private
 12 utility or self-regulatory agency that assigns nation-
 13 ally recognized statistical ratings organizations to
 14 determine the ratings of issuers and obligors of
 15 structured products including—

16 (A) an assessment of potential mechanisms
 17 for determining fees for the nationally recog-
 18 nized statistical ratings organizations, if so as-
 19 signed;

20 (B) appropriate methods for paying fees to
 21 the assigned rating agencies;

FRANKEN

1 (C) the extent to which the creation of
2 such a system would be viewed as creating
3 moral hazard on the part of the government;
4 and

5 (D) any constitutional and other issues
6 concerning the establishment of such a system;

7 (3) range of metrics by which to determine the
8 accuracy of ratings; and

9 (4) alternative means for compensating credit
10 rating agencies that would create incentives for ac-
11 curate credit ratings.

12 (b) REPORT AND RECOMMENDATION.—Not later
13 than 12 months after the date of enactment of this title,
14 the Securities and Exchange Commission shall submit to
15 Committee on Financial Services of the House of Rep-
16 resentatives and Committee on Banking, Housing and
17 Urban Development of the Senate, a report containing the
18 findings under the study required by subsection (a) and
19 any recommendations for either regulatory or statutory
20 changes that the Commission believes should be made to
21 implement the findings.

#4
REJECT

Page 1203, after line 17, insert the following new
section (and conform the table of contents accordingly):

#7
REJECT

1 SEC. 6012. EFFECT OF RULE 436(G).

2 Rule 436(g), promulgated by the Securities and Ex-

3 change Commission under the Securities Act of 1933,

4 shall have no force or effect.



**FINANCIAL REFORM CONFERENCE:
SENATE COUNTEROFFER FOR SUBTITLE C OF
TITLE IX**

[Page and line numbers refer to Conference Base Text]

Strike section 989D and insert the following:

1 **SEC. 939D. STUDY AND RULEMAKING ON ASSIGNED CREDIT**

2 **RATINGS.**

3 (a) **DEFINITION.**—In this section, the term “struc-
4 tured finance product” means an asset-backed security, as
5 defined in section 3(a)(77) of the Securities Exchange Act
6 of 1934, as added by section 941, a structured product
7 based on an asset-backed security, and any other security,
8 as determined by the Commission, by rule.

9 (b) **STUDY.**—The Commission shall carry out a study
10 of—

11 (1) the credit rating process for structured fi-
12 nance products and the conflicts of interest associ-
13 ated with the issuer-pay and the subscriber-pay
14 models;

15 (2) the feasibility of establishing a system in
16 which a public or private utility or a self-regulatory
17 organization assigns nationally recognized statistical

1 rating organizations to determine the credit ratings
2 of structured finance products, including—

3 (A) an assessment of potential mechanisms
4 for determining fees for the nationally recog-
5 nized statistical rating organizations;

6 (B) appropriate methods for paying fees to
7 the nationally recognized statistical rating orga-
8 nizations;

9 (C) the extent to which the creation of
10 such a system would be viewed as the creation
11 of moral hazard by the Federal Government;
12 and

13 (D) any constitutional or other issues con-
14 cerning the establishment of such a system;

15 (3) the range of metrics that could be used to
16 determine the accuracy of credit ratings; and

17 (4) alternative means for compensating nation-
18 ally recognized statistical rating organizations that
19 would create incentives for accurate credit ratings.

20 (c) REPORT AND RECOMMENDATION.—Not later
21 than 12 months after the date of enactment of this Act,
22 the Commission shall submit to the Committee on Bank-
23 ing, Housing, and Urban Affairs of the Senate and the
24 Committee on Financial Services of the House of Rep-
25 resentatives a report that contains—

1 (1) the findings of the study required under
2 subsection (b); and

3 (2) any recommendations for regulatory or stat-
4 utory changes that the Commission determines
5 should be made to implement the findings of the
6 study required under subsection (b).

7 (d) RULEMAKING.—

8 (1) RULEMAKING AUTHORIZED.—After submis-
9 sion of the report under subsection (c), the Commis-
10 sion may, by rule, as the Commission determines is
11 necessary or appropriate in the public interest or for
12 the protection of investors, establish a system for the
13 assignment of nationally recognized statistical rating
14 organizations to determine the credit ratings of
15 structured finance products, in a manner that pre-
16 vents the issuer, sponsor, or underwriter of the
17 structured finance product from selecting the nation-
18 ally recognized statistical rating organization that
19 will determine the credit ratings and monitor the
20 credit ratings.

21 (2) RULE OF CONSTRUCTION.—Nothing in this
22 subsection may be construed to limit or suspend any
23 other rulemaking authority of the Commission.



**FINANCIAL REFORM CONFERENCE:
SENATE COUNTEROFFER FOR SUBTITLE C OF
TITLE IX**

[Page and line numbers refer to Conference Base Text]

Page 1203, after line 17 insert the following:

1 **SEC. 939E. SENSE OF CONGRESS.**

2 It is the sense of Congress that the Commission
3 should exercise the rulemaking authority of the Commis-
4 sion under section 15E(h)(2)(B) of the Securities Ex-
5 change Act of 1934 (15 U.S.C. 78o-7(h)(2)(B)) to pre-
6 vent improper conflicts of interest arising from employees
7 of nationally recognized statistical rating organizations
8 providing services to issuers of securities that are unre-
9 lated to the issuance of credit ratings, including con-
10 sulting, advisory, and other services.

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4 tured finance product” means an asset-backed security, as
5 defined in section 3(a)(77) of the Securities Exchange Act
6 of 1934, as added by section 941, a structured product
7 based on an asset-backed security, and any other security,
8 as determined by the Commission, by rule.

9 (b) STUDY.—The Commission shall carry out a study
10 of—

11 (1) the credit rating process for structured fi-
12 nance products and the conflicts of interest associ-
13 ated with the issuer-pay and the subscriber-pay
14 models;

15 (2) the feasibility of establishing a system in
16 which a public or private utility or a self-regulatory
17 organization assigns nationally recognized statistical

1 rating organizations to determine the credit ratings
2 of structured finance products, including—

3 (A) an assessment of potential mechanisms
4 for determining fees for the nationally recog-
5 nized statistical rating organizations;

6 (B) appropriate methods for paying fees to
7 the nationally recognized statistical rating orga-
8 nizations;

9 (C) the extent to which the creation of
10 such a system would be viewed as the creation
11 of moral hazard by the Federal Government;
12 and

13 (D) any constitutional or other issues con-
14 cerning the establishment of such a system;

15 (3) the range of metrics that could be used to
16 determine the accuracy of credit ratings; and

17 (4) alternative means for compensating nation-
18 ally recognized statistical rating organizations that
19 would create incentives for accurate credit ratings.

20 (c) REPORT AND RECOMMENDATION.—Not later
21 than 12 months after the date of enactment of this Act,
22 the Commission shall submit to the Committee on Bank-
23 ing, Housing, and Urban Affairs of the Senate and the
24 Committee on Financial Services of the House of Rep-
25 resentatives a report that contains—

1 (1) the findings of the study required under
2 subsection (b); and

3 (2) any recommendations for regulatory or stat-
4 utory changes that the Commission determines
5 should be made to implement the findings of the
6 study required under subsection (b).

7 (d) RULEMAKING.—

8 (1) RULEMAKING AUTHORIZED.—After submis-
9 sion of the report under subsection (c), the Commis-
10 sion may, by rule, as the Commission determines is
11 necessary or appropriate in the public interest or for
12 the protection of investors, establish a system for the
13 assignment of nationally recognized statistical rating
14 organizations to determine the credit ratings of
15 structured finance products, in a manner that pre-
16 vents the issuer, sponsor, or underwriter of the
17 structured finance product from selecting the nation-
18 ally recognized statistical rating organization that
19 will determine the credit ratings and monitor the
20 credit ratings. In issuing any rule under this para-
21 graph, the Commission shall give thorough consider-
22 ation to the provisions of section 15E(w) of the Se-
23 curities Exchange Act of 1934, as that provision
24 would have been amended by section 939D of H.R.

1 4173 (111th Congress), as passed by the Senate on
2 May 20, 2010.

3 (2) RULE OF CONSTRUCTION.—Nothing in this
4 subsection may be construed to limit or suspend any
5 other rulemaking authority of the Commission.

