

MEMO# 24009

December 10, 2009

Draft ICI Comment Letter on SEC NRSRO Concept Release

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TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 31-09
EQUITY MARKETS ADVISORY COMMITTEE No. 56-09
FIXED-INCOME ADVISORY COMMITTEE No. 31-09
MONEY MARKET FUNDS ADVISORY COMMITTEE No. 52-09
MUNICIPAL SECURITIES ADVISORY COMMITTEE No. 60-09
SEC RULES COMMITTEE No. 70-09 RE: DRAFT ICI COMMENT LETTER ON SEC NRSRO
CONCEPT RELEASE

The Institute has prepared the attached draft comment letter on the SEC's concept release seeking comment whether the Commission should rescind the exemption for NRSROs from Section 11 liability under the Securities Act. The draft letter supports rescinding the exemption. The letter states that rescinding the exemption would measurably improve the quality of credit ratings by requiring NRSROs to have greater legal accountability for their ratings.

Comments on the proposal are due to the SEC on Monday, December 14. If you have comments on the attached draft letter, please provide them to Ari Burstein by e-mail at aburstein@ici.org or by phone at 202-371-5408 by COB Monday, December 14.

Original Reasons for Exemption are No Longer Warranted

The draft letter agrees with statements made by the Commission in the Concept Release that the original reasons for the exemption may no longer be warranted and that it may now be appropriate to reconsider whether NRSROs should continue to be insulated from

liability under Section 11.

Specifically, when the exemption was adopted, the Commission noted that NRSROs were subject to anti-fraud liability under both Section 10(b) of the Exchange Act and under the Investment Advisers Act. As the Release notes, NRSROs are no longer required to register under the Investment Advisers Act and, although they remain subject to liability under Section 10(b) of the Exchange Act, they are held liable infrequently.

The draft letter also states that it may no longer be consistent with investor protection to exempt NRSROs from the provisions of the Securities Act applicable to experts. The letter notes that when credit ratings are used to sell securities, investors rely on NRSROs and other credit rating agencies as a form of “expert” and on the information provided by credit rating agencies for a key part of their investment decision. The exemption, therefore, could significantly improve investor protection by encouraging NRSROs to improve the quality of their ratings and analysis in order to reduce the risk of liability under Section 11.

Finally, the Concept Release notes that one of the other purposes underlying the adoption of the exemption was the Commission’s concern that, without the exemption, registrants would not voluntarily disclose security ratings in their registration statements because NRSROs would not grant the necessary consent. However, as the Release states, in light of the required disclosure regarding credit ratings that the Commission is proposing in a companion proposal if a credit rating is used in connection with a registered offering, this concern may no longer be valid.

Impact on Competition

The Concept Release requests comment on several issues relating to the impact of rescinding the exemption for NRSROs from Section 11 liability on, among other things, competition among NRSROs and other rating agencies. The draft letter states that rescinding the exemption for NRSROs from Section 11 liability, and therefore leveling the playing field between NRSROs and other rating agencies that are already subject to liability under Section 11, should help to improve the competitive landscape for rating agencies and, consequently, ratings quality.

Ari Burstein
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[Attachment](#)

should not be considered a substitute for, legal advice.