

AMENDMENT NO. _____ Calendar No. _____

Purpose: To instruct the Securities and Exchange Commission to establish a self-regulatory organization to assign credit rating agencies to provide initial credit ratings.

IN THE SENATE OF THE UNITED STATES—111th Cong., 2d Sess.

S. 3217

To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “too big to fail”, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENTS intended to be proposed by Mr. FRANKEN (for himself, Mr. SCHUMER, Mr. NELSON of Florida, Mr. WHITEHOUSE, Mr. BROWN of Ohio, and Mrs. MURRAY)

Viz:

- 1 On page 1006, line 7, strike “Such inaccuracy” and
- 2 all that follows through line 9, and insert the following:
- 3 “Such inaccuracy necessitates changes in the way initial
- 4 credit ratings are assigned.”.

1 On page 1042, strike lines 17 through 24, and insert
2 the following:

3 (a) STUDY.—Not later than 1 year after the Credit
4 Rating Agency Board, as established under section
5 15E(w) of the Securities Exchange Act of 1934, begins
6 to assign nationally recognized statistical rating organiza-
7 tions to provide initial credit ratings, the Comptroller Gen-
8 eral of the United States shall conduct a study on the ef-
9 fectiveness of the implementation of the changes made to
10 that section by section 939D of this Act, including the
11 selection method by which the Credit Rating Agency
12 Board assigns nationally recognized statistical rating or-
13 ganizations to provide initial credit ratings.

14 On page 1044, between lines 2 and 3, insert the fol-
15 lowing:

16 **SEC. 939D. INITIAL CREDIT RATING ASSIGNMENTS.**

17 Section 15E of the Securities Exchange Act of 1934
18 (15 U.S.C. 78o–7), as amended by this Act, is amended
19 by adding at the end the following:

20 “(w) INITIAL CREDIT RATING ASSIGNMENTS.—

21 “(1) DEFINITIONS.—In this subsection the fol-
22 lowing definitions shall apply:

1 “(II) CONSIDERATIONS.—In
2 issuing the regulations required sub-
3 clause (I), the Commission shall con-
4 sider—

5 “(aa) the types of issuers
6 that issue structured finance
7 products;

8 “(bb) the types of investors
9 who purchase structured finance
10 products;

11 “(cc) the different categories
12 of structured finance products
13 according to—

14 “(AA) the types of cap-
15 ital flow and legal structure
16 used;

17 “(BB) the types of un-
18 derlying products used; and

19 “(CC) the types of
20 terms used in debt securi-
21 ties;

22 “(dd) the different values of
23 debt securities; and

1 “(ee) the different numbers
2 of units of debt securities that
3 are issued together.

4 “(ii) REASONABLE FEE.—The Board
5 shall issue regulations to define the term
6 ‘reasonable fee’.

7 “(2) CREDIT RATING AGENCY BOARD.—

8 “(A) IN GENERAL.—Not later than 180
9 days after the date of enactment of the Restor-
10 ing American Financial Stability Act of 2010,
11 the Commission shall—

12 “(i) establish the Credit Rating Agen-
13 cy Board, which shall be a self-regulatory
14 organization;

15 “(ii) subject to subparagraph (C), se-
16 lect the initial members of the Board; and

17 “(iii) establish a schedule to ensure
18 that the Board begins assigning qualified
19 nationally recognized statistical rating or-
20 ganizations to provide initial ratings not
21 later than 1 year after the selection of the
22 members of the Board.

23 “(B) SCHEDULE.—The schedule estab-
24 lished under subparagraph (A)(iii) shall pre-
25 scribe when—

1 “(i) the Board will conduct a study of
2 the securitization and ratings process and
3 provide recommendations to the Commis-
4 sion;

5 “(ii) the Commission will issue rules
6 and regulations under this section;

7 “(iii) the Board may issue rules under
8 this subsection; and

9 “(iv) the Board will—

10 “(I) begin accepting applications
11 to select qualified national recognized
12 statistical rating organizations; and

13 “(II) begin assigning qualified
14 national recognized statistical rating
15 organizations to provide initial rat-
16 ings.

17 “(C) MEMBERSHIP.—

18 “(i) IN GENERAL.—The Board shall
19 initially be composed of an odd number of
20 members selected from the industry, with
21 the total numerical membership of the
22 Board to be determined by the Commis-
23 sion.

1 “(ii) SPECIFICATIONS.—Of the mem-
2 bers initially selected to serve on the
3 Board—

4 “ (I) not less than a majority of
5 the members shall be representatives
6 of the investor industry, including
7 both institutional and retail investors
8 who do not represent issuers;

9 “ (II) not less than 1 member
10 should be a representative of the
11 issuer industry;

12 “ (III) not less than 1 member
13 should be a representative of the cred-
14 it rating agency industry; and

15 “ (IV) not less than 1 member
16 should be an independent member.

17 “(iii) TERMS.—Initial members shall
18 be appointed by the Commission for a term
19 of 4 years.

20 “(iv) NOMINATION AND ELECTION OF
21 MEMBERS.—

22 “ (I) IN GENERAL.—Prior to the
23 expiration of the terms of office of the
24 initial members, the Commission shall
25 establish fair procedures for the nomi-

1 nation and election of future members
2 of the Board.

3 “(II) MODIFICATIONS OF THE
4 BOARD.—Prior to the expiration of
5 the terms of office of the initial mem-
6 bers, the Commission—

7 “(aa) may increase the size
8 of the board to a larger odd num-
9 ber and adjust the length of fu-
10 ture terms; and

11 “(bb) shall retain the com-
12 position of members described in
13 clause (ii).

14 “(v) RESPONSIBILITIES OF MEM-
15 BERS.—Members shall perform, at a min-
16 imum, the duties described in this sub-
17 section.

18 “(vi) RULEMAKING AUTHORITY.—The
19 Commission shall, if it determines nec-
20 essary and appropriate, issue further rules
21 and regulations on the composition of the
22 membership of the Board and the respon-
23 sibilities of the members.

24 “(D) OTHER AUTHORITIES OF THE
25 BOARD.—The Board shall have the authority to

1 levy fees from qualified nationally recognized
2 statistical rating organization applicants, and
3 periodically from qualified nationally recognized
4 statistical rating organizations as necessary to
5 fund expenses of the Board.

6 “(E) REGULATION.—The Commission has
7 the authority to regulate the activities of the
8 Board, and issue any further regulations of the
9 Board it deems necessary, not in contravention
10 with the intent of this section.

11 “(3) BOARD SELECTION OF QUALIFIED NATION-
12 ALLY RECOGNIZED STATISTICAL RATING ORGANIZA-
13 TION.—

14 “(A) APPLICATION.—

15 “(i) IN GENERAL.—A nationally rec-
16 ognized statistical rating organization may
17 submit an application to the Board, in
18 such form and manner as the Board may
19 require, to become a qualified nationally
20 recognized statistical rating organization
21 with respect to a category of structured fi-
22 nancial products.

23 “(ii) CONTENTS.—An application sub-
24 mitted under clause (i) shall contain—

1 “(I) information regarding the
2 institutional and technical capacity of
3 the nationally recognized statistical
4 rating organization to issue credit rat-
5 ings;

6 “(II) information on whether the
7 nationally recognized statistical rating
8 organization has been exempted by
9 the Commission from any require-
10 ments under any other provision of
11 this section; and

12 “(III) any additional information
13 the Board may require.

14 “(iii) REJECTION OF APPLICATIONS.—
15 The Board may reject an application sub-
16 mitted under this paragraph if the nation-
17 ally recognized statistical rating organiza-
18 tion has been exempted by the Commission
19 from any requirements under any other
20 provision of this section.

21 “(B) SELECTION.—The Board shall select
22 qualified national recognized statistical rating
23 organizations with respect to each category of
24 structured finance products from among nation-
25 ally recognized statistical rating organizations

1 that submit applications under subparagraph
2 (A).

3 “(C) RETENTION OF STATUS AND OBLIGA-
4 TIONS AFTER SELECTION.—An entity selected
5 as a qualified nationally recognized statistical
6 rating organization shall retain its status and
7 obligations under the law as a nationally recog-
8 nized statistical rating organization, and noth-
9 ing in this subsection grants authority to the
10 Commission or the Board to exempt qualified
11 nationally recognized statistical rating organiza-
12 tions from obligations or requirements other-
13 wise imposed by Federal law on nationally rec-
14 ognized statistical rating organizations

15 “(4) REQUESTING AN INITIAL CREDIT RAT-
16 ING.—An issuer that seeks an initial credit rating
17 for a structured finance product—

18 “(A) may not request an initial credit rat-
19 ing from a nationally recognized statistical rat-
20 ing organization; and

21 “(B) shall submit a request for an initial
22 credit rating to the Board, in such form and
23 manner as the Board may prescribe.

24 “(5) ASSIGNMENT OF RATING DUTIES.—

1 “(A) IN GENERAL.—For each request re-
2 ceived by the Board under paragraph (4)(B),
3 the Board shall select a qualified nationally rec-
4 ognized statistical rating organization to pro-
5 vide the initial credit rating to the issuer.

6 “(B) METHOD OF SELECTION.—

7 “(i) IN GENERAL.—The Board shall—

8 “(I) evaluate a number of selec-
9 tion methods, including a lottery or
10 rotating assignment system, incor-
11 porating the factors described in
12 clause (ii), to reduce the conflicts of
13 interest that exist under the issuer-
14 pays model; and

15 “(II) prescribe and publish the
16 selection method to be used under
17 subparagraph (A).

18 “(ii) CONSIDERATION.—In evaluating
19 a selection method described in clause
20 (i)(I), the Board shall consider—

21 “(I) the information submitted
22 by the qualified nationally recognized
23 statistical rating organization under
24 paragraph (3)(A)(ii) regarding the in-
25 stitutional and technical capacity of

1 the qualified nationally recognized sta-
2 tistical rating organization to issue
3 credit ratings;

4 “(II) evaluations conducted
5 under paragraph (6);

6 “(III) formal feedback from insti-
7 tutional and retail investors; and

8 “(IV) information from sub-
9 clauses (I) and (II) to implement a
10 mechanism which increases or de-
11 creases assignments based on past
12 performance.

13 “(iii) PROHIBITION.—The Board, in
14 choosing a selection method, may not use
15 a method that would allow for the solicita-
16 tion or consideration of the preferred na-
17 tional recognized statistical rating organi-
18 zations of the issuer.

19 “(iv) ADJUSTMENT OF PROCESS.—
20 The Board shall issue rules describing the
21 process by which it can modify the assign-
22 ment process described in clause (i).

23 “(C) RIGHT OF REFUSAL.—

24 “(i) REFUSAL.—A qualified nationally
25 recognized statistical rating organization

1 selected under subparagraph (A) may
2 refuse to accept a selection for a particular
3 request by—

4 “(I) notifying the Board of such
5 refusal; and

6 “(II) submitting to the Board a
7 written explanation of the refusal.

8 “(ii) SELECTION.—Upon receipt of a
9 notification under clause (i), the Board
10 shall make an additional selection under
11 subparagraph (A).

12 “(iii) INSPECTION REPORTS.—The
13 Board shall annually submit any expla-
14 nations of refusals received under clause
15 (i)(II) to the Commission, and such ex-
16 planatory submissions shall be published in
17 the annual inspection reports required
18 under subsection (p)(3)(C).

19 “(6) EVALUATION OF PERFORMANCE.—

20 “(A) IN GENERAL.—The Board shall pre-
21 scribe rules by which the Board will evaluate
22 the performance of each qualified nationally
23 recognized statistical rating organization, in-
24 cluding rules that require, at a minimum, an

1 annual evaluation of each qualified nationally
2 recognized statistical rating organization.

3 “(B) CONSIDERATIONS.—The Board, in
4 conducting an evaluation under subparagraph
5 (A), shall consider—

6 “(i) the results of the annual exam-
7 ination conducted under subsection (p)(3);

8 “(ii) surveillance of credit ratings con-
9 ducted by the qualified nationally recog-
10 nized statistical rating organization after
11 the credit ratings are issued, including—

12 “(I) how the rated instruments
13 perform;

14 “(II) the accuracy of the ratings
15 provided by the qualified nationally
16 recognized statistical rating organiza-
17 tion as compared to the other nation-
18 ally recognized statistical rating orga-
19 nizations; and

20 “(III) the effectiveness of the
21 methodologies used by the qualified
22 nationally recognized statistical rating
23 organization; and

24 “(iii) any additional factors the Board
25 determines to be relevant.

1 “(C) REQUEST FOR REEVALUATION.—Sub-
2 ject to rules prescribed by the Board, and not
3 less frequently than once a year, a qualified na-
4 tionally recognized statistical rating organiza-
5 tion may request that the Board conduct an
6 evaluation under this paragraph.

7 “(D) DISCLOSURE.—The Board shall
8 make the evaluations conducted under this
9 paragraph available to Congress.

10 “(7) RATING FEES CHARGED TO ISSUERS.—

11 “(A) LIMITED TO REASONABLE FEES.—A
12 qualified nationally recognized statistical rating
13 organization shall charge an issuer a reasonable
14 fee, as determined by the Commission, for an
15 initial credit rating provided under this section.

16 “(B) FEES.—Fees may be determined by
17 the qualified national recognized statistical rat-
18 ing organizations unless the Board determines
19 it is necessary to issue rules on fees.

20 “(8) NO PROHIBITION ON ADDITIONAL RAT-
21 INGS.—Nothing in this section shall prohibit an
22 issuer from requesting or receiving additional credit
23 ratings with respect to a debt security, if the initial
24 credit rating is provided in accordance with this sec-
25 tion.

1 “(9) NO PROHIBITION ON INDEPENDENT RAT-
2 INGS OFFERED BY NATIONALLY RECOGNIZED STA-
3 TISTICAL RATING ORGANIZATIONS.—

4 “(A) IN GENERAL.—Nothing in this sec-
5 tion shall prohibit a nationally recognized sta-
6 tistical rating organization from independently
7 providing a credit rating with respect to a debt
8 security, if—

9 “(i) the nationally recognized statis-
10 tical rating organization does not enter
11 into a contract with the issuer of the debt
12 security to provide the initial credit rating;
13 and

14 “(ii) the nationally recognized statis-
15 tical rating organization is not paid by the
16 issuer of the debt security to provide the
17 initial credit rating.

18 “(B) RULE OF CONSTRUCTION.—For pur-
19 poses of this section, a credit rating described
20 in subparagraph (A) may not be construed to
21 be an initial credit rating.

22 “(10) PUBLIC COMMUNICATIONS.—Any commu-
23 nications made with the public by an issuer with re-
24 spect to the credit rating of a debt security shall

1 clearly specify whether the credit rating was made
2 by—

3 “(A) a qualified nationally recognized sta-
4 tistical rating organization selected under para-
5 graph (5)(A) to provide the initial credit rating
6 for such debt security; or

7 “(B) a nationally recognized statistical rat-
8 ing organization not selected under paragraph
9 (5)(A).

10 “(11) PROHIBITION ON MISREPRESENTA-
11 TION.—With respect to a debt security, it shall be
12 unlawful for any person to misrepresent any subse-
13 quent credit rating provided for such debt security
14 as an initial credit rating provided for such debt se-
15 curity by a qualified nationally recognized statistical
16 rating organization selected under paragraph (5)(A).

17 “(12) INITIAL CREDIT RATING REVISION AFTER
18 MATERIAL CHANGE IN CIRCUMSTANCE.—If the
19 Board determines that it is necessary or appropriate
20 in the public interest or for the protection of inves-
21 tors, the Board may issue regulations requiring that
22 an issuer that has received an initial credit rating
23 under this subsection request a revised initial credit
24 rating, using the same method as provided under
25 paragraph (4), each time the issuer experiences a

1 material change in circumstances, as defined by the
2 Board.

3 “(13) CONFLICTS.—

4 “(A) MEMBERS OR EMPLOYEES OF THE
5 BOARD.—

6 “(i) LOAN OF MONEY OR SECURITIES
7 PROHIBITED.—

8 “(I) IN GENERAL.—A member or
9 employee of the Board shall not ac-
10 cept any loan of money or securities,
11 or anything above nominal value, from
12 any nationally recognized statistical
13 rating organization, issuer, or inves-
14 tor.

15 “(II) EXCEPTION.—The prohibi-
16 tion in subclause (I) does not apply to
17 a loan made in the context of dis-
18 closed, routine banking and brokerage
19 agreements, or a loan that is clearly
20 motivated by a personal or family re-
21 lationship.

22 “(ii) EMPLOYMENT NEGOTIATIONS
23 PROHIBITION.—A member or employee of
24 the Board shall not engage in employment
25 negotiations with any nationally recognized

1 statistical rating organization, issuer, or
2 investor, unless the member or employee—

3 “(I) discloses the negotiations
4 immediately upon initiation of the ne-
5 gotiations; and

6 “(II) recuses himself from all
7 proceedings concerning the entity in-
8 volved in the negotiations until termi-
9 nation of negotiations or until termi-
10 nation of his employment by the
11 Board, if an offer of employment is
12 accepted.

13 “(B) CREDIT ANALYSTS.—

14 “(i) IN GENERAL.—A credit analyst of
15 a qualified nationally recognized statistical
16 rating organization shall not accept any
17 loan of money or securities, or anything
18 above nominal value, from any issuer or in-
19 vestor.

20 “(ii) EXCEPTION.—The prohibition
21 described in clause (i) does not apply to a
22 loan made in the context of disclosed, rou-
23 tine banking and brokerage agreements, or
24 a loan that is clearly motivated by a per-
25 sonal or family relationship.

1 “(14) EVALUATION OF CREDIT RATING AGENCY
2 BOARD.—Not later than 5 years after the date that
3 the Board begins assigning qualified nationally rec-
4 ognized statistical rating organizations to provide
5 initial ratings, the Commission shall submit to Con-
6 gress a report that provides recommendations of—
7 “(A) the continuation of the Board;
8 “(B) any modification to the procedures of
9 the Board; and
10 “(C) modifications to the provisions in this
11 subsection.”.