

Rating Agency Confirmations – Moody's policy statement

In a policy statement dated March 2010 Moody's has further clarified its position on the circumstances in which it will provide a Rating Agency Confirmation (RAC).

This statement addresses the provision of RACs for "post-closing changes or amendments to transaction documents, structures or parties". In particular Moody's emphasised that it is not bound by provisions in transaction documents to which it is not a party which require a RAC as a condition precedent to an action being taken.

As a statement of Moody's policy, in our view the letter does not contain anything materially different to the advice that parties have received from Moody's, following the submission of a request for a RAC, since the onset of the financial crisis.

Noteworthy omissions

A number of market participants consider that it would be helpful for Moody's to set out examples of the circumstances in which RACs have been and will be provided. We note that there are no examples in the policy statement.

The market would also appreciate guidance on the circumstances in which Moody's will provide confirmation that they do not view the proposed action as significant to the rating.

Timing of disclosure

One point in the letter which does not directly relate to Moody's RAC policy is that:

"Moody's encourages issuers to disclose any transaction changes or amendments to the public as early as possible so that investors and other market participants may arrive at their own conclusions about the amendments' credit implications";

In practice, if the trustee can make a determination that the amendments will not be materially prejudicial to the noteholders, the amendments are made, any new transaction documents are executed and then a notice is sent, in accordance with the procedures set out in the transaction documents, to investors to notify them of the changes. In our experience, it would be extremely unusual for investors to be notified prior to an amendment being made when the trustee exercises its discretion and consents to the amendments.

We have not interpreted this statement by Moody's as being critical of the practice of notifying investors following the amendments to the transaction documents being effected. We have read this statement with others made by Moody's which purport to limit its liability by stating that investors should independently analyse amendments and not rely solely on the fact that a RAC was issued.

Key Issues

The policy statement clarifies the circumstances in which Moody's will provide a RAC

Noteworthy omissions:

- examples of when RACs have been provided,
- guidance on when statements will be made that an action is not considered to be relevant to the ratings analysis.

Statement on the timing of disclosure of proposed action to investors.

For further commentary on RACs see our [New Beginnings brochure](#)

If you would like to know more about the subjects covered in this publication or our services, please contact:

[Esther Cavett](#) +44 (0)20 7006 2847

[Kevin Ingram](#) +44 (0)20 7006 2416

[Kate Gibbons](#) +44 (0)20 7006 2544

[Johanna Sheppard](#) +44 (0)20 7006 4450

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

Market response to RAC policies

Moody's, consistent with the other rating agencies, has emphasised that in its view market participants should come to their own conclusions on, for example, proposed amendments to the transaction documents and not rely exclusively on a RAC. However, in our view, particularly in the current environment, it is unrealistic to expect issuers and trustees to proceed with, for example, amendments to the transaction documents, without any input from the relevant rating agencies. Whilst such amendments may not warrant a formal RAC, there will inevitably be a level of engagement with the rating agencies and confirmation that the relevant rating agency does not view the proposed action as significant to the rating would be helpful.

Documentary impact

Given that the rating agencies are generally not willing for new transactions to prescribe situations when RACs are required before an action can be taken, we are starting to see other ways of considering the potential ratings impact being inserted into the transaction documents. In practice the two main documentary techniques we have seen are (a) the requirement for a RAC being replaced with a determination by another transaction party, for example a servicer or cash manager, that, after making appropriate enquiries (which could include speaking to the rating agencies), they do not consider that the amendment would have a negative ratings impact and (b) the definition of "Rating Agency Confirmation" being amended to include the concept that if the relevant rating agency has been approached in relation to the requirement to obtain a RAC and has not provided a RAC within a specified period of time (nor has it given any negative feedback within such timeframe) the relevant rating agency shall be deemed to have provided such RAC. Though this latter wording has been accepted by the rating agencies in certain deals, in our view the concept of a deemed RAC should ideally be avoided due to the fact that it does not resolve the ratings uncertainty as the rating agencies could still take adverse ratings action.

For further discussion of the market's response to the practical implications of the RAC policies of the rating agencies see the first article called 'Rating agency confirmations – how necessary will they be?' in our [New Beginnings brochure](#).

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Tokyo ■ Warsaw ■ Washington, D.C.

* Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm