SEC Adopts Credit Rating Reforms Addressing Conflicts; Other Aspects Deferred

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Introduction

Against the backdrop of a financial crisis partially caused by a lack of confidence in the accuracy of credit ratings, the SEC has adopted rules to reform the credit rating agency process. Essentially, the current financial crisis was partially caused because the credit rating agencies failed investors, said SEC Commissioner Kathleen Casey, who noted that the largest rating agencies awarded their highest ratings to complex debt instruments that were undeserving of investment grade status. Investors and the markets paid a heavy price.

A March 2008 report by the President's Working Group on the Financial Markets found that many of the global investors in the AA- and AAA-rated mortgage-backed securities and collateralized debt obligations relied heavily on the credit ratings in making their investment decisions and in communicating risk appetites to their investment managers, rather than undertaking their own independent credit analysis on these complex instruments. When it became apparent that even AAA tranches of asset-backed securities could face large write downs, investors lost faith in the ratings of a broad range of complex structured products. And, no longer willing to rely on ratings and unable to perform their own credit analyses, investors simply pulled back from a wide range of structured product markets.

The rating agencies certainly were not the only cause of the current crisis, but it is becoming apparent that they played a significant role. The conflict of interest issue looms large on both sides of the Atlantic. Recently, the European Commission proposed the regulation of credit rating agencies under a series of sweeping measures designed to restore confidence to the markets.

Credit rating agencies are the only market participants who make it their primary focus to evaluate and disseminate information. And the importance of their central roles is further affirmed by rules such as those used to determine pension investment guidelines and capital requirements for financial institutions. All of these factors indicate that the credit rating agencies have substantial responsibilities for providing timely and accurate information to other market participants.

After nearly a century of self-regulation, the rating agencies became subject to SEC oversight after the enactment of the Credit Rating Agency Reform Act of 2006. The Act authorizes the SEC to oversee credit rating agencies registered with the Commission as nationally recognized statistical rating organizations (NRSROs). The Act has the interrelated goals of enhancing accountability, transparency, and competition in the rating industry. The Commission has actively used its authority from the very beginning. Starting in August 2007, the SEC staff conducted a comprehensive, year-long inspection and examination of the rating agencies and produced a public report detailing considerable deficiencies. That inspection, in part, informed the adoption of the current rules.

One of the defining characteristics of the rating industry has been the virtual absence of market-based competition. Longstanding, deeply entrenched incumbents have not retained market share by virtue of issuing ratings of a superior quality. They simply did not have to. But the SEC saw the need to create an environment, as envisioned and required by Congress, that is unapologetically pro-competitive, because until there is a market penalty for being wrong, the industry will not serve investors as effectively as it would otherwise.

SEC Study

The SEC study evolved from an extensive 10-month examination of three major credit rating agencies. Broadly, the study found that, as the securitization process exploded with a substantial increase in the number and complexity of mortgage-backed securities and CDOs, the rating agencies could not keep up with the growth. The study also found that the rating agencies did not properly manage conflicts of interest in rating asset-backed securities during the sub-prime era. The SEC also found that the rating agencies neither fully disclosed nor properly documented their procedures for rating mortgage-backed securities and collateralized debt obligations. SEC Chair Christopher Cox said that the Commission uncovered serious shortcomings at the firms, including a lack of both public disclosure and of policies to manage the rating process, as well as insufficient attention to conflicts of interest.

Rating agencies generally use the issuer pay model under which the issuer of the security pays the rating agency for the rating. The conflict of interest inherent in this model is that rating agencies have an interest in generating business from the firms that seek the rating, which could conflict with providing ratings of integrity. SEC rules specify that it is a conflict of interest for a rating agency being paid by issuers to determine credit ratings with respect to securities they issue. They must establish procedures reasonably designed to manage such conflicts of interest.

The SEC study found that, although the rating agencies had policies to manage conflicts of interest, key participants in the rating process were still allowed to participate in the fee discussions. Further, there were no efforts made to shield analysts from e-mails and other communications from issuers discussing fees and revenue.

Moreover, while rating agencies had policies prohibiting employees from owning any security that is subject to a credit rating by a team on which the employee is a member, the study revealed that the agencies varied in how rigorously they monitor or prevent prohibited transactions, including personal trading by their staff, from occurring. Two rating agencies did not prohibit structured finance analysts from owning shares of investment banks participating in mortgage-backed securities transactions.

In addition, the rating agencies did not always document significant steps in the ratings process, said the report, including the rationale for deviations from their models. There was also inadequate documentation of rating committee actions and the presence of significant participants in the ratings process.

None of the rating agencies had specific written procedures for rating mortgage-backed securities or CDOs. Further, they did not have specific procedures to identify errors in either their models or their methodologies.

Rulemaking

In the wake of the study, the SEC proposed a three-pronged reform to regulate the conflicts of interests, disclosures, and business practices of credit rating agencies. The first prong would address conflicts of interest in the ratings process and require new disclosures designed to increase the transparency and accountability of ratings agencies. The second prong would require credit rating agencies to differentiate the ratings they issue on structured products from those they issue on bonds through the use of different symbols or by issuing a report disclosing the differences. The third part of the SEC's proposed rulemaking would clarify the limits and purposes of credit ratings and ensure that the role assigned to ratings in SEC rules is consistent with the objectives of having investors make an independent judgment of credit risks.

Interestingly, proposing Release No. 34-57967 (FED. SEC. L. REP. ¶88,236 [IP access user]) notes that there is no standard definition of a sub-prime loan. The SEC goes on to define such a loan as a mortgage loan that does not conform to the underwriting standards required for sale to the government sponsored enterprises (non-conforming loans) and is made to borrowers who have weakened credit histories; have reduced repayment capacity as measured by credit scores; and have not provided documentation to verify all or some of the information, particularly financial information, in their loan applications.

The SEC approved a series of measures to increase transparency and accountability at credit rating agencies, and ensure that firms provide more meaningful ratings and greater disclosure to investors. The new rules are designed to deal with conflict of interest issues that came into stark relief as a result of the securitization crisis. The rules reflect a growing skepticism that a rating agency can give an objective rating to a security product if it has advised the issuer or underwriter on how to structure that same product.

In an effort to restore trust in the rating process, the SEC has established a framework for rating agencies under which conflicts of interest are properly and more effectively managed. The SEC's actions were informed by the extensive 10-month examination of three major credit rating agencies that found significant weaknesses in ratings practices. But, on the issue of differentiation of structured products, the SEC issued a reproposal. These comprehensive rules touch every aspect of the credit rating process, said Chairman Cox, from conflicts of interest, to publication of ratings methodologies, to disclosure of ratings track records. See Christopher Cox, Statement at Open Meeting on Credit Rating Agency Reforms (Dec. 3, 2008).

The regulatory program established by the Credit Rating Agency Reform Act of 2006 allows the Commission to promulgate rules regarding public disclosure, recordkeeping and financial reporting, and substantive requirements designed to ensure that rating agencies conduct their activities with integrity and impartiality. The adopted rules are meant to supplement previous rules implemented by the Commission under the Credit Rating Agency Reform Act.

Conflict of Interest

To address the conflict of interest charges, the SEC added three new prohibited conflicts to its rules. The first will prohibit a rating agency from issuing a credit rating with respect to a security where the agency made recommendations to the issuer, underwriter, or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the issuer of the security. The second change will prohibit a person within a rating agency who has responsibility for participating in determining credit ratings or for developing or approving procedures or methodologies used for determining credit ratings from participating in any fee discussions or arrangements.

The third change will prohibit a rating agency from allowing a credit analyst who participated in determining or monitoring the credit rating to receive gifts, including entertainment, from the obligor being rated or from the issuer or underwriter of the securities being rated, other than items provided in the context of normal business activities, such as meetings, that have an aggregate value of no more than $25.

The new rules also require rating agencies to provide the Commission with an annual report of the number of credit rating actions that occurred during the fiscal year for each class of security for which they are registered.

A related reform is the refinement in SEC rules implementing the Act's requirement that performance measurement statistics be disclosed over short-, mid- and long-term periods. Specifically, the SEC requires disclosure of separate sets of default and transition statistics for different asset classes, displayed over one-, three- and ten-year periods. Also, the statistics now will include upgrades and defaults relative to the initial rating. The purpose of these changes is to make it easier to compare the accuracy of ratings on a class-by-class basis.

Another important reform requires enhanced disclosure of ratings methodologies. Rating agencies will have to disclose whether and, if so, how asset verification and qualitative assessments of originators are relied on in determining structured finance ratings. In addition, they will need to disclose, for all asset classes, the frequency of their surveillance efforts and how changes to their quantitative and qualitative ratings models are incorporated into the surveillance process.

Recordkeeping and Ratings Histories

Another key reform adopted by the SEC requires rating agencies to make and retain a record for each outstanding credit rating they maintain showing all rating actions, including initial ratings, upgrades, downgrades, placements on watch for upgrade or downgrade, and withdrawals, and the date of such actions

The SEC added three new recordkeeping requirements to its rules. First, rating agencies will have to make and retain records of all rating actions related to a current rating from the initial rating to the current rating. Second, if a quantitative model is a substantial component of the credit rating process for a structured finance product, a rating agency must keep a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued. Third, rating agencies must retain records of any complaints regarding the performance of a credit analyst in determining, maintaining, monitoring, changing or withdrawing a credit rating.

In addition, under the new regime, rating agencies must make publicly available, on a six-month delayed basis, a random sample of ten percent of the ratings histories for each class of credit rating for which it is registered and has issued 500 or more issuer-paid ratings. This will allow market participants and others to use the information to conduct analyses comparing rating agency performance. Moreover, requiring the data to be made available in XBRL format will ensure that it will be analyzed with greater speed and accuracy, and at less cost. Specifically, this information must be made public on the rating agency's corporate Internet website in XBRL format no later than six months after the rating is made.

As explained by Commissioner Casey, XBRL will greatly facilitate third-party development of ratings performance measurement statistics, and create an environment that will allow those rating agencies issuing more accurate ratings to gain market share. In other words, it will help the rating industry function like any other industry.

The Commission at the same time also proposed that rating agencies make publicly available in an XBRL format, and on a 12-month delayed basis, ratings history information for 100 percent of their current issuer-paid ratings. This is a significant, pro-competitive reform proposal that would further the Act's objectives. It reflects the SEC's belief that the original proposal to require public disclosure of ratings action histories for all current credit ratings could provide substantial benefits to users of credit ratings.

The proposed rule would apply only to issuer-paid credit ratings determined after June 25, 2007. The prospective nature of the proposed rule is designed to ease the compliance burden. In addition, to protect the revenues that rating agencies derive from selling downloads and data feeds to their current outstanding issuer-paid credit ratings, a credit rating action would not have to be disclosed until 12 months after the fact. At the same time, the SEC is requesting comment on whether this proposal should extend beyond issuer-pay rating agencies to include all rating agencies.

The purpose of this proposed amendment is to provide users of credit ratings, investors, and other market participants with the maximum amount of raw data with which to compare how rating agencies initially rated an obligor or security and, subsequently, adjusted those ratings, including the timing of the adjustments. The Commission believes that requiring disclosure of the ratings action history of each issuer-paid credit rating would create the opportunity for market participants to use the information to develop performance measurement statistics that would supplement those required to be published by the agencies themselves in Exhibit 1 to Form NRSRO (FED. SEC. L. REP. ¶34,183 [IP access user]).

In her remarks, Commissioner Casey deemed it vital that 100 percent of the credit ratings be disclosed to investors and market participants. The proposed approach would permit maximum comparability of ratings on an obligor-by-obligor or instrument-by-instrument basis. Investors should know who is issuing the most useful ratings, and without comparability such determinations are not feasible.

Differentiation

A significant and far-reaching reform is the reproposal of the information disclosure program a rating agency uses to issue a structured finance rating. The SEC reproposed this pro-competitive amendment with substantial modifications. The Commission is acting to address concerns that investors assumed that the risk characteristics for structured finance products, particularly highly rated instruments, were the same as for other types of similarly rated instruments; and that they may not have performed internal risk analysis on structured finance products before purchasing them. The principle of differentiation is embedded in the European Commission's recent proposed rating agency reforms, discussed further below.

The reproposal calls for three significant changes. First, it specifies that the arrangers, such as the issuer or underwriter, rather than the rating agencies, would be responsible for disclosing the information provided to the hired rating agency to determine the credit rating. Second, the reproposal limits the disclosure to other rating agencies, thus avoiding any Securities Act implications. Third, it modifies Regulation FD (FED. SEC. L. REP. ¶22,742 [IP access user]), because the arranger will be disclosing material non-public information and would need to rely on the Regulation FD exclusions in order to disclose the information to the rating agencies without simultaneously making a public disclosure.

The arrangers would need to provide the rating agencies they hire to rate structured finance products with a representation that they will provide information given to the hired agency to other rating agencies and agencies seeking to access information maintained by the rating agencies. The rating agencies and the arrangers would also need to furnish the Commission an annual certification that they are accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using the information.

To allow subscriber-paid rating agencies to take advantage of this new information disclosure program, Regulation FD must be amended to permit the disclosure of material non-public information to rating agencies irrespective of whether they make their ratings publicly available. The reproposal would also accommodate any rating agency that accesses the information under the proposed program but ultimately does not issue a credit rating using this information. In addition, it would replace Regulation FD's definition of credit rating agency with the statutory definition of the term.

The reproposal would also permit competitive analysis by other rating agencies that are not paid by the issuer to rate the product. They could issue unsolicited ratings, and the marketplace could decide whose performance is superior.

The goal of these new proposals is to increase the number of ratings outstanding for a given structured finance security or money market instrument and, in particular, promote the issuance of ratings by rating agencies that are not hired by the arranger.

The European Commission has proposed reforms that embody the principle of differentiation under which rating agencies must either differentiate rating categories for structured finance instruments so that they are not confused with rating categories for other types of financial instruments or produce a comprehensive report attached to each structured finance rating. It is envisioned that such a report would provide a detailed description of the rating methodology used to determine the credit rating and an explanation of how it differs from the determination of ratings for any other type of rated entity or financial instrument, and how the credit risk characteristics associated with a structured finance instrument differ from the risks related to any other type of rated instrument.

The Financial Stability Forum, in an April 2008 report, highlighted the inherent differences in the ratings of structured products from those of traditional debt issues. The structured product ratings are based on models and more largely driven by underlying assumptions. In addition, the rating process is driven by the desire to achieve a certain rating; the structure of the product will therefore be adapted accordingly. The ratings may also rely on non-public information about some of the assets; and are potentially more volatile.

Reliance on Ratings in SEC Rules

No reform of rating agency regulation will be complete until the SEC addresses the oligopoly in the rating industry and the overreliance on ratings by removing the regulatory requirements embedded in SEC rules. In the view of Commissioner Casey, it is imperative for the SEC to remove the regulatory requirements that have served to elevate credit ratings to a status that does not reflect their actual purpose and limitations. This evolution in the use of ratings has been recognized by numerous commentators and market participants, including the rating agencies, who have emphasized what a credit rating is intended, and not intended, to represent.

To remove the credit rating references from SEC rules will require a reassessment of the Commission's longstanding uses of ratings. But, in the commissioner's view, doing so is absolutely essential to the Commission's efforts to faithfully implement the clear congressional intent of enhancing transparency, accountability, and competition in the rating industry.

In 1975 the SEC began to make explicit reference to credit ratings in its rules, using credit ratings by market-recognized rating agencies to distinguish among grades of creditworthiness for various purposes under the federal securities laws. The Commission originally adopted the term NRSRO in 1975 solely for determining capital charges on different grades of debt securities under the net capital rule for broker-dealers. Over time, however, the NRSRO concept was incorporated into a number of additional SEC rules and regulations, including rules issued under the Securities Act, the Securities Exchange Act, and the Investment Company Act. Congress also began to use the NRSRO concept in legislation, as have other regulatory bodies, including banking regulators both at home and abroad.

Thus, the Commission has referred to credit ratings for over three decades. Although it is quite understandable why they were first incorporated into the net capital rule and in subsequent rules here and elsewhere, it has become evident over time that there are considerable unintended consequences to the regulatory use of credit ratings. For example, it was never intended to establish and preserve a valuable franchise for the large rating agencies, while simultaneously inoculating them from market competition. Nor was it intended to serve as a substitute for adequate due diligence on the part of investors, managers, directors, and others. Unfortunately, as recent events demonstrate, it appears to have led to such results in too many cases.

Issuer-Paid and Subscriber-Paid Models

The SEC limited the application of the adopting and proposing rules to only issuer-paid credit rating agencies. Congress has identified the issuer-paid model as an inherent conflict of interest and specifically encouraged the proliferation of competing business models that are less conflicted. While the subscriber-based model is not necessarily free from the conflicts that may affect issuer-paid ratings, there is more concern with sustaining a ratings franchise that has failed investors and the financial markets.

Commissioner Casey gave some insight into the Commission's thinking, noting that making subscriber-paid firms release their ratings for free could very likely cripple these firms as they begin to grow, and equally important, discourage new entrants into the ratings business. That would be antithetical to the primary purpose of the Rating Agency Act, which is to increase competition in an oligopolistic industry.

European Commission Reform

In the wake of the SEC's proposals, the European Commission said that credit rating agencies must be subjected to regulation. Internal Market Commissioner Charlie McCreevy recently remarked that no regulator appears to have "got as much as a sniff of the rot at the heart" of the securitized asset rating process before it blew up. European Union political leaders have already called for reform of the credit rating agency process in light of the market turbulence triggered by the sub-prime crisis. While supporting a market-driven solution, the leaders have said that regulation and legislation will be on the table if an appropriate market response is not forthcoming. Regulation is now on the table.

The conflict of interest issue looms large on both sides of the Atlantic. Commissioner McCreevy expressed skepticism about whether a rating agency can give an objective rating to a bank's structured securitized product if it has advised that same bank on how to structure that same product. He stated that, to effectively restore trust in the process, a framework for rating agencies must be implemented under which conflicts of interest are properly and more effectively managed.

The European Commission recently proposed the strict regulation of credit rating agencies in an effort to restore confidence in the markets. The regulations are designed to ensure that the ratings issued by the agencies are independent, objective, and of the highest quality. The new regime is based on concepts of transparency, independence, and sound corporate governance. The proposal signals the failure of voluntary regulation through codes of conduct for rating agencies. According to Commissioner for the Internal Market Charlie McCreevy, the proposed regime for credit rating agencies will ensure that regulators with responsibility for oversight will have at their disposal sufficient resources and expertise to keep up with financial innovation and to challenge the rating agencies in the right areas, on the right issues, and at the right time.

But the European Commission ensured that regulators under the new regime will not interfere in the content of the ratings. Credit rating agencies will be solely responsible for the methodologies, model and rating assumptions they use and the opinions they develop on that basis.

Under the proposal, credit rating agencies would have to comply with rigorous rules to make sure that ratings are not affected by conflicts of interest, that rating agencies remain vigilant on the quality of the rating methodology and the ratings, and that credit rating agencies act in a transparent manner. The proposal also mandates the registration of credit rating agencies under an effective surveillance regime whereby European regulators will oversee the rating agencies.

Under the new regulatory regime, credit rating agencies may not provide advisory services. They will not be allowed to rate financial instruments if they do not have sufficient quality information to base their ratings on. Further, they must disclose the models, methodologies and key assumptions on which they base their ratings; and will have to publish an annual transparency report. The rating agencies will also have to create an internal function to review the quality of their ratings.

With regard to governance, the rating agencies must have at least three independent directors on their boards whose remuneration cannot depend on the business performance of the rating agency. The directors will be appointed for a single term of office that can be no longer than five years. Moreover, they can only be dismissed in case of professional misconduct, and at least one of them should be an expert in securitization and structured finance.

In the European Commission's view, credit rating agencies contributed to the financial crisis by failing to sufficiently consider the risks inherent in complex financial instruments. As a consequence, they manifestly underestimated the risk posed by those instruments. Once the rating agencies gave the highest possible ratings to many of those innovative instruments, investors felt encouraged to purchase them without assessing properly the risks involved. Finally, as market conditions worsened, the credit rating agencies failed to reflect this promptly in their ratings. Their failure to produce sound and accurate ratings was combined with the imprudent and non-judicious approach taken by the investors, who relied blindly on credit ratings.

Credit rating agencies based in the US and other non-EU countries will need to have a legal presence in the EU in the form of a subsidiary, which must apply for registration in the EU jurisdiction where its registered office is located. The agency will have to comply with all the requirements under the proposed regulations.

The new regulations seek to ensure more accurate ratings by requiring rating agencies to systematically use all data available to them that they have declared important to their rating. They should also have measures to establish whether the information used is of sufficient quality and from reliable sources. In particular, with regard to structured finance instruments, rating agencies should state to what extent they have verified the information themselves or relied on third-party assessment of due diligence processes at the level of underlying assets. Further, credit rating agencies will not be allowed to rate instruments in cases where they do not have sufficient quality information to do so.

In addition, although the proposed regulations do not stipulate how the rating methodologies should be structured and reviewed, they do require that the methodologies be subject to independent internal scrutiny performed by a dedicated review function within the credit rating agency, but separate from the business lines. This function will have a direct reporting line to the independent members of the board.

The proposal embodies the principle of differentiation under which rating agencies must either differentiate rating categories for structured finance instruments so that they are not confused with rating categories for other types of financial instruments or produce a comprehensive report attached to each structured finance rating. It is envisioned that such a report would provide a detailed description of the rating methodology used to determine the credit rating and an explanation of how it differs from the determination of ratings for any other type of rated entity or financial instrument, and how the credit risk characteristics associated with a structured finance instrument differ from the risks related to any other type of rated instrument.

Importantly, under the EC’s new regime, rating agencies will have to improve the way they deal with conflicts of interest in order to regain the markets’ confidence. To ensure ratings independence, rating agencies must prevent conflicts of interest and adequately manage unavoidable conflicts. They will have to disclose conflicts of interest in a complete, timely, specific, and prominent manner and record all significant threats to the rating agency’s independence or that of its employees involved in the credit rating process, together with the safeguards applied to mitigate those threats. The rating agencies will also have to implement adequate internal policies and procedures to insulate employees involved in credit rating from conflicts of interest and ensure the quality, integrity and thoroughness of the rating and review process.

There are other, more specific prohibitions and limitations in the rules designed to prevent conflicts of interest. For example, rating agencies will have to disclose to the public the names of the rated entities from which they receive more than five percent of their annual revenue. Further, a rating agency will not be able to issue a credit rating or will have to withdraw an existing credit rating when itself or its analyst involved in the credit rating have ownership of financial instruments in the rated entity or control links.

Also, a rating agency will not be allowed to provide consultancy or advisory services to the rated entity or any related third-party regarding the corporate or legal structure, assets, liabilities or activities. Rating agencies will only be permitted to provide ancillary services in cases that do not present conflicts of interest with its rating activity. Moreover, analysts will not be allowed to make proposals or recommendations, either formally or informally, regarding the design of structured finance instruments on which the agency is expected to issue a rating.

The SEC and European Commission proposals for credit rating agency regulation are proceeding on parallel tracks and are very similar. They both address the main conflict of interest concerns. And, with the SEC's reproposal on differentiating structured products, both commissions are moving towards a differentiation standard. Since the crisis was global, there is concern that the regulatory reform must be consistent when done by national regulators. The Committee of European Securities Commissions has noted the international dimension of the credit rating activity, and the effects of a European regime on the markets worldwide and of decisions by US and other regulators on the European markets. CESR has urged all regulators conducting credit rating agency reform to take into account the international dimension as well as the measures already adopted in other jurisdictions with the intention to avoid inconsistencies and an un-level playing field. ❐

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