Deutsche Bank

July 31, 2008

VIA ELECTRONIC MAIL (rule-comments@sec.gov)

Ms. Florence E. Harmon
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Proposed Rules for Nationally Recognized Statistical Rating Organizations
Release No. 34-57967, File No. S7-13-08

Dear Ms. Harmon:

Thank you for giving Deutsche Bank Securities Inc. ("DBSI") the opportunity to respond to the above-captioned release (the "Proposing Release") by the Securities and Exchange Commission ("SEC" or "Commission") pertaining to Nationally Recognized Securities Rating Organizations ("NRSROs" or "credit rating agencies").

DBSI is the U.S. broker-dealer affiliate of Deutsche Bank AG ("Deutsche Bank"). Headquartered in Frankfurt, Germany, Deutsche Bank has over 77,000 employees in 75 countries. Since Deutsche Bank's acquisition of Bankers Trust in 1999, DBSI has grown to become the ninth largest broker-dealer in the United States measured by U.S. capital, and employs over 13,000 persons. Deutsche Bank listed on the New York Stock Exchange in October 2001, one of the first major new listings to commence trading after the events of 9/11. As a major "foreign" investment bank with a global business, a substantial commitment to the U.S. and extensive experience with structured finance products, we believe we have an important perspective to offer.

Deutsche Bank representatives have participated in the Securities Industry and Financial Markets Association Credit Rating Agency Task Force ("SIFMA Task Force. We concur with the points in the SIFMA Task Force's comment letter, but wanted to amplify several items that are of particular concern to us.

Overview

Responding to significant concerns raised about the performance of credit rating agencies in the current difficulties of the credit markets, important proposals for reform have been advanced by regulators and industry groups around the world. As recently noted by the Institute of International Finance, "the market needs to be assured that the [rating] agencies maintain a robust procedure for reviewing and validating their models and assumptions, and that they have adequate resources to do this."[1] Tighter regulation of the rating process is an indispensable ingredient in restoring investor confidence in the ratings process. Many aspects of the SEC's Proposing Release offer precisely the sort of regulatory response that is needed, such as the proposals that

- make all NRSRO ratings and subsequent rating adjustments publicly available,

- require NRSROs to publish performance statistics over specified time periods in each ratings category in a manner that facilitates comparison with other credit rating agencies;

- require NRSROs to document the reasons for any significant out-of-model adjustments from quantitative models, and

- prohibit gifts from recipients of ratings to those personnel who rate them beyond a *de minimis* amount.

While we strongly support many of the proposed rules and believe that they are highly desirable to restore confidence in rating agencies, regrettably in some respects the proposed rules may have the unintended effect of weakening the quality of credit ratings. In particular we question provisions pertaining to the disclosure of information provided by issuers, underwriters or sponsors to rating agencies and to the disqualification of rating agencies that make a "recommendation" while securities are being considered or prepared for issuance. We also think that adding new ratings subcategory symbols for structured products unnecessarily weakens the rules and is likely to increase rather than mitigate confusion about these products.

The decision not to exclude Regulation S transactions from the proposed new disclosure rule could also have unintended negative consequences, both for US

[1] IIF Press Release, July 17, 2008, at 4, available at http://www.iif.com/press/press+75.php

investors, who may be more frequently excluded from non-US transactions as a result, and for the SEC's own regulatory relationships, which might come under tension as a result of the Commission's seeking to impose a new requirement on extraterritorial activities and markets.[2]

Particular Comments

Required Disclosure of All Information Provided to Rating Agencies

Proposed Rule 17g-5(a)(3)(i) and (ii) will require disclosure of all information provided to an NRSRO in rating a structured security that is "used" by the NRSRO in determining an initial credit rating or in undertaking any credit rating surveillance. This rule as proposed is likely to have adverse unintended consequences. We believe that the definition of the information required to be publicly disclosed is both overly extensive and poorly defined. As underwriters or sponsors, we do not have definitive knowledge of what was "used" by the NRSRO. Although NRSROs make their own determination regarding what information they should use, we believe that most NRSROs will interpret this requirement broadly and disclose all communications that they receive regarding the security being rated. This will likely lead to NRSROs restricting their communication with issuers, underwriters and sponsors. This will reduce the amount of information that is informally provided to NRSROs leading to ratings that are less fully informed.

Perhaps more importantly, we believe that the vast bulk of the information to be disclosed will be of little or no value to either investors or other rating agencies interested in making unsolicited ratings. Issuers, underwriters and sponsors currently provide information to rating agencies for a variety of reasons. It may be solely to demonstrate to the NRSRO that the underlying assets have been assembled. In other instance, where the final contents of the structured security have not been determined, it may be to demonstrate the type of assets that the structured entity is likely to contain. A broad and undefined disclosure obligation will result in extensive and irrelevant information that is more likely to confuse or overburden than to enlighten. Moreover, the Commission's stated purpose of

[2] The SEC's relationships with fellow regulators are critical for products that trade in increasingly global markets. We believe that it is easier for regulators to maintain close and effective working relationships to the extent that they follow similar approaches to common regulatory issues. In this regard, it is notable that the Consultation Paper just issued by the European Commission identifies difficulties with credit rating agencies and suggests similar modifications in the issuance of ratings. However, it follows some different approaches from the Commission. Specifically, it deals differently with the sharing of information between issuers, underwriters and credit rating agencies and on consultancy or advisory services This highlights the need for more consultation in the creation of new and important regulation that will have an effect on securities that are sold and trade in the cross-border marketplace. *See* http://ec.europa.eu/internal_market/consultations/docs/securities_agencies/consultation-cra-framework_en.pdf (issued July 31, 2008).

creating opportunities for investors to receive competing unsolicited ratings may be unlikely to be realized in many instances. Unless both rating agencies use exactly the same analytic models, the information that was actually used by one rating agency may not be the data that another rating agency needs to feed its unsolicited analysis.

The disclosure requirement also creates significant liability concerns. As the Proposing Release itself recognizes, in the context of public offerings substantial new liability concerns would arise for the underwriter under Sections 11 and 12(2) of the Securities Act. In non-registered offerings there would at least be an argument, which class action plaintiffs' counsel will surely try to get courts to adopt, that the disclosure should give rise to Rule 10b-5 liability. We note parenthetically that the SEC could mitigate at least this one aspect of our concern if the final rule specified that the disclosures did not give rise to 10b-5 liability.[3]

We also share the SIFMA Task Force's concern that the rule would require the disclosure of information that is confidential or proprietary to issuers, underwriters and sponsors. As underwriters, we share possible characteristics of structured securities, such as specific collateral pools or structural characteristics on a confidential basis. An important purpose of these discussions is to obtain the NRSRO's assessment of the credit involved. These discussions lead to more accurate ratings, and a broader range of structured products that can be offered to investors. There are many circumstances where unique skill and creativity is required in organizing different aspects of a structured security. Often the facts that are shared during these discussions are disclosed to investors at the time the structured security is offered for sale,[4] but wider public disclosure would be problematic.[5] If proprietary approaches to the creation of these securities needed to be made public, underwriters would have less incentive to create a wide range of structured products for investors.

Investors are already protected despite the confidential nature of these discussions under disclosure rules that already exist. To the extent information provided to an NRSRO is material to the security being offered, existing rules govern its disclosure. Though offering rules and practices differ based on such conditions as whether the securities are registered or not, offering documents (and

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[3] The SEC has carved out specific regulatory requirements from 10b-5 liability in other contexts. For example, Regulation FD carves violations of that rule out from 10b-5 liability. See 17 CFR 243.102.

[4] There are also private transactions where this information can be kept confidential without diminishing the disclosure of material facts to investors.

[5] The sensitivity of information disclosed to a rating agency was explicitly recognized by the Commission when it decided to exempt these disclosures from the requirements of Regulation FD. 17 CFR 240, 243, 249.

counsel opinions when obtained) already need to be carefully and accurately prepared and the proposed rules would not change this obligation.

Disqualification of Rating Agencies that Provide a Recommendation

Proposed Rule 17g-5(c)(5)would disqualify an NRSRO where the NRSRO or any person associated with the NRSRO made a recommendation regarding the structure, assets, liabilities, or activities of the obligor or issuer of the security. While we understand the concern about potential conflicts of interest that drives this proposal, we share the concern of SIFMA and others that the imprecision in the key term "recommendation" could disqualify the particular NRSRO that knows the most about a particular security, and in general, limit the quality of ratings that are given. In addition, we are concerned that NRSROs, for practical business purposes, will formalize and limit their communications with others who are involved in a potential offering. This would lower the risk that guidance or indication from an NRSO staff person, even if given informally, might be characterized as a "recommendation" and result in the NRSRO's disqualification from a transaction.

From the issuer's side, this will greatly complicate the ability to understand what the rating agency is looking for in order to improve the rating of a proposed transaction. There may be some ways to deal with this, but they would be so inefficient and convoluted as to further highlight the difficulties posed by the vagueness of the proposed rule. For instance, one could imagine an issuer seeking a rating for a collateral pool, and after receiving a disappointing rating making adjustments to the pool, then returning for another rating, then tinkering with the pool some more if the rating is still not satisfactory, then returning for a third rating, and so forth until it stumbles upon the right combination. This would be a massively inefficient and time-consuming exercise. We commend the SIFMA Task Force recommendations on this point as an approach that fully addresses the concerns that underlie this proposed rule with far less collateral damage to the ability of issuers and rating agencies to communicate clearly with each other.

Ratings Modifiers

We join the SIFMA Task Force in recommending that the SEC should adopt proposed Rule 17g-7 requiring a report reflecting the specific credit rating methodology and associated risks of structured finance products, but that it not adopt its proposed alternative of a differentiated symbol for these products. Adding a new ratings sub-category unnecessarily weakens the new report requirement. It will also hurt liquidity and add confusion to a market that is already under pressure. In particular, a great number of US and non-US insurance, pension and other laws will have to be amended to permit institutions

to continue holding these securities. Past experience with seeking to effect universal amendments to state laws shows that this process can take years. Adopting laws in other nations to accommodate the new ratings modifier may take even longer, particularly if other markets in their own securities codes choose not to adopt modifiers, or adopt different modifiers from the SEC's. This uncertainty about the length of time legislatures will need to address the issue makes it doubtful that even a significantly delayed effective date for the modifier requirement would solve the problem.

The use of a single modifier for all structured products also raises the prospect that structured products that have not performed as badly as subprime residential mortgage-backed securities, such as credit card and prime mortgage asset-backs, could be adversely impacted in the eyes of investors by being painted with the same brush. Many structured products are already suffering from a significantly increased pricing discount due to credibility issues that exist between investors and the rating agencies. Unlike the proposed report, a new ratings designation will do nothing to close this credibility gap while adding new concerns about liquidity impairment.

Consequences of the Extraterritorial Effect of the Rules

The proposed rules are structured so that Regulation S transactions are not exempt from the proposed disclosure obligation. This will effectively create a disclosure obligation under US law if a non-US issuer requests an NRSRO rating for a structured product offering, even if the offering occurs entirely outside the United States and involves no US investors. We believe that one practical effect of this extraterritorial application of the rule will be to encourage issuers, underwriters and sponsors of such transactions to categorically exclude US investors from participation in many offerings. Given that the SEC has recognized in other contexts the need to give its rules flexibility so as not to unnecessarily limit US investor access to foreign markets (such as its pending proposed amendment to Rule 15a-6) we believe the Commission should give attention to this possibility.

Conclusion

DBSI appreciates the opportunity to comment on the proposed regulations. With changes to address the concerns highlighted above, the SEC's regulations for NRSROs can play a key role in restoring market confidence in credit ratings.

Sincerely,

Robert S. Khuzami
Managing Director and
General Counsel,
Deutsche Bank Americas