Securities and Exchange Commission
Re-Proposed Rules for Nationally Recognized Statistical Rating Organizations
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I. Introduction

The Commission's recently adopted rules relating to credit rating agencies are a modest step in the right direction, but much more vigorous action is needed. The dominant credit rating agencies have effectively resisted all efforts at meaningful reform for nearly a decade. While Congress chased the long-term dream of a perfectly competitive rating market in which reputational considerations would guarantee high-quality ratings and therefore devoted its attention to issues like reducing regulatory barriers to entry, it appears – "appears" because the data for rigorous analysis is not available – that huge numbers of low-quality ratings were being issued and in some respect being relied upon by investors.

At the risk of understatement and without disparaging the efforts of entrant agencies, there appears to be little evidence that entrants have provided or do currently provide a meaningful check on the dominant rating agencies' incentives to issue poor-quality ratings or on the potentially catastrophic effects of those ratings. Perhaps they will provide such a check one day; perhaps they won't. Perhaps efforts to promote competition will only make matters worse because the perverse incentives of the rating market – the rating-dependent regulation and issuer-pays model – cause rating agencies to compete in laxity, not quality.

Until such time as these issues are resolved, the Commission should not rely solely on the hope that competition will someday improve things. Instead, if the facts are what so many observers believe them to be – that is, if rating agencies have issued large numbers of low-quality ratings on novel products, the Commission should consider actions that *directly affect* the *current* incentives of the rating agencies *that matter*.

A first step in this direction is to disclose the information that would make systematic, rigorous assessment of rating quality possible. Although rating agencies are widely blamed, rightly or wrongly, for playing a major role in the collapse of the worldwide credit markets, although agency ratings continue to play a crucial role in regulation of banks and other crucial institutions around the globe, and although agencies continue to assert that their ratings are of high quality, they have not made the information necessary to evaluate rating quality available to the public – even as they cite public availability as a reason for permitting the conflict-ridden issuer-pays model to persist. Adoption of the rating-history disclosure requirements currently under consideration is a necessary next step.

The following step – assuming that rigorous analysis reveals low quality across the board or in some segments – is to *hold rating agencies accountable for the quality of their product*. Even if a perfectly competitive market will work its magic at some undefined point in the future, what we need *now* is either incentives for high-quality ratings or immediate abandonment of rating reliance throughout the regulatory and financial system. The latter course is impossible because agency ratings are too deeply entrenched in the regulatory system and private contracts. Thus, the Commission should adopt a system for monitoring and evaluating rating quality and taking action if quality is poor.

The rating-agency business continues to be artificially propped up by inappropriate regulatory reliance on ratings. That blunts whatever market incentives do exist for high-quality production and – in combination with the issuer-pays model and the lack of accountability – might as well be designed to induce the production of inflated, low-quality ratings. The Commission has quite rightly considered the suggestion of Professor Frank Partnoy and others that rating-dependent regulation be reduced. Unfortunately, the Commission apparently has abandoned or tabled this effort without explanation. The Commission should promptly revive its reconsideration of rating-dependent regulation.

Finally, the Commission should consider banning the issuer-pays model. Its failure even to entertain this option, given its statutory authority to do so, the clarity of the conflict of interest, and the weak case presented in favor of the model, is puzzling.

II. The Current Rules Are a Step in the Right Direction

The Commission is to be commended for taking some action with respect to credit rating agencies[1] in the wake of the worldwide credit crisis. The rules adopted earlier this year, which relate to recordkeeping; disclosure of rating actions and performance measurement statistics; and controlling conflicts of interest, are extremely unlikely to be harmful and may be modestly helpful.[2]

In particular, the requirement that agencies disclose the rating performance history for ten percent of issuer-paid ratings, broken down by class of instrument,[3] is promising. Despite the assertions of some rating agencies that they are able to make ratings and rating actions publicly available because of the issuer-pays model,[4] those who have tried to use the agencies' Websites without a paid subscription know that it is extremely difficult – if not impossible – to conduct the kind of systematic review of rating performance that would allow a reasoned assessment of agency rating quality.[5] The ten-percent rule is an improvement, albeit an extremely incomplete one.

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[1] Throughout these comments, I use "rating agency" to mean "nationally recognized statistical rating organization" as that term is used in the Commission's rules, except where expressly noted.

[2] *See* Release No. 34-59342, Feb. 2, 2009.

[3] 17 C.F.R. § 240.17g-2(d).

[4] *See*, *e.g.*, *Assessing the Current Oversight and Operation of Credit Rating Agencies: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 109th Cong. (March 7, 2006), Prepared Testimony of Vickie A. Tillman, Executive Vice President, Standard & Poor's, at 10-11 (issuer-pays model "promotes the wide and free dissemination of information to the market quickly"); Letter from Vickie A. Tillman, WALL ST. J., Jan. 9, 2009 ("because we publish our ratings and models for free on our Web site (something not afforded, by the way, by a subscription-based model), investors have always had the ability to judge for themselves if they agree with our opinions and act accordingly."); Letter from Vickie A. Tillman, WALL ST. J., Aug. 31, 2007 (same).

[5] For example, S&P's website apparently has a publicly available list of *current* ratings for various types of issuers that is reasonably user-friendly, but provides no historical information. It is thus impossible to match initial ratings with default, which is the cornerstone of rating quality analysis. In addition, S&P should be invited to explain exactly when it adopted its current user-friendly rating list.

III. The Proposed Rules Represent a Further Step in the Right Direction

A. Complete Disclosure of All Rating Histories Is Critical

It is currently impossible for members of the public – the same public that is paying for the rating agencies' apparent failures via such measures as the bailouts of trading counterparties who entered into credit default swaps with AAA-rated AIG on agency-rated mortgage-backed securities – to obtain the basic data needed to evaluate rating quality without the rating agencies' sufferance. This is true despite the tremendous importance of credit ratings to the global economy and regulatory system, the dominant rating agencies' claims of high quality, and their assertions that their concern for their sterling reputation gives them the right incentives to produce high-quality ratings.

It is critical for the market to learn *whether* rating agencies failed and *on what products* and *of what vintages* they failed. This kind of detailed analysis is needed to determine, for example, whether agency quality was as high as could be expected, whether it suffered only because agencies failed to predict an anomalous real-estate market decline, whether there is a widespread problem with novel products, or whether there is a general problem with rating agencies, perhaps because of the issuer-pays model, rating-dependent regulation, or lack of competition.

The ten-percent requirement is helpful in this enterprise, but robust analysis of specific products of specific vintages is not likely to be possible unless 100% of the data is available. Moreover, the selection process adopted for the 10% of rating histories that are disclosed will add an additional level of complication to analysis. For example, despite the best efforts of all parties to construct representative samples, the appropriateness of the sampling technique may be questioned. If the only data available is what is sampled, then this kind of question could haunt any analysis. It is far better to make *all* the data available and let the researchers debate sampling techniques.

The dominant rating agencies defend the issuer-pays model on the ground that it promotes public dissemination of rating information. Thus, any arguments on general principle against rating-history disclosure that they advance should be dismissed out of hand.[6] Any arguments based on technical or operational considerations should be evaluated with an appropriate degree of skepticism.[7]

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[6] The comments of Fitch Ratings on this proposal, which recognize the "need for adequate disclosure of historical information," are thus to be commended. *See* Comments of Charles D. Brown, General Counsel, Fitch Ratings ("Brown Comments"), at 1.

[7] Notably, the objection of DBRS to the re-proposed rule on the ground of "burden" contains *no* specifics whatsoever. *See* Comments of Mary Keogh, DBRS, at 4-5. The Commission should discard such unsubstantiated claims.

B. Disclosure of Underlying Pool Data for Asset-Backed Securities Is Likely to Be Helpful

To the extent that a vibrant competitive fringe[8] can reasonably be expected to constrain the dominant rating agencies' incentives to issue poor-quality ratings at some point in the future, widespread availability of underlying pool data is likely to be a good idea. Government-sponsored efforts to foster such a fringe in the presence of highly entrenched incumbents have a fairly poor record of success, as the history of the 1996 Telecommunications Act and various efforts to introduce retail electric competition attest. But perhaps there is a greater appetite for critical analysis of dominant agencies' ratings after the events of the past two years.

To the extent that investors have lost trust in agencies' novel-product ratings, information that would allow independent observers to evaluate structured-product ratings in detail is likely to be helpful in restoring confidence on a firmer foundation – assuming operational problems can be worked out and there are no legal barriers.

IV. Specific Questions Posed by SEC on Rating-History Disclosure Requirement

A. Rating-History Disclosure Should Be Required for Ratings Starting from an Earlier Date

It is critical to understand what happened to ratings in the years leading up to the current credit crisis. Currently, we have on the one hand a very widespread sense that ratings failed. On the other, we have rating agencies' assertions that they did a great job, except for failing to catch the worst real estate downturn in decades. This state of debate is not helpful to the current, wide-ranging discussion of the future direction financial regulation, which goes far beyond the parochial interests of rating agencies to embrace such broader issues as the proper role of securitization versus classical banking as a credit mechanism, the cyclicality of capital regulation, and the desirability of hard limits on financial innovation. An understanding of credit rating quality is critical to both these discussions.

Limiting disclosures to ratings issued after mid-2007 or even mid-2006 frustrates this critical purpose. There is nothing in the Credit Rating Agency Reform Act that imposes such a limit on the Commission's authority to require disclosure, and rating history disclosure should be required for as many ratings as possible. A starting date as early as the early 2000s, when the credit bubble was forming, is an absolute minimum. Ideally, the disclosure requirement should start even earlier, so that the market has enough information for robust evaluation of the absolute and relative quality of traditional bond ratings and ratings on novel financial products. What is

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[8] By "competitive fringe" I mean an intellectually competitive fringe. The participants could be rival for-profit rating agencies or academics and observers such as Joseph Mason and Josh Rosner, who were able to cast serious doubt on agency methodologies even without extensive data availability. *See* Joseph R. Mason & Josh Rosner, *Where Did the Risk Go? How Misapplied Bond Ratings Cause Mortgage Backed Securities and Collateralized Bond Market Disruptions*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027475 (May 3, 2007).

needed to understand rating agency quality, rather than the date the enabling statute was enacted or became effective, should be the touchstone in evaluating this question.

B. Rating-History Disclosure Should Be Required for All Ratings from the Cutoff Date

As explained above, the starting date for disclosure should be as early as possible. All ratings issued after the starting date should be subject to the history disclosure requirement.

C. Disclosure Time Lag

We do not currently have the information necessary to answer the question whether the issuer-paid model should be allowed to exist at all. Thus, it is premature to give weight to any parochial concerns of the dominant, issuer-paid rating agencies that they will lose money from selling data feeds if they are required to provide the level of useful disclosure that will allow understanding of what happened in the rating market.

A time lag of zero is justifiable on these grounds. However, it is not clear that zero-time-lag disclosure is needed to achieve the primary purpose of these rules: systematically assessing rating-agency quality. To the extent that the Commission is inclined to entertain rating agencies' private concerns at all, it should consider the fact that rating information that is even three months old is extremely stale by market standards. In any market of even moderate liquidity, we should expect the information content of the rating change to be priced in far sooner than that. Even if markets are illiquid, no investor who finds ratings even moderately useful for any economic purpose is going to wait three months for rating actions to become publicly available.

A three-month lag ought to be more than adequate to protect any legitimate agency interest in selling data feeds and may be adequate to serve the purposes of the disclosure regime.

D. Disclosure by Dominant Agencies Is a Higher Priority than Disclosure by Subscriber-Pays Agencies

From the standpoint of transparency, ideally information about both subscriber-pays and issuer-pays agencies would be made available so that investors would be able to benefit from systematic evaluation of quality in both segments. However, one extremely pressing question is whether the dominant-agency ratings failed and, if so, in what respects. Subscriber-pays disclosure does not help answer this question.

The Commission may also wish to consider that subscriber-pays agencies are more likely to be harmed by a disclosure requirement, that the dominant agencies have every incentive to squash any competitive threat from this segment, that the policy of the 2006 Act is to promote competition, and that subscriber-paid agencies are not widely blamed for playing a role in precipitating global credit-market collapse.

It is also worth remembering that the dominant agencies, not the subscriber-pays agencies, have justified their business model on the ground that it promotes public disclosure of

ratings. Standard & Poor's, in particular, should be treated as estopped from arguing for parallel disclosure requirements now.[9]

Disclosure by dominant rating agencies has greater benefits and likely lower costs than disclosure by subscriber-pays agencies. It would be appropriate for the Commission to take this into account in crafting a disclosure regime.

Whatever the Commission decides, the bottom line is that disclosure by subscriber-paid agencies, with their tiny market share, is a side issue that should not consume an excessive amount of the Commission's attention.

E. Unsolicited Ratings Should Not Be Discouraged

To the extent that problems in the rating-agency markets are to be solved by competition, unsolicited ratings appear critical – especially if the issuer-pays model is going to be retained. One may question the likely effectiveness of policies to promote competition in this market, but if competition is the solution that the Commission is going to continue to pursue, then the rules should promote unsolicited ratings, which appear to be the primary vehicle for head-to-head competition.[10] Unsolicited ratings may of course be infected with the conflicts of interest posed by the issuer-pays model: An agency may offer high unsolicited ratings in the hope of getting future business from an issuer. But this is just an example of "competition in laxity," a phenomenon that results from the interaction of rating-dependent regulation, the issuer-pays model, and competition. It is not a problem with unsolicited ratings *per se*.

Ideally, as much information as possible about the history of unsolicited ratings should be made available, subject to the qualification above relating to the competitive status of subscriber-paid agencies. The general principle should be maximum disclosure of rating histories absent demonstrated need not to do so based on a specific policy.

V. Additional Measures Should Be Considered

A. Reducing SEC Rating-Dependent Regulation

The Commission considered, but did not adopt, reforms that would have reduced its regulatory scheme's dependence on credit ratings.[11] As Professor Frank Partnoy of the University of San Diego has been pointing out a decade,[12] and as many others have recently

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[9] *See supra* note 4.

[10] This commenter is in general agreement with the comments of Fitch Ratings on this point. *See* Brown Comments, at 2.

[11] *See* Exchange Act Release No. 58070 (July 1, 2008), 73 Fed. Reg. 40,088 (July 11, 2008); Securities Act Release No. 8940 (July 1, 2008), 73 Fed. Reg. 40,106 (July 11, 2008); Investment Company Act Release No. 8940 (July 1, 2008), 73 Fed. Reg. 40,124 (July 11, 2008).

[12] *See, e.g.,* Frank Partnoy, *The Siskel & Ebert of Financial Markets?: Two Thumbs Down for the Rating Agencies,* 77 WASH. U. L.Q. 619 (1999).

come to recognize,[13] incorporation of ratings into the regulatory system creates artificial demand for credit ratings and reduces the degree to which market mechanisms will constrain agencies from issuing low-quality ratings.

A form of rating-dependent regulation (very broadly defined) may be the best, or least bad, solution to regulatory problems in some settings,[14] but that is not the case for many of the SEC rules that have been under consideration. For example, the use of agency ratings to determine "haircuts" to security values in Rule 15c3-1 under the Exchange Act[15] appears to rely on credit ratings primarily as a measure of liquidity, as broker-dealer assets are marked to market. That is not their intended purpose of credit ratings, and it should be reconsidered. Similarly, it seems unclear that credit risk as measured by a credit rating is the best indicator of whether an asset-backed security should be marketable as under a shelf registration, so reliance on ratings for that purpose on Form S-3[16] also should be reconsidered. The Commission also should consider carefully whether the requirement in Rule 2a-7 of the Investment Company Act that money-market funds to invest only in highly rated securities if they wish to avoid fair-value accounting for their assets[17] serves its intended purpose. The Commission should consider whether money-market funds would face excessive incentives to take on credit risk if they were not limited to highly rated investments and if so whether the rating requirement is the best solution to the problem.

Even complete elimination of rating-dependent regulation from the Commission's rules would be of limited effect given ratings' widespread incorporation into other financial regulation and private arrangements, reconsideration by the Commission of rating-dependent regulation is justified on the merits, is important for symbolic reasons, and could help spur other agencies and private parties to reexamine their reliance on credit ratings. At a minimum, the Commission should provide a reasoned explanation of its decision to change or not to change its rules relating to rating-dependent regulation.

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[13] *See, e.g,*, Charles A.E. Goodhart, *The Financial Economists Roundtable's Statement on Reforming the Role of SROs in the Securitization Process*, Dec. 5, 2008 ("The Roundtable strongly endorses eliminating from SEC regulations every prescriptive mandate that is or would be based solely on credit ratings'); Zanny Minton Beddoes, *Taming the Beast*, THE ECONOMIST, Oct. 9, 2008 (the "popular suggestion" to "reform rating agencies" "will not yield much" because "the problem with credit-rating agencies lies in the tension between their business model and their use as a regulatory tool"); James Westbrook & Mark Pittman, *SEC May Curb Credit-Rating Conflicts, Delay New Mortgage Grades*, Bloomberg.com, Dec. 2, 2008 (quoting Christopher Whalen of Institutional Risk Analytics: "The SEC and Congress need to strip out of the federal statute every instance where a pension fund or bank is required to use ratings."); Robert Rosenkranz, *Let's Write the Rating Agencies out of Our Law*, WALL. ST. J., Jan 8, 2009.

[14] This point is developed more fully in my article *One Cheer for the Rating Agencies*: *How the Mark-to-Market Accounting Debate Highlights the Case for Rating-Dependent Regulation*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331633 (forthcoming, *South Carolina Law. Review*), which argues that the regulation of pure credit risk probably has a place in capital regulation and that that requires evaluation of credit risk – in other words, performance by someone of the function supposedly performed by credit rating agencies.

[15] 17 C.F.R. § 240.15c3-1.

[16] *See* 17 C.F.R. § 229.1101; Form S-3, General Instruction I.B.5.

[17] *See* 17 C.F.R. 270.2a-7(a)(10).

B. Ex Post Remedies for Poor Quality Ratings

1. "Reputation" Is Not Likely to Work for Novel Products, Even Under Ideal Conditions

If financial innovation continues at anything resembling its present rate, we may not expect even a well-functioning reputation mechanism to produce high-quality ratings on innovative products.[18] As long as agencies are paid (by investors or issuers) to issue ratings and not based on rating performance, they may be tempted to issue low-quality ratings when they don't know what they are doing. A supplemental mechanism for holding rating agencies accountable for low-quality rating should be considered.

A rating agency faced with the opportunity to issue ratings on a novel product may or may not be able to issue ratings that are of comparable quality to its ratings on existing products. If it is not capable of issuing high-quality ratings, it must choose whether to rate the product anyway. If it rates the product, it is paid for the rating (by subscribers or issuers) and incurs risks to its reputation. If it does not rate the product, it is not paid but does not risk its reputation. The agency's decision whether to issue the rating will depend on the size of the market for the ratings (the anticipated short-term gains from issuing the rating) and on the risk to its reputation if the rating turns out to be of poor quality.

If the agency can expect that the market for the novel product will be large, as the market for structured products in the early 2000s was, then the agency will be tempted to issue low-quality ratings.

Turning to the power of "reputation" to constrain issuance of low-quality ratings, it seems that a critical element of this analysis is the *scope* of the reputational capital at risk: The smaller the scope of the reputation at risk, the smaller the deterrent to issuing low-quality ratings. A rating agency faced with the decision to rate New Product X does not have a currently existing reputation for high quality in that product. Reputation will not constrain issuing low-quality ratings on Product X unless its reputation for rating other products will somehow suffer. Large "spillover" effects will cause reputation to deter low-quality ratings; small "spillover" effects will not.

In the case of novel products that the agency does not know how to rate for technological reasons, we would expect spillover effects to be small. The failure to rate an exotic product such as a CPDO with high quality tells investors nothing about the agency's ability to rate traditional products such as corporate bonds.

To the extent we can discern anything from the performance of rating agencies' businesses since the beginning of the credit crisis in summer 2007, data seems to support the idea that reputation loss has been narrow in scope and, by and large, confined to novel products where

[18] The argument in this section is taken from my paper *Rating Agencies and the 'Worldwide Credit Crisis': The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement*, http://ssrn.com/abstract=1267625 (forthcoming, *Columbia Business Law Review*).

ratings have performed poorly. For example, I am aware of no evidence that the major agencies' traditional bond-rating businesses suffered as a result of their perceived poor quality in rating novel instruments. Although the traditional rating business has fluctuated with the volume of bond issuance, it does not appear that issuers have stopped seeking ratings for the issues that have come out.

Of course, rating-dependent regulation and other hardwiring, lack of competition, and the issuer-pays model complicate the interpretation of market data, but the basic point that we will see only small spillover reputation losses from rating failures on novel products seems likely to be true.

2. The Commission Can and Should Consider an Ex Post Remedy for Low-Quality Ratings

The problem identified above – that rating agencies are going to be tempted to issue ratings on novel products when they do not know what they are doing – is a conflict of interest. It is a conflict between the agency's interest in making money by issuing ratings on the novel product and the investors' interest in high-quality ratings. Thus, the Commission has the existing authority – indeed, the obligation – to adopt rules requiring the "management and disclosure" of this conflict of interest.[19]

For example, the Commission could require rating agencies to disgorge profits derived from ratings on products that do not meet a specified standard of quality. The rating-agency industry has existing quality measures, such as the "accuracy ratio" that may be suitable for this purpose. One key part of such a regime would be to hold agencies responsible for their position that ratings on novel products generally have the same meaning as ratings on traditional products: If it happens that novel-product ratings perform too differently from traditional-product ratings, disgorgement of profits should be required.

This approach manages the conflict of interest by removing the incentive for rating agencies to issue ratings on novel products that they do not know how to rate. It does require the establishment of a minimum quality standard, which in turn requires an understanding of how agency ratings actually have fared. This underscores the importance of the Commission's current proposal to make performance information available so that rating quality can be evaluated in a rigorous and objective fashion.

The typical rating-agency objections to serious efforts at regulation do not apply to this proposal. The proposal does not regulate the "substance" of ratings; agencies are free to assign, or not assign, whatever ratings they like. They simply cannot make money from issuing *low-quality* ratings. Nor does it violate the First Amendment. Requiring reasonable diligence from those who run a business selling credit assessments does not violate the First Amendment, as the Supreme Court held in *Dun & Bradstreet v. Greenmoss Builders*.[20] A recent memo from the

[19] 15 U.S.C. § 78*o*-7(h)(2).
[20] 472 U.S. 749 (1985).

Grais & Ellsworth law firm refutes rating agencies' extravagant First Amendment claims in more detail.[21]

C. Banning the Issuer-Paid Business Model

The issuer-paid business model presents a flagrant and obvious conflict of interest. The Commission possesses the statutory authority to ban this business model[22] and should seriously consider doing so. Given the extremely widespread recognition of the problems presented by issuer-pays, the Commission's decision over the past year not to entertain even the possibility of changing this business model is baffling. This decision has contributed to a perception, and may reflect the reality, that the Commission has been in thrall to the dominant rating agencies and has been unwilling to consider any reform that runs counter to their narrowly defined business interests.

Although the dominant rating agencies have presented endless vague assurances over the years that they were effectively managing the conflicts presented by the issuer-pays business model,[23] they never really explained *why* this model was a good idea. The only justification that was ever offered was that issuer-pays permits free dissemination of ratings.[24] But the dominant rating agencies never made a comprehensive set of their ratings available for free, and at least some of them now oppose the requirement that they do so, making the vacuous argument that it would be unfair (or, in regulation-speak, "violate regulatory neutrality") for them to have to do so.[25]

The implicit argument that free-riding would kill the rating business without issuer-pays appears to be based in part on an apocryphal story that the agencies moved to the issuer-pays model in the 1970s because of the rise of photocopying. No evidence has ever been presented substantiating this just-so story, which sounds like a law-and-economics urban legend. Some

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[21] David J. Grais & Kostas D. Katsiris, *Not .The World.s Shortest Editorial.: Why the First Amendment Does Not Shield the Rating Agencies for Over-Rating* CDOs, BLOOMBERG L. REP., Nov. 2007 (available at www.graisellsworth.com/publications.html).

[22] 15 U.S.C. § 78*o*-7(h)(2) (Commission is to "prohibit, *or* require the management and disclosure of" conflicts of interest) (emphasis added); 17 C.F.R. § 240.17g-5(b)(1) (identifying "[b]eing paid by issuers or underwriters to determine credit ratings" as a conflict of interest).

[23] *See, e.g.*, Letter from Vickie Tillman, WALL ST. J., Sept. 17, 2007 ("[w]e have numerous safeguards in place that help us manage such conflicts" (*i.e*., conflicts arising from the issuer-pays model)); Michael Mackenzie et al., *Ratings Agencies in the Line of Fire*, FIN. TIMES, Sept. 9, 2007 (quoting Vickie Tillman, "We will have conversations with Mr. McCreevy and other regulators and assure that we manage the perceived conflicts of interest.").

[24] *See, e.g.*, Tillman testimony, *supra* note 4.

[25] *See* Comments of Mary Keogh, DBRS, on Re-Proposed Rules for Nationally Recognized Statistical Rating Organizations, File No. S7-04-09, at 3-4. At the risk of belaboring the obvious, regulatory neutrality means treating similarly situated parties alike. Congress expressly found in enacting the Credit Rating Agency Reform Act that all rating agencies are *not* similarly situated. *See* Pub. L. 109-291, § 2 (Congressional finding that "the 2 largest credit rating agencies serve the vast majority of the market, and additional competition is in the public interest"). Although the treatment of DBRS, like the treatment of subscriber-paid agencies, is really a secondary issue, DBRS' arguments should under no circumstances be understood as supporting diminished disclosure requirements for the dominant rating agencies.

scholars have challenged the account,[26] and in any event every single information-delivery industry in the world is going through rapid Internet-driven change.[27] Regulators should evaluate the issuer-pays based on current technologies and facts, not legends from the misty past or unsubstantiated theories.

Although transition away from the issuer-pays model may be presented by dominant rating agencies as some sort of unthinkably fundamental change, it is important to evaluate such a claim in the context of the catastrophic failure of regulation that the global economy seems to have experienced. *Perhaps* a different rating-agency business model would not have forestalled the decision to issue ratings on products "structured by cows."[28] *Perhaps* poor rating quality did not contribute materially to the total collapse of global private credit markets and an economic downturn that has led to semantic debates over the technical definition of "depression." But it is intellectually impossible to rule out that possibility at this stage, so it is irresponsible to rule out discussion of the issuer-paid business model on the ground that changing it would be "too radical."

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[26] Fabian Dittrich, *The Credit Rating Industry: Competition and Regulation* (2007), at 19 (arguing that other information providers did not shift revenue models at that time, and explaining shift to issuer-pays in terms of rise of mutual funds).

[27] It is clear that there is no single model for dealing with Internet delivery of information. The idea that only one method is suitable for widespread dissemination of information should be rejected out of hand. *See, e.g.*, www.economist.com (providing a mix of free and paid content); www.wsj.com (same); www.ft.com (same); www.bloomberg.com (providing extensive free content, potentially as a loss leader for premium financial information service); www. hulu.com (free television content); www.creditsights.com (premium credit research); www.gimmecredit.com (same); www.creditresearch.com (same, with limited free content).

[28] United States Securities & Exchange Commission, *Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies*, July 2008, at 12.