



Insight beyond the rating.

March 25, 2009

Filed Electronically

Ms. Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F St., N.E.
Washington, D.C. 20549

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*Re: Re-proposed Rules for Nationally Recognized
Statistical Rating Organizations, File No. S7-04-09*

Dear Ms. Murphy:

DBRS appreciates the opportunity to comment on the above-referenced proposal to further enhance the credit rating agency regulatory regime adopted pursuant to the Credit Rating Agency Reform Act of 2006 (the "Rating Agency Act").¹ DBRS is a Toronto-based credit rating agency established in 1976 and still privately owned by its founders. With a U.S. affiliate located in New York and Chicago, DBRS analyzes and rates a wide variety of issuers and instruments, including financial institutions, insurance companies, corporate issuers, issuers of government and municipal securities and various structured transactions. Registered as a nationally recognized statistical rating organization ("NRSRO") since September 2007,² the firm maintains ratings on more than 43,000 securities in approximately 35 countries around the globe.

In its current rulemaking, the Commission revisits two rules it initially proposed last summer.³ The Commission first proposes to amend the Rating Agency Act's recordkeeping rule to impose additional disclosure requirements regarding the credit ratings histories of NRSROs who operate on an issuer-pay model.⁴ The Commission also proposes to amend the Rating Agency Act's conflict of interest rule to require that information regarding certain structured finance products be provided to all NRSROs, whether or not they have been hired by the arrangers of those products to issue credit ratings on the products.

¹ "Re-proposed Rules for Nationally Recognized Statistical Rating Organizations," SEC Rel. No. 34-59343 (February 2, 2009), 74 Fed. Reg. 6485 (February 9, 2009) (the "Re-proposing Release").

² Prior to the implementation of the NRSRO registration scheme, DBRS had been designated as a full-service NRSRO under the prior no-action letter process. See Letter from Annette L. Nazareth, director, Division of Market Regulation, Securities and Exchange Commission, to Mari-Anne Pisarri, Pickard and Djinis LLP (February 24, 2003).

³ "Proposed Rules for Nationally Recognized Statistical Rating Organizations," SEC Rel. No. 34-57967 (June 16, 2008), 73 Fed. Reg. 36212 (June 25, 2008) (the "Initial Proposal").

⁴ In an "issuer-pay" model, an NRSRO's credit ratings are paid for by the obligor being rated or by the issuer, underwriter or sponsor of the securities being rated. Issuer-paid credit ratings generally are made available to the public free of charge.



Although DBRS appreciates the Commission's thoughtful attention to the comments it received on the Initial Proposal, DBRS believes that the latest proposal regarding Rule 17g-2 should not be adopted, the most recent amendment of this rule should be corrected, and a further modification of re-proposed Rule 17g-5 should be made.

A. PROPOSED AMENDMENT OF RULE 17g-2

Rule 17g-2 under the Securities Exchange Act of 1934 ("Exchange Act") sets forth the recordkeeping obligations of registered NRSROs. In the Initial Proposal, the Commission proposed to add a provision to this rule requiring NRSROs to make and retain comprehensive internal records of the history of each of their outstanding credit ratings. The Commission also proposed to require NRSROs to make those records publicly available on their corporate Web sites in XBRL⁵ format, no later than six months after the date of the rating action being recorded. This disclosure was designed to provide users of credit ratings, investors and other market participants with the raw data necessary to compare how the NRSROs initially rated an obligor or security and how they subsequently adjusted those ratings over time.⁶

After considering public comment on the Initial Proposal, the Commission adopted the internal recordkeeping change to Rule 17g-2, but modified the public disclosure part of the proposal.⁷ Instead of requiring all NRSROs to publicly disclose comprehensive ratings histories, the Commission amended section (d) of the rule to require an NRSRO to publish, in XBRL format and on a six-month delay, ratings action histories for a randomly selected ten percent of its outstanding issuer-paid credit ratings.⁸ In view of the fact that an XBRL display of ratings information depends on data tags that have yet to be created, the effective date of this amendment has been delayed until August 2009 at the earliest.

Notwithstanding the fact that implementation of the limited ratings history disclosure rule is still at least several months away, the Commission now seeks to impose a second layer of public disclosure on NRSROs who operate on an issuer-pay model. In this regard, the Commission proposes to require NRSROs to publish, in XBRL format, ratings history information for 100 percent of their issuer-paid credit ratings determined on or after June 26, 2007.⁹ In order to mitigate financial loss for some firms, the proposed amendment would allow an NRSRO to delay publicly disclosing a rating action for up to 12 months. The Commission believes that such

⁵ "XBRL" means eXtensible Business Reporting Language.

⁶ Initial Proposal at 68, 73 Fed Reg. at 36228-36230.

⁷ "Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 34-59342 (February 2, 2009), 74 Fed. Reg. 6456 (February 9, 2009) ("Rule Amendments Adopting Release").

⁸ This disclosure obligation (hereafter referred to as the "ten-percent sample disclosure") applies to each class of rating for which the NRSRO is registered and for which it has issued 500 or more issuer-paid credit ratings.

⁹ June 26, 2007 was the effective date of the Rating Agency Act.



additional disclosure would assist market participants in developing their own performance statistics so they can compare issuer-paid credit ratings and judge the output of NRSROs operating under that business model.

As a general matter, DBRS does not object to the publication of its ratings data in a format that enables the comparison of ratings across NRSROs and assists investors in their own analysis and decision-making. However, DBRS submits that the re-proposed amendment of Rule 17g-2 draws an impermissible distinction between different types of NRSROs and is unjustifiably burdensome. Instead of adopting this change, DBRS urges the Commission to extend the pending ten-percent-sample disclosure requirement to all NRSROs, and to examine the practical effects of this rule carefully before expanding the disclosure requirement further.

1. The Proposed Rule Draws An Impermissible Distinction Between NRSRO Business Models

One of the primary goals of the Rating Agency Act was to foster competition in the credit rating agency industry. To this end, the statute contemplates a single regulatory regime applicable to all business models, and it prohibits the Commission from regulating either the substance of credit ratings or the procedures and methodologies by which credit ratings are determined.¹⁰

As initially proposed, the ratings history disclosure requirement would have applied to all NRSROs, whether they operate on an issuer-pay model or a subscriber-pay model.¹¹ Both subscriber-pay NRSROs and issuer-pay NRSROs who sell downloadable packages of their credit ratings objected to the proposal, arguing that it would damage or destroy the commercial value of their services, and might constitute an unconstitutional taking of their private property without just compensation.¹² The Commission addressed these concerns by reducing the disclosure obligation on issuer-pay NRSROs to the ten-percent-sample disclosure requirement and by relieving subscriber-pay NRSROs from their disclosure obligations altogether. The Commission now proposes to perpetuate this disparate treatment by imposing the new disclosure obligations on issuer-paid ratings only.

Requiring ratings history transparency for one type of NRSRO, while allowing another type of NRSRO to effectively operate as a "black box," violates the principle of regulatory neutrality that is at the heart of the Rating Agency Act. Furthermore, this approach may constitute a prohibited regulation of the procedures by which credit ratings are determined.¹³ Such disparate treatment could also create the anti-competitive effects the Commission has tried so hard to avoid.

¹⁰ Exchange Act, Section 15E(c)(2).

¹¹ In a "subscriber-pay" model, the NRSRO's credit ratings are paid for and are available only to parties who subscribe to the NRSRO's services.

¹² Re-proposing Release at notes 17 - 19 and accompanying text.

¹³ See note 10 *supra*.



There is debate in some circles about the relative quality and reliability of ratings issued under the issuer-pay and subscriber-pay business models. This debate cannot be resolved so long as market participants are unable to verify the ratings accuracy claims made by subscriber-based ratings providers.¹⁴ Moreover, by emphasizing the need for greater accountability for NRSROs that determine issuer-paid credit ratings while not demanding the same accountability for NRSROs operating under a subscriber-pay model, the Commission tacitly endorses these unproven claims.¹⁵

Nor do the subscriber-pay NRSROs' protestations of business harm justify the Commission's unequal approach to ratings history transparency. In explaining why the ten-percent-sample disclosure rule addresses similar claims by issuer-pay firms who also sell packages of ratings, the Commission expressed its belief

that customers that are willing to pay for full and immediate access to downloadable information for all of an NRSRO's ratings actions are unlikely to reconsider their purchase of that product due to the ability to access ratings histories for 10% of the NRSRO's outstanding issuer-paid credit ratings selected on a random basis and disclosed with a six-month time lag.¹⁶

If this is so, limited disclosure should not hamper the ability of subscriber-pay NRSROs to sell their ratings either. Consequently, DBRS urges the Commission to eliminate from Rule 17g-2(d) the language pertaining to issuer-paid credit ratings, thereby making the ten-percent-sample disclosure obligation applicable to all NRSROs.

2. The Proposed Rule Would Impose An Unwarranted Burden on NRSROs

The Commission opines that the ten-percent-sample disclosure rule will make a "substantial amount" of information about credit ratings available to the users of credit ratings and will allow market observers to begin analyzing ratings and developing their own performance metrics.¹⁷ DBRS notes that by virtue of changes the Commission recently made to Form NRSRO, this new information will be supplemented by the publication of more robust performance measurement statistics for all NRSROs.¹⁸ However, instead of waiting to assess whether all this new disclosure will enable investors and other market participants to effectively compare the ratings accuracy of particular NRSROs, the Commission proposes immediately to add another, overlapping layer of disclosure. In this regard, NRSROs would be obliged to disclose the ratings history of one hundred

¹⁴ The fact that subscriber-pay NRSROs can refuse to sell their ratings to their competitors or independent analysts makes it even more difficult to obtain an objective assessment of such ratings.

¹⁵ See, e.g. Re-proposing Release at 14 and 17-18, 74 Fed. Reg. at 6488-89.

¹⁶ *Id.* at 10, 74 Fed. Reg. at 6487.

¹⁷ *Id.*

¹⁸ Rule Amendments Adopting Release at 5 – 11, 74 Fed. Reg. at 6457-6459.



percent of their issuer-paid ratings determined since June 26, 2007 *in addition to* disclosing a randomly selected ten-percent sample of their issuer-paid ratings.¹⁹

The Commission does not explain the need for such duplicative disclosure. At a minimum, this proposal does not appear to be "narrowly tailored to meet the requirements of" the Rating Agency Act, as Section 15E(c)(2) of the Exchange Act requires. Instead of layering duplicative obligations on issuer-pay NRSROs, DBRS suggests that the Commission extend the ten-percent-sample disclosure rule to all NRSROs and then undertake a post-implementation review of the information generated by this rule before thinking about adding new disclosure requirements. Such a review would include an assessment against results of the intended objective of giving investors the tools they need to compare one NRSRO to another.

Although DBRS does not believe proposed Rule 17g-2(d)(3) should be adopted at all, DBRS offers the following additional comments in response to some of the questions raised in the Re-proposing Release:

- DBRS agrees with the prospective application date of "on or after June 26, 2007" as all NRSROs at that date and all new applicants would fall under consistent requirements. Retrospective application of this rule would be too expensive to provide additional benefit.
- Although the Rating Agency Act requires a firm to have only three years of ratings experience in order to register as an NRSRO for a particular class of ratings, DBRS believes that ratings history information for a full market cycle (5 – 7 years) is necessary to permit meaningful comparisons among NRSROs.
- DBRS believes either a 6-month or a 12-month delay before publicly disclosing a rating action would be sufficient. DBRS makes its rating actions publicly available on a daily basis.
- All ratings history disclosure obligations should apply equally to all NRSROs regardless of their business model.
- DBRS suggests that unsolicited ratings should be included in any ratings history disclosure rule.²⁰

B. RE-PROPOSED AMENDMENT TO RULE 17g-5

The Initial Proposal included an amendment to Rule 17g-5 that would have prohibited an NRSRO from issuing or maintaining a structured finance product credit rating paid for by the issuer, sponsor or underwriter of the product (hereafter collectively referred to as "arrangers"), unless the information provided to the NRSRO by the arranger to determine the rating was also disseminated to the public. The goals of this amendment were to increase the transparency of the ratings

¹⁹ Proposed Rule 17g-2(d)(3) and (d)(2), respectively. Over time, it is likely that the same ratings history would be reported under both provisions.

²⁰ DBRS does not issue unsolicited ratings unless it has sufficient public information available to support its analysis. DBRS' approach to ratings and conflicts of interest is the same whether the rating is an unsolicited rating based on public information only or a typical rating based on management involvement.



process for structured finance products, to reduce ratings shopping and to enhance competition among NRSROs by giving new entrants access to the information needed to issue their own ratings for such products. Commenters, including DBRS,²¹ raised a host of legal and practical issues with the proposal, the most notable of which was that the rule would make NRSROs ultimately responsible for disclosure obligations that more appropriately belong to the arrangers. In light of these comments, the Commission withdrew this part of the Initial Proposal and has re-proposed a substantially modified version of the amendment.

The re-proposal creates a new disclosure regime involving arrangers of structured finance products, NRSROs hired by the arrangers to rate such products ("hired NRSROs") and all other NRSROs ("non-hired NRSROs"). Under this regime, a hired NRSRO would be required to disclose to non-hired NRSROs the deals it is in the process of rating.²² The hired NRSRO also would be obliged to obtain a representation from the arranger to the effect that the arranger will disclose to the non-hired NRSROs the written information it gives to the hired NRSRO for the purpose of determining or monitoring the rating.²³ Both the hired NRSRO and the arranger would be required to maintain and provide free and unlimited access to password-protected Internet Web sites for the purpose of making their respective disclosures to the non-hired NRSROs.

For their part, the non-hired NRSROs would be obligated to certify to the Commission annually that they are accessing the information made available by the hired NRSRO and the arranger solely for the purpose of determining or monitoring credit ratings, and that they will keep such information confidential and treat it as material non-public information.²⁴ If they access information for 10 or more deals during the calendar year covered by the certification, they also must certify that they will rate at least ten percent of the deals for which they obtain information. Finally, the non-hired NRSROs would have to tell the SEC annually how many deals they accessed information for and how many of those deals they rated during the most recent calendar year.

DBRS appreciates the Commission's efforts to find a reasonable and prudent approach to reduce ratings shopping and to permit unsolicited ratings of structured finance products by NRSROs who wish to undertake them. Nevertheless, although the Commission has shifted the disclosure obligations to the arrangers, where such obligations belong in the first place, DBRS believes that certain aspects of the re-proposed Rule 17g-5 are unnecessarily complicated and could impose

²¹ See Letter to Florence E. Harmon, Acting Secretary, SEC, from Kent Wideman and Mary Keogh, DBRS, dated July 23, 2008.

²² Proposed Rule 17g-5(a)(3)(i) and (ii). This information would have to be disclosed until the NRSRO has issued a final rating on the deal.

²³ Proposed Rule 17g-5(a)(3)(iii). In a welcome departure from the Initial Proposal, the re-proposed rule would provide a safe harbor to a hired NRSRO who reasonably relies on an arranger's representations.

²⁴ Proposed Rule 17g-5(e). A non-hired NRSRO's right to access an arranger's or hired NRSRO's password-protected Web site would be conditioned upon the accessing party's furnishing the party maintaining the Web site with a copy of the certification made to the SEC for the applicable calendar year.



unjustified burdens on hired NRSROs, while other aspects of the rule could burden non-hired NRSROs and compromise the effectiveness of the rule.

For example, DBRS questions whether the benefits to be derived from the requirement that hired NRSROs make information available to non-hired NRSROs via password-protected Web sites justify the burdens of this proposal. The Commission estimates that the average one-time cost to each NRSRO to establish such a Web site would be \$65,850, and that the annual cost of making disclosure through the sites would range between \$24,600 and \$795,400, depending on the size of the firm.²⁵ These are substantial costs, especially for smaller NRSROs who may need to post only very limited information under the rule.²⁶

A far simpler and more cost-effective approach would be for the arranger to notify qualified non-hired NRSROs,²⁷ via e-mail, when it has supplied information to one or more NRSROs whom it has engaged to rate a structured finance deal. This notice would include the address of the password-protected Internet Web site where the arranger will post the information described in proposed paragraphs (a)(3)(iii)(C) and (D) of Rule 17g-5.²⁸

In the alternative, DBRS suggests that the Commission implement a six-month pilot project wherein it would set up and maintain such a Web site. That is, arrangers would post their information on the Commission's confidential Web site at the time they send the information to hired NRSROs. The Commission would then notify non-hired NRSROs to permit these NRSROs to access the Commission's site to determine whether they wish to conduct an unsolicited rating. The Commission could charge a reasonable fee to non-hired NRSROs to offset the cost of the pilot project. This pilot project would also allow the Commission to directly monitor the progress and the effectiveness of this approach against its intended objective to determine whether a full roll-out or modifications are in order.

Such a pilot program would also give the Commission the opportunity to monitor whether the new disclosure regime causes arrangers to limit the amount of written information they provide to hired NRSROs. Were arrangers to begin providing critical information to hired NRSROs orally in order to avoid the disclosure regime, the quality of the resulting credit ratings would suffer.

²⁵ Re-proposing Release at 78-79, 74 Fed. Reg. at 6504.

²⁶ An NRSRO hired to rate just a few structured finance deals would still be obliged to incur the full cost of creating and maintaining a Web site.

²⁷ A "qualified" non-hired NRSRO would be one that provides the arranger with a copy of the certification described in Rule 17g-5(e).

²⁸ In order to effectuate this change, proposed subsections (a)(3)(i) and (ii) of the Rule would be eliminated, since the hired NRSRO would no longer be required to maintain a password-protected Web site for the benefit of the non-hired NRSROs. Proposed subsection (iii) of the Rule would be appropriately renumbered and would be modified to add a representation by the arranger to the hired NRSRO regarding the arranger's e-mail notification of the non-hired NRSROs.



In addition to questioning the need for hired NRSROs to maintain Web sites for the benefit of non-hired NRSROs, DBRS also questions the utility of making non-hired NRSROs commit to rate ten percent of the deals for which they access information. The Commission states that the purpose of this provision is to require a non-hired NRSRO to determine a meaningful number of ratings without forcing it to undertake work that it may not have the capacity or resources to perform. However, until a non-hired NRSRO has had the opportunity to review the information posted on arrangers' Web sites, and can assess this information against its methodologies and similar deals it rated in the past, that NRSRO may not feel comfortable committing to undertake any number of unsolicited ratings. Despite the intent of the rule, requiring such an NRSRO to commit to conduct unsolicited ratings on at least ten percent of the deals it accesses (assuming it accesses information for at least ten deals) may actually be in opposition to its policies. The result could be either that the non-hired NRSRO stops looking at information on structured-finance deals or that it goes ahead and determines ratings anyway, releasing an inferior product to the market.

A better alternative would be to eliminate the ten-percent portion of the certification in proposed rule 17g-5(e), and to add a provision to Rule 17g-2(a) requiring a non-hired NRSRO to make and retain records showing each deal it accessed pursuant to Rule 17g-5(a)(3), and indicating whether it did or did not rate the securities or money market instruments involved in that deal. Such records would permit SEC examiners to verify the information contained in the non-hired NRSRO's annual certifications and would assist examiners in uncovering any misuse by such an NRSRO of the material, non-public information it has accessed.

With respect to some of the Commission's other questions about proposed Rule 17g-5(a)(3):

- DBRS believes that all iterations of information, preliminary and final, should be disclosed on the arrangers' password-protected Web sites, but that changes to such information should be clearly identified to avoid confusion. Limiting disclosure to only final information could reduce the accuracy of unsolicited ratings provided by non-hired NRSROs.
- DBRS also believes that the arranger should be required to represent that it will disclose on its Web site all material information that is provided to the hired NRSRO for the purpose of determining the rating. Allowing arrangers to exclude such material information could have an adverse effect on the quality of the non-hired NRSRO's unsolicited ratings.
- DBRS believes that access to the information provided under Rule 15g-5(a)(3) should be limited to credit rating agencies ("CRAs") that are registered as NRSROs. Unregistered CRAs are not subject to the Rating Agency Act's rule regarding the prevention of misuse of material nonpublic information or recordkeeping rule. Nor are they subject to SEC examinations. The heightened possibility that a non-regulated CRA would misuse the disclosed information might chill the arrangers' communications with NRSROs.

Ms. Elizabeth M. Murphy
March 25, 2009
Page 9 of 10



C. REGULATION FD

Finally, the Commission has proposed to expand Regulation FD²⁹ to permit the disclosure of material nonpublic information to NRSROs pursuant to the new disclosure regime to be established under Rule 17g-5(a)(3), even if the recipient of that disclosure does not make its ratings publicly available. The purpose of this change is to accommodate subscriber-based NRSROs, as well as NRSROs that access information under the proposed rule but that do not ultimately issue a rating. Rule 100(b)(2)(iii) of Regulation FD would also permit disclosure of material, nonpublic information to any credit rating agency (as that term is defined under the Rating Agency Act)³⁰ that does make its ratings publicly available, for the purpose of developing a credit rating.

Although DBRS agrees that the new disclosure regime proposed under Rule 17g-5 cannot operate effectively unless Regulation FD is expanded, DBRS notes that such an expansion poses a risk that none of the ratings determined for a structured finance product would be publicly available. For this reason, DBRS suggests that the exception be revised to allow information provided under 17g-5(a)(3) to be disclosed to all NRSROs, only so long as the ratings of at least one of those NRSRO are publicly available.

CONCLUSION

DBRS appreciates the opportunity to comment on this important set of re-proposals.

We would be happy to supply the Commission or the staff with additional information regarding any of the matters discussed herein. Please direct any questions about these comments to the undersigned or to our outside counsel, Mari-Anne Pisarri of Pickard and Djinis LLP. She can be reached at 202-223-4418.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Mary Keogh", is positioned above the typed name.

Mary Keogh
Managing Director, Regulatory Affairs
416.597.3614

²⁹ Regulation FD requires that an issuer, or any person acting on its behalf, publicly disclose material nonpublic information if the information is disclosed to certain specified persons. Currently, one exception to this requirement is disclosure of information to an entity whose primary business is the issuance of credit ratings, so long as the information is disclosed solely for the purpose of developing a rating and the entity's ratings are publicly available.

³⁰ DBRS notes that the reference to this definition in the proposed amendment to Rule 100(b)(2)(iii)(B) should read "(a)(61)" instead of (a)(62)."

Ms. Elizabeth M. Murphy
March 25, 2009
Page 10 of 10



A handwritten signature in black ink that reads "Daniel Curry". The signature is written in a cursive style with a long, sweeping tail on the letter "y".

Daniel Curry
President, DBRS, Inc.
212.806.3244

cc: Hon. Mary L. Shapiro
Hon. Kathleen L. Casey
Hon. Elisse B. Walter
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