

Filed Electronically

December 16, 2009

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

Re: *Concept Release on Possible Rescission of Rule 436(g)
Under the Securities Act of 1933; File No. S7-25-09*



Insight beyond the rating.

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Dear Ms. Murphy:

DBRS appreciates the opportunity to comment on the above-referenced concept release regarding the possible rescission of Rule 436(g) under the Securities Act of 1933 ("Securities Act").¹ DBRS is a nationally recognized statistical rating organization ("NRSRO"). As explained below, DBRS believes that rescinding this rule would reduce the availability of credit ratings in connection with public offerings; would alter the character and diminish the quality of credit ratings; and would impose a disproportionate burden on smaller NRSROs.

Background

Rule 436(g) exempts credit ratings issued by NRSROs from being considered part of a registration statement prepared or certified by a person under Sections 7 and 11 of the Securities Act. In relevant part, Section 11 imposes liability on certain types of experts who are identified in a registration statement filed under the Securities Act as having prepared or certified a report for use in connection with that statement. Section 7 requires the expert's written consent to the use of his report to be filed as an exhibit to the registration statement.

The Commission adopted Rule 436(g) in 1982, around the time it began to permit credit ratings to be disclosed in registration statements.² By virtue of this rule, a registrant need not file the consent of an NRSRO in order to disclose a credit rating in a registration statement, and an NRSRO whose credit rating is disclosed in a registration statement has no liability under Section 11.

¹ "Concept Release on Possible Rescission of Rule 436(g) Under the Securities Act of 1933, Release Nos. 33-9071, 34-60798 and IC-28943 October 7, 2009) 74 Fed. Reg. 53114 (October 15, 2009), *corrected by* 74 Fed. Reg. 55162 (October 27, 2009) ("Concept Release").

² Prior to 1981, the Commission's policy was to discourage the disclosure of credit ratings in registration statements. See "Disclosure of Ratings in Registration Statements," Release No. 33-6336 (August 6, 1981), 46, Fed. Reg. 42024 (August 19, 1981).



The Continuing Justification for Rule 436(g)

Along with its companion proposal to mandate the disclosure of credit ratings used in connection with public offerings,³ the Commission is soliciting comment as to whether Rule 436(g) should be rescinded. The Commission advances four reasons why it may be appropriate to eliminate this rule. First, the Commission suggests that the conditions that led to the adoption of the rule have changed. Second, the Commission opines that credit ratings are akin to other professional opinions whose inclusion in registration statements implicates the consent and expert liability provisions of the Securities Act. Third, the Commission suggests that increasing NRSROs' risk of liability under the federal securities laws would improve investor protection. Finally, the Commission questions the continued validity of exposing NRSROs and unregistered credit rating agencies (who cannot avail themselves of Rule 436(g)) to different liability standards. DBRS respectfully disagrees with the Commission's views on these issues and submits that eliminating Rule 436(g) would do more harm than good.

The Conditions That Led to the Adoption of 436(g) Still Exist Today.

According to the Concept Release, Rule 436(g) was adopted in order to encourage the voluntary disclosure of credit ratings in registration statements.⁴ The Commission states that if it mandates the disclosure of credit ratings used in connection with public offerings, as it proposes to do, there will no longer be a need to encourage this behavior. DBRS does not agree.

The inclusion of NRSRO credit ratings in registration statements will still require the NRSROs' consent under Section 7 of the Securities Act. As was the case in 1982, the risk of uncertain and potentially unlimited liability is likely to deter NRSROs from providing the required consents. If this occurs, ratings could be pulled from the public domain and market transparency could decrease, as issuers shift toward private placements and away from public offerings.

Exposing NRSROs to Section 11 liability also could change the character and diminish the quality of credit ratings that are disclosed in registration statements. If the threat of litigation encourages NRSROs to adopt more defensive rating methodologies, credit ratings could be transformed from informed, forward-looking assessments of credit risk to bland descriptions of existing facts. We note further that characterizing NRSROs as "participants" in the registration process is fundamentally at odds with the Commission's efforts over the past few years to ensure the independence of NRSROs' credit assessments.

³ See "Credit Ratings Disclosure," Release Nos. 33-9070, 34-60797 and IC-28942 (October 7, 2009), 74 Fed. Reg. 53086 (October 15, 2009), *corrected by* 74 Fed. Reg. 55162 (October 27, 2009).

⁴ Concept Release at 14, 74 Fed. Reg. at 53117.



*Credit Ratings Are Fundamentally
Different From Other Expert Opinions.*

The Commission characterizes credit rating opinions as analogous to legal opinions, valuation opinions, fairness opinions and audit reports, all of which are treated as expert reports for Securities Act purposes. DBRS submits that there are fundamental differences between credit ratings and the other types of opinions, and that these differences justify different treatment for purposes of Section 11 liability.

The most fundamental distinction is that credit rating opinions are forward-looking assessments, whereas the other types of opinions are focused on past or current events. The SEC's own staff recently explained the difference between credit ratings and auditors' reports as follows:

While often linked together . . . as 'gatekeepers,' the role of an independent auditor and a [credit rating agency (CRA)] is very different . . . Auditors might be described as 'backwards-focused,' in that they use audit standards set by the Public Company Accounting Oversight Board (PCAOB) to opine on statements that an issuer makes regarding historic facts. By contrast CRAs are 'forwards-focused,' using non-standardized and proprietary methodologies . . . to predict the likelihood of future events.⁵

In addition to their unique temporal focus, credit ratings are further distinguishable from other expert opinions by virtue of the fact that they are the only opinions conveyed by means of a symbol. As such, they lack the caveats, assumptions and justifications found in other expert reports. Ratings also are subject to more granular performance measurements than other opinions, as reflected in the default and transition studies NRSROs are obliged to publicly disclose.⁶ All of these distinctive characteristics make credit ratings particularly unsuitable subjects of the Securities Act's expert liability scheme.

*Imposing Section 11 Liability on NRSROs
Is Not Necessary To Protect Investors.*

When it proposed Rule 436(g), the Commission expressed the view that NRSROs were already subject to enough liability to protect investors without adding expert liability under the Securities

⁵ "The SEC's Role Regarding and Oversight of Nationally Recognized Statistical Rating Organizations," SEC Report No. 458, Appendix V (August 27, 2009) (Letter dated August 25, 2009, from the SEC's Office of International Affairs to the SEC's Inspector General).

⁶ See Form NRSRO, Exhibit 1.



Act to the mix.⁷ In this regard, the Commission cited NRSROs' potential liability under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and the fact that NRSROs were subject to regulation under the Investment Advisers Act of 1940 ("Advisers Act"). In the Concept Release, the Commission notes that NRSROs are no longer subject to the Advisers Act, and that they are infrequently found liable for Section 10(b) fraud.⁸ The Commission asks whether increasing NRSROs' risk of liability by rescinding Rule 436(g) would significantly improve investor protection. DBRS believes the answer to this question is no.

While NRSROs are no longer subject to the ill-fitting investment adviser regulatory regime, they now are subject to the far more customized requirements established under the Credit Rating Agency Reform Act of 2006 ("Rating Agency Act"). In implementing this statute, the Commission has adopted an elaborate system of regulation designed to ensure the quality, integrity and transparency of NRSRO credit ratings. This system includes extensive controls on rating agency conflicts of interest, and prohibitions on both the misuse of material, nonpublic information and unfair business practices. The NRSRO regulatory regime also requires registered rating agencies to use systematic rating processes and transparent rating methodologies and to publish sufficient information and performance data to permit comparability with other parties performing similar services. Moreover, registered rating agencies are subject to SEC examination to ensure their compliance with the NRSRO requirements.

Because of the comprehensive regulatory program established under the Rating Agency Act, DBRS believes that investors have far more protection today than they had when Rule 436(g) went into effect. DBRS further believes that rescinding that rule would actually diminish investor protection by limiting the public availability of ratings and altering the character of those ratings in the manner discussed above. We also share the Commission's concern that subjecting NRSROs to Section 11 liability would harm investors by undermining competition among registered rating agencies. Smaller NRSROs may be less resilient in the face of increased litigation risk and may be unable to negotiate the type of indemnification agreements that could spare the larger firms.

*The Distinction in Rule 436(g) Between NRSROs and
Unregistered Credit Rating Agencies is Justified.*

The Commission notes that Rule 436(g) may make it harder for unregistered credit rating agencies to compete for ratings business, since they are subject to Section 11 liability, while NRSROs are not. Instead of addressing the competition issue by extending the exemptive rule to all credit ratings, the Commission favors eliminating the rule in order to enhance investor protection.

⁷ See note 2, *supra*.

⁸ Concept Release at 15, 74 Fed. Reg. at 53117.

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DBRS believes that NRSROs and unregistered rating agencies are in fundamentally different positions when it comes to investor protection. As explained above, NRSROs are subject to a plethora of rules that address the quality, integrity and transparency of their credit ratings. Where unregistered rating agencies are concerned, their conflicts of interest may be unmanaged, their methodologies may be opaque, and their track records may be undisclosed.

If the Commission's primary concern is having a source of investor protection other than Exchange Act Section 10(b), DBRS suggests that Rule 436(g) be retained in its current form. On the other hand, if the primary concern is competition, DBRS suggests that the rule be amended to cover all credit ratings. Under no circumstances, does DBRS think the rule should be rescinded.

Conclusion

For all of the reasons discussed above, DBRS opposes the rescission of Rule 436(g). 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 black ink, appearing to read "Mary Keogh".

Mary Keogh
Managing Director, Regulatory Affairs
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A handwritten signature in black ink, appearing to read "Daniel Curry".

Daniel Curry
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cc: Hon. Mary L. Schapiro
Hon. Kathleen L. Casey
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