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A Question of Credibility: Enhancing the Accountability and Effectiveness of Credit Rating Agencies

In the wake of the controversial role of credit rating agencies in the financial crisis, policymakers should focus on three major areas of reform.

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The Study In Brief

In the wake of the financial crisis, Credit Rating Agencies (CRAs) have been criticized for having played a significant role in the market turmoil. Numerous reports have identified failures on the part of CRAs that have affected the quality and integrity of the rating process. In light of the critiques, a strong consensus has emerged among policymakers that regulatory intervention is needed. In Canada, the European Union and the United States, policymakers have opted for registration systems.

I argue that the regulatory regimes proposed on both sides of the Atlantic do not appear to be the preferable route for regulating CRAs. Indeed, the registration regimes can stifle competition, induce undue reliance on ratings and burden regulators. From a Canadian perspective, it is unfortunate that the CSA had to move away from the disclosure-based registration because of compatibility concerns with the European framework.

Three major areas of reform should be pursued. The first pertains to the elimination of regulatory references to ratings. The second area relates to the development of a due diligence obligation for institutional investors with respect to the creditworthiness of issuers. The final area of reform concerns the disclosure of information on underlying assets by issuers of structured finance products. Given that these reforms imply important changes to the regulatory landscape, an incremental approach is the preferable route.

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The credit crisis that started in the US mortgage subprime market in 2007 has had profound social and economic consequences that are still being felt today.

This crisis was the product of a perfect storm resulting from failures on the part of issuers, intermediaries, investors, regulators and governments (IOSCO 2008a and SEC 2008). In addition, a number of studies and reports note that credit rating agencies (CRAs) played a significant role in the market turmoil because of the characteristics of structured finance products that made investors particularly dependent on their ratings.[1] Thus, questions have been raised with respect to the quality and integrity of the rating process. To address these concerns, an impressive number of reform initiatives are underway in North America and Europe that seek to enhance the accountability and effectiveness of rating agencies.

The purpose of this *Commentary* is to analyze these regulatory initiatives gain a better understanding of the policy choices being made. The first part of the paper offers background on CRAs and their controversial role in the context of structured finance products. After highlighting the past failings of CRAs, the *Commentary* then offers a critical comparative analysis of the strategies for enhancing the accountability and effectiveness of CRAs.

Finally, the paper argues that three main areas of reform should be pursued: eliminate regulatory references to ratings; foster due diligence by institutional investors with respect to issuer creditworthiness; and enhance the disclosure of information on the part of issuers of structured finance products.

Rating Agencies and Structured Finance Products

A. Credit Rating Agencies and the Operations of Capital Markets

CRAs are pervasive institutions. The Basel Committee on Banking Supervision estimates there are more than 130 CRAs worldwide, with about 30 of them playing a prominent role in G10 countries, operating at a national, regional or even global scale (White 2002).

Nonetheless, the credit rating industry is highly concentrated. At the international level, Moody's, Standard & Poor's and Fitch dominate, with about 95 percent of the global market (SEC 2011a and IOSCO 2003). These three agencies are also the major US players, issuing 97 percent of outstanding ratings in 2011 and earning some 98 percent of ratings revenues (SEC 2011b and White 2002). In Canada, the rating industry is also concentrated, with one Canadian organization, Dominion Bond Rating Services, acting alongside US CRAs.

Some CRAs provide ratings, solicited or unsolicited, on a limited number of issuers, while others rate all issuers in a given marketplace. Using statistical models, ratings can focus on specific fixed-income securities, including complex financial instruments issued in structured finance, as well as on issuers such as corporations, municipalities and governments. Aside from

1 See, e.g., IOSCO (2008b) and De Larosière Group (2008) and SEC (2008).

providing ratings, some CRAs also offer ancillary services, including rating assessment, whereby they provide an evaluation of the impact of contemplated corporate action on an issuer's rating, as well as risk management and consulting services that assist financial institutions and other corporations in the management of credit and operational risk.

Traditionally, CRAs earned their revenues from subscriber fees paid by investors. In the early 1970s, they changed their business model and also started charging issuers for their rating services. At present, the larger CRAs derive most of their revenues from fees charged to issuers.[2]

Credit rating agencies provide an evaluation of the creditworthiness of issuers, which is essentially an assessment of how likely they are to make timely payments on their debts in general. They also offer ratings of individual debt instruments that indicate the probability of default or delayed payment with respect to that particular security.

Since their primary function is to evaluate credit risk, CRAs do not assess the economic appeal of investments. They do not express opinions on whether a particular debt security should be bought or sold. Their role is intended only to convey information regarding the relative safety of the securities in regards to credit risk.

From this perspective, "rating agencies perform the same function as securities law: reducing the information asymmetry between issuers of securities and investors" (Schwarcz 2002, p. 10). In the case of asset-backed securities, the contribution of CRAs is buttressed by their access to private information on the securities, in particular their underlying assets.

B. Regulation of Credit Rating Agencies before the Crisis

Canada

In Canada, many federal and provincial regulatory schemes refer to ratings issued by CRAs.[3] These regulatory regimes rely on such ratings to distinguish investment-grade from speculative securities in prudential regulation of the banking and investment-dealing sectors. The regimes also use ratings to identify securities in which certain types of institutional investors can invest without prior authorization.

In securities regulation, issuers of investment-grade securities benefit from particular exemptions designed to reduce the regulatory burden, reflecting the lower risk level of their securities.[4] Despite the rather broad use of ratings, there has traditionally been no principled approach with respect to CRAs. The organization and activities of CRAs are not regulated per se. Whereas regulatory regimes recognize only ratings issued by "approved" or "recognized" rating agencies, these categories are not defined except through a simple listing of large CRAs that is based on undisclosed criteria.[5]

United States

In the United States, regulatory schemes apply ratings for similar purposes. Since 1975, regulations have required that ratings be issued from a "nationally recognized statistical rating organization" (NRSRO) designated by the Securities and Exchange Commission (SEC). Thus,

2 See Basel Committee On Banking Supervision (2000), Smith & Walter (2002).
3 On the regulatory use of ratings, see Nicholls (2005).
4 See, e.g., *National Instrument 44-101, Short Form Prospectus Distributions*.
5 Regulatory regimes typically refer to Canadian Bond Rating Services, Dominion Bond Rating Services, Moody's, Standard & Poor's, Fitch, Duff & Phelps, and Thomson BankWatch.

rating agencies that do not have NRSRO status are barred from a significant segment of the market.

Despite its importance, the term NRSRO was not defined initially, nor were criteria for NRSRO designation formally adopted (Hill 2004). However, SEC staff subsequently developed relevant criteria, the most important being that the applicant had to be "nationally recognized by the predominant users of ratings in the United States as an issuer of credible and reliable ratings" (SEC 2003, p. 9). The weight attributed to this factor created a Catch-22 situation: "an agency has to be nationally recognized to be an NRSRO but has to be an NRSRO to become nationally recognized" (Hill 2004). In sum, the framework clearly favoured existing rating agencies already recognized as NRSROs.

In the wake of the corporate scandals of the early 2000s, academics, regulators and lawmakers criticized rating agencies for failing to properly play their role in evaluating the creditworthiness of issuers. Following a number of studies, Congress adopted the *Credit Rating Agency Reform Act of 2006* to "improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry."[6] [7] The provisions of the Act, and the rulemaking powers it provides the SEC, form the basis of a registration and regulatory program for CRAs that seek to obtain NRSRO status.

The Act purports to create an objective registration framework through which rating organizations may apply for NRSRO status. It seeks to facilitate entry by legitimate agencies that could not previously qualify under the former NRSRO designation process. Relying on its new authority, the SEC in 2007 enacted rules that impose disclosure and record-keeping obligations on CRAs.[8] However, pursuant to the Act, the SEC does not have the power to "regulate the substance of credit ratings or the procedures or methodologies by which an NRSRO determines credit ratings."[9]

European Union

CRAs have traditionally been unregulated entities in the European Union (EU), although their activities and relevance have been recognized by three EU directives.[10] Despite the 2001 Enron scandal, the Committee of European Securities Regulators (CESR) said that legislation was not necessary to address the failings of CRAs.[11] The CESR instead relied on the self-regulating International Organization of Securities Commissions (IOSCO) Code of Conduct to ensure CRA accountability.

At the same time, the EU charged the CESR with responsibility for monitoring compliance with the IOSCO Code and reporting annually to the commission in this respect. After an initial CESR report noting that CRAs generally complied with the code, the commission concluded in 2006 that while improvements were desirable, the case in

6 Public Law. 109-291.

7 The long title of the act is *An Act to Improve Ratings Quality for the Protection of Investors and in the Public Interest by Fostering Accountability, Transparency, and Competition in the Credit Rating Agency Industry*.

8 Securities and Exchange Commission, *Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations*, Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564 (June 18, 2007).

9 *Credit Rating Agency Reform Act of 2006*, P.L. 109-291, s. 15E.

10 The directives are: the *Market Abuse Directive* (MAD), Directive 2003/125/EC, the *Capital Requirements Directive* (CRD), 2006/48/EC, and the *Markets in Financial Instruments Directive* (MiFID), 2004/39/EC. See European Securities Markets Expert Group, *Role of Credit Rating Agencies*, Report to the European Commission, 2008, p. 7-9.

11 See also Hann and Amtenbrink (2011).

favour of specific legislation remained unproven.[12] Following the financial crisis, the EU launched an extensive reform that is now leading to a full-fledged regulatory regime.

C. Criticisms of Credit Rating Agencies in the Context of the Financial Crisis

The 2007 subprime mortgage debacle that triggered the financial crisis has led to experts questioning the role of rating agencies. As the turmoil unfolded, CRAs issued numerous multi-notch downgrades of subprime related asset-backed securities that were hitherto rated triple-A. Subsequently, several studies at the international level have argued that CRA failures exacerbated the financial crisis by affecting the quality and integrity of ratings.[13] Similarly, in Canada, some CRAs "have been criticized for failing to detect and alert investors of the weaknesses of ABCP offerings before the crisis broke out" (Chant 2008, p. 21).

These varied studies all made similar recommendations in regard to transparency, the quality of the rating process and conflicts of interest.

Transparency

Given the contribution that CRAs make in resolving information asymmetries, it is crucial that their ratings and processes be transparent. Critiques point to inadequate disclosure by CRAs of their methodologies, in particular key assumptions and ratings criteria (SEC 2008). Analysts also state that CRAs were not sufficiently forthcoming with respect to the limitations of their ratings. In particular, they maintain that CRAs did not adequately disclose that promoters and arrangers provided them with data that had not been properly verified. Finally, they say that CRAs did not always provide investors with verifiable and comparable historical performance data regarding their ratings (IOSCO 2008a).

Transparency issues extend beyond CRAs. Asset-backed securities are typically issued under a prospectus exemption. In this unregulated environment, voluntary disclosure proves unsatisfactory (Toovey and Kiff 2003). The complex legal structures surrounding this type of security remain opaque. Thus, important information on credit and liquidity enhancement is not available. As a result, investors are unable to make independent assessments of credit risk because they lack access to fundamental data on the underlying assets.

Quality of the Rating Process

Various studies have criticized the quality of the rating process, particularly with respect to plain-vanilla debt instruments and structured financial products.[14] Three critiques are noteworthy.

(i) The first relates to the resources committed to rating asset-backed securities (SEC 2008). From 2002 to 2006, the market for residential mortgage-backed securities (RMBS) and collateralized debt obligations (CDOs) experienced substantial growth. At the same time, these products were becoming increasingly complex. As a result, rating agencies struggled to keep pace. Staff increases did not always match this growth. In some cases, ratings were issued despite unresolved issues (SEC 2008). Likewise, resource constraints hampered agencies'

12 Communication from the Commission on Credit Rating Agencies, *Official Journal of the European Union*, 2006/C 59/02, 59/5.

13 See, e.g., De Larosiere Group (2009); Financial Stability Forum (2008); SEC(2008); Turner Review (2009).

14 For a detailed and objective account with respect to structured financial products, see Benmelech and Duglosz (2009). With respect to government and corporate debt instruments, see Cantor and Packer (1995).

abilities to monitor the assigned ratings in a timely fashion. Thus, CRAs were slow to review and, if required, downgrade ratings.[15]

(ii) A second critique in regard to the quality of ratings concerns the agencies' practices with respect to the information they receive. CRAs "did not engage in any due diligence or otherwise seek to verify the accuracy or quality of the loan data underlying the RMBS pools they rated" (SEC 2008, p.18).

Furthermore, they did not require that issuers perform due diligence to ensure the integrity or reliability of the information provided, even though poor information quality may have affected their assessments.[16] While this approach raises criticism, it is important to stress that the agencies disclosed their practice and had no legal duty to perform due diligence.

(iii) Finally, some question the effectiveness of the agencies' methodologies.[17] Specifically, the critiques stress that since CRAs did not have a long track record in rating asset-backed securities, they may have relied on models that did not cover all of the risk dimensions, such as market liquidity risk (Crouhy and Turnbull 2007).

In this respect, the European Securities Market Experts Group noted that the inordinate level of downgrading of structured products "appears to indicate that the methodologies were inadequate and suggests that the CRAs staff did not have an adequate understanding of the structured finance market, or at least in the subprime residential mortgage market" (European Securities Markets Expert Group 2008, p. 11).

Without going as far, the SEC remarked that the agencies did not have specific written procedures for rating RMBS and CDOs, or for addressing errors in their models or methodologies (SEC 2008). Furthermore, the SEC noted that agencies did not document the rationale for rating decisions that deviated from their models, echoing earlier doubts as to whether agencies conduct sufficiently thorough analyses of the issuers whose debt they rate (Rousseau 2006).

Conflict of Interest

Since credit rating agencies act as intermediaries between issuers and investors, they sometimes act on behalf of both parties. From an economic perspective, the relationship that exists between a rating agency and issuers or investors can be qualified as being one of agency (Smith and Walter 2002).[18] The interaction between agents and their principals may give rise to agency problems. One potential agency problem relates to CRAs being paid by issuers to provide ratings (IOSCO 2008a; SEC 2003). Agencies may be tempted to downplay

15 See IOSCO (2008a). Critiques of the timeliness of rating changes are not new. Rating agencies have been severely criticized for their performance in the continual monitoring of ratings assigned in the past. For example, CRAs maintained Enron's credit rating at above investment grade as late as November 28, 2001, only a few days before it filed for bankruptcy. See for example US, Senate, Staff of the Committee on Governmental Affairs (2002). Enron filed for bankruptcy on December 2, 2001. Agencies were also criticized for keeping the ratings for General Motors and Ford just above investment grade at a time where the market traded the bonds of those corporations "at spreads equivalent to junk status" (*The Economist* 2005, p.91).

16 F. Norris, "Moody's Official Concedes Failure in some Ratings," *The New York Times*, January 26, 2008, reporting that Moody's Chief executive officer lamented that the completeness and veracity of the information provided deteriorated as the subprime mortgage grew; R. Lowenstein, "Triple-A Failure," *The New York Times Magazine*, April 27, 2008.

17 For a review of recent studies, see E.I. Altman et al. (2011). See also Deb et al. (2011); Financial Stability Forum (2008); Mason and Rosner (2007).

18 See generally Spulber (1996).

the credit risk of issuers and to inflate their ratings in order to retain their business. The practice of charging fees based on the size of offerings also renders CRAs more vulnerable to pressure by larger issuers.

In the structured products market, a number of other factors influence the intensity of the potential conflict of interest associated with the issuer-pays model. First, "rating assessment for structured products necessarily takes place ex ante" (Deb et al. 2011, p.10). Thus, the arranger has the ability to adjust the deal structure to obtain the rating sought. Where it is also acting as underwriter, the arranger has the ability to influence the choice of rating agency.

As well, there is a high level of concentration in the underwriting business for RMBS and CDOs, which compounds the influence of the firms acting as their arrangers and underwriters (Mason and Rosner 2007). Finally, rating-structured finance products generate high profit margins for rating agencies, which increases the incentive of CRAs in securing future business from arrangers. In this respect, recall that rating agencies under the traditional model get paid only when the issuer elects to "buy" the rating. And unsolicited ratings are rarely possible in structured finance because the relevant information is mostly privately held. This deprives the market from an independent check on the ratings issued.

According to an SEC study, the "combination of the arranger's influence in determining the choice of rating agencies and the high concentration of arrangers with this influence appear to have heightened the inherent conflicts of interest that exist in the issuer pays compensation model" (SEC 2008, p. 32).[19] More precisely, analysts "appeared to be aware, when rating an issuer, of the rating agency's business interest in securing the rating of the deal."

As well, the SEC found that agencies did not take measures to curtail the potential influence of this dimension on the ratings or ratings criteria. The potential conflicts of interest may have resulted in rating agencies clinging to older criteria in order to satisfy the arrangers' preference for a fast and predictable ratings process that allowed them to complete a greater volume of deals.[20]

Another potential conflict-of-interest area relates to the issuers-CRAs axis. Here, the development of ancillary services by some CRAs creates a situation where rating decisions may be influenced by whether an issuer purchases such additional services (Hill 2004).[21] Moreover, issuers may feel the need to subscribe to such services simply "out of fear that their failure to do so could adversely impact their credit rating (or, conversely, with the expectation that purchasing these services could help their credit rating)" (SEC 2003, p. 43).

Reforming Credit Rating Agencies Regulation after the Financial Crisis: A Transatlantic Perspective

In light of the critiques highlighted above, a strong consensus has emerged among policymakers that regulatory intervention is needed. The G20 leaders demonstrated this consensus at their April 2009 meeting where they pledged, "more effective oversight of the activities of Credit Rating Agencies, as they are essential market participants."[22] Consequently, a number of reform initiatives have been implemented while still others are underway to address concerns raised by CRAs' activities in structured finance products.

19 See, e.g., Lucchetti (2008).

20 See also Griffin and Tang (2011).

21 Consulting services can be rendered in the context of regular debt offerings or structured finance products.

22 *Global Plan Annex: Declaration on Strengthening the Financial System Statement Issued by the G20 Leaders*, April 2, 2009, London.

At the international level, the IOSCO has amended its Code of Conduct Fundamentals to buttress provisions dealing with the quality and integrity of the rating process, conflicts of interest and CRAs' responsibilities toward investors and issuers (IOSCO 2008a). At the regional level, the European Parliament has adopted a *Regulation on Credit Rating Agencies* that includes a legally binding registration and surveillance regime for all EU credit rating agencies.[23]

Furthermore, the European Parliament has entrusted the European Securities Markets Agency (ESMA) with the exclusive responsibility for registration and supervision of CRAs.[24] For its part, the European Commission (EC) has suggested a number of bold reforms, including the creation of new CRAs at the national level as private or public entities, and the establishment of an independent European CRA (European Commission 2010).

At the national level, the members of the Canadian Securities Administrators (CSA) have adopted *National Instrument 25-101 – Designated Rating Organizations* that sets forth a registration framework that imposes mandatory compliance with the IOSCO Code of Conduct (CSA 2008, 2011). The Canadian framework also provides for additional requirements that draw on the US and EU reforms.

Finally, in the United States, a number of reform initiatives have been launched since the Enron scandal, culminating in the *Dodd-Frank Act* that provides the thrust for the overhaul of the NRSRO regulatory regime (Altman et al. 2011). The overall goal of the reform is to enhance the accountability of CRAs for the quality of their ratings and to improve their transparency. In this respect, *Dodd-Frank* established an Office of Credit Ratings within the SEC to administer the commission's rules.

The breadth of the ongoing reforms can be seen by examining current US, Canadian and European initiatives from the supply and demand-side perspectives.

A. Supply-side Reform Initiatives

These efforts focus on two distinct areas: registration and civil liability.

Registration

CRAs are now subject to registration regimes that form the basis of the regulatory framework. They must register with the proper authority and comply with rules of conduct that deal with every aspect of their activities and operations. There are three areas subject to registration: the rating process; conflict of interest along with governance; and transparency.

The Rating Process

European and Canadian initiatives seek to enhance ratings' accuracy by imposing requirements on CRA methodologies and processes, as well as the monitoring and updating of the ratings.[25] Generally, Canada's National Instrument 25-101 and the EU Regulation require that CRAs use rating methodologies that are rigorous, systematic, continuous and subject to validation on historical

23 European Parliament, *Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, [2009] Official Journal of the European Union* L302/1 [entered into force on December 7, 2010]. See, in general, Haan & Amtenbrink (2011).

24 European Parliament, *Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies, [2011] Official Journal of the European Union* L145/30.

25 European Parliament, *Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, [2009] Official Journal of the European Union* L302/1; IOSCO (2008B).

experience. Most notably, the EU Regulation requires that CRAs submit their proposed methodologies to ESMA for assessment.

To further enhance the reliability of ratings, these measures provide that CRAs should adopt reasonable measures so that the information they use is of sufficient quality to support a credible rating. CRAs must ensure that their employees making up the rating committees have appropriate knowledge and experience. Once they have issued ratings, CRAs have the obligation to monitor and update their ratings. They should take steps to ensure that the decisionmaking process for reviewing and potentially downgrading a current rating of a structured finance product is conducted in an objective manner. For instance, agencies could choose to vest the monitoring of structured finance products to a different team from the one that issued the initial rating.

In the United States, the SEC and state authorities are prohibited from regulating the substance of credit ratings. Nonetheless, *Dodd-Frank* purports to regulate more closely the production of ratings. The Act directs the SEC to make rules addressing six main issues:[26] 1) the approval of the rating procedures and methodologies by the CRA's board of directors; 2) the application, disclosure and notification of any material change to the rating procedure and methodologies; 3) the definition and consistent application of rating symbols; 4) the notification of users of the version of a procedure or methodology used with respect to a particular rating, when a material change is made to the latter; 5) the consideration of information from sources other than the issuer; and 6) the qualification standards for analysts. Clearly, when enacted, those rules will subject NRSROs to a more formal regime with respect to the production of ratings.

Conflict of Interest and Governance

Canada's NI 25-101 and the EU Regulation recommend that CRAs adopt internal procedures and mechanisms to identify and eliminate, or manage and disclose, conflicts of interests.[27] These measures also require CRAs to disclose the general nature of their compensation arrangements with issuers and other rated entities. Finally, they say CRAs should structure their compensation arrangements in a way that eliminates or manages effectively all actual or potential conflicts of interest in order to ensure the independence of their analysts and employees.

Although they leave intact the issuer-pays model, the Canadian and European instruments bar CRAs from making proposals or recommendations regarding the design of structured finance products that they rate. The instruments target analysts' potential conflicts by calling upon CRAs to monitor the revolving door phenomenon in which analysts leave the agency to work for issuers, and to review the impact of the compensation policies on analysts' objectivity.

The conflict-of-interest measures provide that CRAs must be organized in a way so that business interests do not impair the independence or accuracy of their ratings. Thus, at least one-third but no less than two board members of a credit rating agency must be independent; i.e., not involved in rating activities.[28] In addition, the compensation of independent members shall not be linked to the agency's business performance and shall be arranged so as to ensure the independence of their judgment.

26 *Dodd-Frank Act*, s. 932 and ss.

27 *Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies*, COM (2008) 704, November 12, 2008, p. 7-8.

28 According to the EU Regulation, the majority of the members of the board must have sufficient expertise in financial services.

The Canadian and European reform initiatives buttress the internal oversight of CRAs' activities. They mandate the establishment of sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems. They also require that CRAs have a permanent and effective compliance function department. And the instruments vest the independent board members with specific monitoring tasks, including with respect to the credit rating methodologies and policy, the effectiveness of internal control, the effectiveness of the mechanisms addressing conflicts of interest, and the compliance and governance processes.

In November 2011, the EC proposed to further strengthen CRAs' independence by requiring issuers to rotate their rating agencies every three years, or every year if the CRA rates more than 10 consecutive debt instruments of the issuer.[29] According to the EC, the "rotation rule is expected to significantly mitigate the potential conflicts of interest issues relating to the issuer-pays model."

However, the proposed rotation rule has faced strong opposition from lawmakers and regulators who maintain it will not enhance competition as issuers will merely replace one of the big three CRAs with another with little disciplinary effect (Leftly 2012). Even more worrisome, ESMA leaders say they fear that smaller agencies that received new business as a result of this rule might not have the capacity and internal control to ensure rating quality (Masters and Barkers 2012).

The EC also plans to require issuers to hire two different agencies for ratings on structured finance products to reduce over-reliance on a single rating. Again, this requirement is also intended to enhance competition.

In the United States, NRSROs have been subject to conflict-of-interest rules for some time. At a general level, they must identify conflicts and either eliminate or properly manage them, including through disclosure. In 2009, the SEC amended its conflict-of-interest rules to include prohibiting an NRSRO from issuing or maintaining a rating with respect to an obligor or security where it has made a recommendation to the obligor, or the issuer, underwriter or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security.[30] In addition, the SEC introduced a prohibition, which already existed in the IOSCO Code, barring anyone who participates in determining a credit rating from negotiating the fee that the issuer pays for it.

Dodd-Frank adds other conflict-of-interest measures, including a requirement that at least one-half of NRSRO board members must be independent. And the compensation of independent directors must not be linked to the NRSRO's performance.

The Act also mandates the establishment, maintenance, enforcement and documentation of internal control structures governing the implementation of and adherence to policies, procedures and methodologies for determining credit ratings. Each NRSRO must produce an annual report to the SEC that offers a description of the responsibility of management in establishing and maintaining an effective internal control structure, as well as an assessment of its effectiveness. The report is to be certified by the NRSRO's CEO.

29 European Commission, *Proposals for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies*, COM (3022) 747/2.

30 *Amendments to Rules for Nationally Recognized Statistical Rating Organizations,* 74 F.D. 63842 (Dec. 4, 2009), introducing paragraph (5) to Rule 17g-5(c).

As well, the SEC is charged with the task of prescribing rules that prevent the sales and marketing considerations of an NRSRO from influencing the production of its ratings. In this respect, *Dodd-Frank* requires that the NRSRO attest that no part of any credit rating was influenced by any other business activities, that the rating was based solely on the merits of the instruments being rated and that such rating was an independent evaluation of the risks and merits of the instrument.

Transparency

In the United States, NRSROs are subject to new requirements that they provide a general description of their procedures and methodologies, so that users understand the processes employed.[31] More particularly, they must disclose whether and, if so, how information about verification performed on the assets underlying a structured product is relied on in determining credit ratings. In addition, rating agencies are compelled to disclose whether, and if so, how assessment of the quality of originators of assets plays a part in the determination of credit ratings. Furthermore, the rules require that CRAs indicate how frequently they review ratings and whether different models are used for ratings surveillance than for initial ratings. In this respect, they must prepare an annual report of ratings actions they took in each ratings class.

Meanwhile, *Dodd-Frank* directs the SEC to enact rules concerning the disclosure of information on the initial credit rating determined by an NRSRO with respect to any instrument, as well as any subsequent change to the rating. The goal is to allow users to evaluate the accuracy of ratings and compare the performance of different NRSROs. This requirement supplements the SEC rule that obliges NRSROs to communicate all of their ratings and subsequent rating actions, as well as performance statistics for the past one, three and 10 years within each rating category. Finally, the SEC must also prescribe rules setting out the quantitative and qualitative information that must be disclosed with each rating, which includes the assumptions underlying the ratings procedures and methodologies.

EC reforms impose similar requirements. The EU Regulation mandates the disclosure of CRAs' methodologies, models and key rating assumptions used in the rating process.[32] The regulation also compels the disclosure of all substantially material sources used to prepare the ratings, the principal methodology relied upon, the meaning of each rating category and the date at which the rating was first released.[33] CRAs must disclose whether they consider satisfactory the quality of information available on the rated entity and to what extent it has verified the information it was provided with.

Furthermore, the CRA shall report publicly the key elements underlying its analysis when announcing a credit rating. Any change to the methodologies, model or key rating assumptions must be disclosed, and the credit ratings issued must be reviewed periodically. Finally, the EU Regulation also enacts continuous disclosure obligations.

It is interesting to note that, following the IOSCO recommendation, the EU Regulation requires that CRAs use different symbols to

31 US, SEC, *Proposed Rules for Nationally Recognized Statistical Rating Organizations*, Release No. 34–59342; File No. S7–13–08, Federal Register, vol. 74, no. 25, 6456, 6457-6460.

32 *Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies*, COM (2008) 704, November 12, 2008, p. 8-9.

33 *Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies*, COM (2008) 704, November 12, 2008, p. 8-9.

differentiate the ratings for structured products from other securities. For its part, the SEC has proposed a new rule that would require NRSROs to distinguish ratings for structured instruments from other classes of ratings.[34]

Recent proposed amendments to the EU Regulation would further require CRAs to communicate their ratings to the ESMA. With this data, the ESMA would create a European Rating Index that would make freely available ratings on the market for debt instruments.

In Canada, by implementing the IOSCO Code in NI 25-101, the CSA are imposing transparency obligations with respect to ratings and rating processes. The CSA have supplemented these disclosure obligations with requirements that are largely inspired by the EU Regulation. Therefore, save for the EU's amendments proposed in November 2011, the Canadian and European approaches are similar with respect to transparency.

Civil Liability

Traditionally, CRAs have not been subject to a special civil liability regime. The situation is, however, changing. *Dodd-Frank* creates new liability exposure for NRSROs as experts under the 1933 *Securities Act* when they consent to the disclosure of their ratings in a prospectus. Following this amendment, issuers now have to obtain the permission from NRSROs to use their ratings in their prospectuses.

In addition, *Dodd-Frank* makes the enforcement and penalty provisions of the 1934 *Securities and Exchange Act* applicable to NRSRO statements. Thus, NRSROs are subject to the same standards as public accountants and securities analysts. It is worth noting, however, that the impact of the reform "is largely contingent on the future success of rating agencies' First Amendment 'opinion' defence" (Cane et al. 2011, p. 32). Indeed, CRA publications have traditionally been afforded the protection of the First Amendment, which means that CRAs are not liable for negligent misrepresentations, unless their conduct is reckless.

In Europe, the November EU proposals contemplate a new regime where CRAs would be held liable to investors when they infringe intentionally or with gross negligence any EU Regulation obligation. In other cases, CRA liability would continue to be governed by national laws.

In Canada, however, regulators have not shown any interest in enhancing the liability exposure of CRAs. "We are not at this time proposing such changes because we do not think that the benefits of subjecting designated rating organizations to 'expert' liability in Canada would outweigh the potential costs," the CSA said in a statement. Thus, CRAs are subject only to the general common law (or civil law) liability regime. Given the difficulty of pursuing a remedy for false or misleading rating at common (or civil) law, liability is not a significant constraint affecting the behaviour of Canadian rating agencies.

B. Demand-side Reform Initiatives

On the demand-side, the reform focus is on disclosure and the regulatory use of ratings.

Disclosure of Information on Asset-backed Securities

To enhance competition in the rating industry with respect to structured finance products, regulators are seeking to address the paucity of public information on asset-backed securities. According

34 Section 938(b) of the *Dodd-Frank Act* states that nothing prohibits a NRSRO from using distinct sets of symbols to denote credit ratings for different types of securities.

to the IOSCO, “CRAs as an industry should encourage structured finance issuers and originators of structured finance products to publicly disclose all relevant information” concerning structured products (IOSCO 2008b, p.15). Nonetheless, the IOSCO has refrained from enacting such a requirement in its code.

In Canada, the CSA are proposing to improve the disclosure of information by issuers of structured finance products as part of a new regulatory regime contemplated for these securities, set forth in National Instrument 41-103 and National Instrument 51-106.[35]

In the United States, issuers, sponsors or underwriters of structured finance securities must post on a password-protected website the information provided to a CRA to rate their securities. The website must be set up and maintained by each NRSRO. And the chosen NRSRO must provide free and unlimited access to the website to any other NRSRO that furnishes the required certification.

In a nutshell, access to the website is permitted only for determining or monitoring ratings. The non-hired NRSRO must promise to keep the information confidential and maintain the credit ratings for at least 10 percent of the issued structured finance products for which it accesses information. With this regime, the SEC seeks to inform the non-hired NRSROs of new transactions so as to enable them to rate or monitor the structured finance securities.

Recently, as part of its November 2011 amendments, the EC is proposing to mandate the disclosure of information of structured finance products. Specifically, the EC wants to compel the issuer, the originator and the sponsor of a structured finance instrument to make public any information on issues such as the credit quality and performance of the individual underlying assets, the structure of the securitization transaction, the cash flows and any collateral supporting the securitization exposure. However, the disclosure obligation does not extend to the provision of information that would breach statutory provisions governing the protection of confidential information or the processing of personal data.

Regulatory Use of Ratings

In the wake of the credit crisis, there is a strong consensus among regulators that investors tended to give too much weight to the ratings, viewing them as “a seal of approval” (IOSCO 2008b, p. 8). For instance, prior to the global recession investors tended not to independently analyze asset-backed securities, relying heavily or solely on ratings to assess the risks of holding these securities. At the time, investors’ reliance on ratings was not unreasonable, given the regulatory treatment of ratings, the role of CRAs in advising originators and the challenges raised by risk analysis.

Although the “regulatory license” critique of CRAs is still debated among academics the SEC took the side of those who questioned the influence of the regulatory use of ratings. On July 1, 2008, it issued three proposals that aimed to reduce undue reliance on credit ratings by investors and improve the analysis underlying investment decisions.[36] However, faced with strong objections from markets participants, the SEC refrained from going forward with the reforms.

35 *Proposed NI 41-103 Supplementary Prospectus Disclosure Requirements for Securitized Products, Proposed NI 51-106 Continuous Disclosure Requirements for Securitized Products, Proposed Amendments to NI 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings, Proposed Amendments to NI 45-106 Prospectus and Registration Exemptions and NI 45-102 Resale of Securities, and Proposed Consequential Amendments*, (2011) 34 O.S.C.B. 3813.

36 US, SEC, *References to Ratings Of Nationally Recognized Statistical Rating Organizations*, Release No. 34–58070; File No. S7–17–08, Federal Register, vol. 73, no. 134, 40088.

Subsequently, *Dodd-Frank* changed the landscape. Indeed, the Act mandates the removal of references to credit ratings from a number of statutes, including the *Securities and Exchange Act* and the *Investment Company Act*; that is the regulatory regimes must no longer contain references to or requirements regarding credit ratings. The references and requirements must be replaced by other standards of creditworthiness in lieu of credit ratings. As a consequence, regulators are developing alternative standards for determining creditworthiness in the banking sector (Sullivan and Cromwell 2011).

Important changes are also underway in Europe. In July 2011, the EC issued a proposed directive on capital requirements that seeks to address the issue of over-reliance. Specifically, the proposal states that financial institutions must have internal methodologies to assess their exposure to credit risk, as well as to calculate capital requirements. And internal methodologies cannot rely mechanistically on external credit ratings.

Later, in November 2011, the EC proposed similar changes with respect to fund managers and insurers. Moreover, the November proposals direct European authorities to refrain from referring to credit ratings in their guidelines and instruments, when such references have the potential to trigger mechanistic reliance on credit ratings.

In light of this strong push toward the reduction of regulatory use of ratings, Canada seems to be lagging. While Canadian regulators share similar concerns, they have proposed only to reduce reliance on ratings in the new regulatory regime suggested by the CSA for structured products.[37] Under this proposal, for instance, the prospectus exemption for asset-backed securities will no longer require that issuers obtain an "approved credit rating." In lieu of this requirement, the exemption will restrict the investors permitted to subscribe to asset-backed securities placed under the exemption to a narrow class of "eligible securitized product investor." Further, the exemption imposes disclosure requirements on issuers at the time of issuance and on a continuous basis.[38] However, other regulatory references to ratings remain presently untouched.[39]

Policy Options to Enhance the Accountability and Effectiveness of Credit Rating Agencies

A. Regulating Rating Agencies

Goals of Securities Regulation

Since CRAs' role is to contribute to the efficient operation of capital markets, they fall under the scope of securities regulation. Thus, any regulatory effort concerning rating agencies should espouse the twin goals underlying all securities regulation: efficiency and investor protection.

37 *Proposed NI 41-103 Supplementary Prospectus Disclosure Requirements for Securitized Products, Proposed NI 51-106 Continuous Disclosure Requirements for Securitized Products, Proposed Amendments to NI 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings, Proposed Amendments to NI 45-106 Prospectus and Registration Exemptions and NI 45-102 Resale of Securities, and Proposed Consequential Amendments,* (2011) 34 O.S.C.B. 3813.

38 The disclosure obligations vary depending on whether the securitized product is a short-term security.

39 The CSA Consultation Paper states that the "Committee is analyzing whether the approach taken by the SEC could inform its proposals to maintain, modify or delete references to credit ratings in Canadian securities legislation". See Canadian Securities Administrators (2008).

Market Efficiency

Generally speaking, encouraging greater market efficiency entails encouraging the most rational and efficient allocation of capital resources.[40] In this regard, securities regulation promotes informational efficiency by reducing information asymmetries between issuers and investors in order to foster more accurate pricing. Secondly, efficiency requires that transaction costs be kept low so as to ensure the continued use of capital markets.

In the CRA context, achieving market efficiency means correcting market failures that can affect rating agencies' activities and processes. Two market failures are noteworthy: imperfect competition and agency problems.

The credit rating industry is characterized by imperfect competition, given its high level of market concentration. The barriers to entry that contribute to market concentration are well known and have been discussed extensively elsewhere.[41] The reputation of CRAs, which is an integral part of their business model, acts as a powerful barrier to entry as it can only be built over time. Economies of scale and scope in the rating industry also give an advantage to incumbents. Besides, regulation can act as a barrier to entry.

Insufficient competition deprives the public of an effective check on the quality and integrity of the rating process, thereby facilitating shirking by established CRAs.[42] Lack of competition also negatively affects innovation, as well as diversity of thinking and opinions.[43] A related element is that competition is important for the enforcement of reputational sanctions that shape CRAs' conduct (Hörner 2002). In a competitive market, information about prices charged, the level of service provided and performance tend to be more visible. Furthermore, there are more alternatives with which to compare services offered. Thus, in an oligopolistic setting, reputational sanctions are less effective.

Some worry that competition may prove counter-productive.[44] Competition could reduce the disciplinary effect of reputation by reducing the rent derived from it, thereby affecting CRAs' incentive to preserve reputation by providing accurate ratings (Klein and Leffler 1984; Becker and Milbourn 2008).

Competition could also induce a race to the bottom as new entrants inflate ratings to get a share of the market. However, this concern should not be overstated. It is doubtful that there is a significant demand for inflated ratings, especially in an environment where regulation does not refer to ratings. In fact, competition could actually lead to the emergence of rating agencies that meet investors' unmet needs, for instance by providing more timely information on creditworthiness (Beaver, Shakespeare and Soliman, 2006). From this perspective, public policy should seek to improve competition (Coffee 2006; Zelmer 2002) by facilitating entry of new CRAs and by fostering the development of ratings substitutes (Utrig 2010).[45]

The second cause of market failure, agency problems, has been discussed above. As noted,

40 *Ontario Securities Act*, s. 1.1. See D.L. Johnston & K.D. Rockwell, Securities Regulation, 2nd Ed., Toronto, Butterworths, 1998, p. 2-3.

41 See Coffee (2006); Committee of European Securities Regulators (2005); Rousseau (2006); White (2002).

42 Coffee (2006); European Securities Markets Expert Group (2008); Grundfest and E. Petrova (2009).

43 European Securities Markets Expert Group (2008); Cinquegrana (2009); Zelmmer (2007).

44 Communication from the Commission on Credit Rating Agencies, *Official Journal of the European Union*, 2006/C 59/02, 59/5; Cinquegrana (2009); Fitzpatrick and Sagers (2009); Matthews (2009).

45 See, e.g., the experience of NAIC which has retained PIMCO Advisors: "NAIC Selects Pimco To Model Residential Mortgage-Backed Securities", 17 novembre 2009 [online: http://www.naic.org/Releases/2009_docs/pimco_rmbs.htm]; Deb et al., (2011).

the potential conflict of interest associated with the issuer-pays model may affect the accuracy of ratings. Public policymakers need to ensure that adequate mechanisms are in place to curb the adverse consequences that arise when conflicts affect ratings.

Investor Protection

Securities regulation also attempts to protect investors from fraud and other forms of exploitation in order to preserve public confidence in the market.[46] While there is considerable debate as to the emphasis that should be accorded to market efficiency, as opposed to investor protection, market efficiency on balance should prevail, given the importance of a well-functioning capital market to the well-being of modern economies.

The market dominance by institutional and sophisticated investors is relevant when discussing investor protection. These investors possess the expertise to analyze and assess information disclosed by issuers. They can also rely on market-based measures, such as credit-default swaps, to evaluate issuer creditworthiness (Hilsher and Wilson 2012; Altman et al. 2011).

As well, since institutional investors participate in numerous offerings, they have significant experience when it comes to analyzing the value of issuers or of securitized products. In other words, institutional investors are not defenceless in credit markets. Since they can form critical judgments in light of their own analysis and research, institutional investors can contribute to moderating the conflicts of interests affecting CRAs.[47]

The dominance of institutional and sophisticated investors also carries implications for retail investors. They can seek some protection by investing through institutional investors to benefit from their informational advantage. In this way, retail investors are also not defenseless in credit markets.

Acknowledging Regulatory Failures

When discussing policy options, it is important to acknowledge the possibility of government failing to exercise adequately its responsibilities in regulating markets. Two types of government's failures that can arise in regulated industries are particularly noteworthy (Breyer 1979; Swire 1999). The first can occur when the government fails to properly consider the costs associated with regulation—and those costs offset any efficiency gains. Administrative costs are incurred by the government agency charged with the formulation of the rules and standards of conduct, the monitoring of behaviour and the enforcement of compliance. There are also compliance costs borne by market participants. These costs depend on the degree of precision and flexibility of regulation, and can be compounded by the lack of harmonization of national regulatory regimes that apply to market participants, such as CRAs, that operate in multiple jurisdictions.

A second type of government failure occurs when assumptions are relaxed concerning the competence of government officials and the objectives guiding their interventions. In the real world, government officials can be incompetent, hindered by informational problems or affected by psychological biases, just as any other market actor. When that is the case, the costs of regulation will be greater and the benefits smaller. Even more worrisome is the possibility that government officials may not be guided by the public interest when shaping a regulatory regime. Rather, as public choice theorists argue, they may be pursuing the private goals of concentrated interest groups, which captured them in one way or another.

46 *Ontario Securities Act*, s. 1.1. See D.L. Johnston and Rockwell, *supra* note 176, pp. 2-3.
47 On the moderating role of institutional investors in the equity market, see LjungQvist et al. (2005).

Therefore, any case for regulatory intervention will have to demonstrate not only that a market imperfection exists, but that its impact would be reduced by the proposed policy measure or reform in a cost-effective manner. As well, efficiency may be compromised when private interests groups capture the regulator. In this respect, it is worth emphasizing that the risk of capture is more probable where concentration in the industry is high (Becker 1983).[48]

B. Assessing Reform Initiatives

The Pitfalls of the Registration Regime

In Canada, the European Union and the United States, policymakers have opted for registration systems with various degrees of compliance. In Canada and the EU, registration is mandatory for rating agencies. In the United States, registration is necessary for agencies that seek NRSRO status and, thus, have their ratings recognized for regulatory purposes. Once registered, CRAs become subject to requirements developed by securities authorities, including inspections and examinations.

Registration can yield two main benefits. Firstly, it can validate new or smaller agencies to the extent that it provides them with regulatory recognition of their expertise and qualifications. In this way, regulatory approval of new entrants may boost competition. Still, this benefit should not be overstated, based on the US experience where "the SEC's belated efforts to allow wider entry during the current decade have had little substantial effect" (White 2010). Secondly, putting securities commissions in charge of the regulation and supervision of CRAs can enhance their accountability, thereby bolstering public trust.

However, a registration system has several drawbacks.[49] A flawed framework, such as the no-action letter regime used by the SEC with respect to NRSROs, can create significant barriers to entry, given the mandatory nature of the registration system (Altman et al 2011). [50] With respect to rules of conduct, while regulators can impose requirements to help CRAs manage conflicts of interest (See Committee of European Securities Regulators 09), it is doubtful they have the expertise to develop requirements that improve the *quality* of ratings.[51]

Indeed, regulatory involvement in the rating process can hamper innovation. This is because regulators will "have difficulty keeping abreast of the flow of new products that are regularly developed in financial markets" (Zelmer 2007).[52] In addition, regulators may be overly conservative with respect to rating practices.

Another important concern is that market participants might view registration as implying an official endorsement of ratings.[53] This perception will be present particularly when authorities attempt to regulate the substance of ratings. In addition, it may render regulatory authorities accountable to investors for the failings of rating agencies.

A final concern relates to the ability of regulators to effectively oversee CRAs. A new registration regime places significant pressure on regulators (Deb et al. 2011). They will need to have the resources

48 See also Carpentier and Suret (2003).

49 For critiques of the registration system see Amterbrink and De Haan 2009; Cinquegrana (2009); Coffee (2006); Hunt (2009); White (2007).

50 See also Committee of European Securities Regulators (2005); Theis and Wolgast (2012).

51 See however Coffee (2006), doubting the relevance of rules with respect to conflicts of interest.

52 See also *Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies*, COM (2008) 704, November 12, 2008, par. 236.

53 Committee of the European Securities Regulators (2009); Zemmner (2007); Haan and Amtenbrink (2011).

and information to carry out their duties. And they will be expected to be diligent in their oversight of CRAs. Overseeing CRAs could prove a challenge for regulators given that, unlike other gatekeepers in capital markets, there are no self-regulatory organizations that deal first-hand with CRAs.

To conclude, the registration regimes proposed on both sides of the Atlantic do not appear to be ideal. As argued elsewhere (Rousseau 2006), from a Canadian perspective, a disclosure-based registration regime would have been the preferable option.[54] Unfortunately, the CSA did not retain this option because of compatibility concerns with the European framework.

The Challenge of Solving the Agency Problems

Some reformers have advocated doing away with the inherent conflict in the issuer-pays model by restoring the "principal-agent relationship that once existed by requiring rating agencies to be paid by the users of their information, not the issuer" (Coffee 2006, p. 298). This proposal, however, faces a number of important barriers, the most notable of which is the public-good aspect of ratings. Indeed, research on creditworthiness is similar to a public good in that it is difficult to exclude investors who have not paid for it. In the case of credit ratings, exclusion is particularly difficult given that the information translates into symbols that are easy to leak and communicate to non-paying third parties. Thus, the public good problem threatens the viability of the investor-pays model (Coffee 2006, p. 299).

Even if rating agencies were able to overcome this problem, the case for restoring an investor-pay model would still be fragile. To the extent that ratings would only be available to subscribers in such model, the general investing public would be deprived of information about creditworthiness, including about rating actions such as downgrades. As Coffee notes, an investor-pays model could easily be viewed "as institutionalizing a de facto system of selective disclosure," a result that would run counter to the objectives of disclosure regimes put in place by securities regulators.

Given these difficulties, lawmakers and regulators have fortunately not attempted to implement an investor-pays model. Nonetheless, a number of initiatives have been put forth to address the model's potential conflicts of interest, including governance requirements, disclosure obligations, as well as a mandatory rotation rule. With respect to governance requirements, we share Hill's wariness as to the effectiveness of such measures (Hill 2011). For instance, "increased independence on corporate boards has scarcely been a panacea; the type of independence that is needed is independent-mindedness, not independence as it is formally defined" (Hill 2011, p.145). Indeed, a disclosure-based approach is preferable for governance requirements.

As for the European rotation rule, it is doubtful that it will have a meaningful impact in the current context characterized by a high degree of concentration in the industry. Transparency offers more potential in that thorough disclosure of ratings can have a disciplinary effect on CRAs.

Still, further reforms are likely. In the United States, *Dodd-Frank* contains provisions that could lead to a new regime governing the selection of CRAs. Indeed, the Act instructs the SEC to give thorough consideration to the so-called Franken Amendment that envisions a centralized clearing platform for rating agencies. Specifically, a new Office of Credit Ratings would house a Ratings Board composed of investors in structured finance products. The Ratings Board would have the authority to select the rating agency for each issuer.

54 *Consultation Paper: Concept Proposal – 11-405 – Securities Regulatory Proposals Stemming from the 2007-2008 Credit Market Turmoil and its Effect on the ABCP Market in Canada*, October 6, 2008.

In this way, an independent ratings clearinghouse would likely end the conflicts of interest that exist in the current model. While issuers would still pay the rating agencies, they would no longer select the agencies.

The ratings clearinghouse approach raises a number of issues. To a large extent, it would do away with the ratings market by replacing it with a system of central allocation. In such a setting, "incentives for CRAs to maximize their operational performance and to compete on the basis of price and service quality could significantly be reduced (SEC 2011a)." Stated differently, the system could generate moral hazard.

Given that there are only three major CRAs in the United States, it is difficult to envision how the ratings clearinghouse would be really effective. At most, it would reallocate market shares among the industry leaders, a result whose merits are certainly debatable.

The Way Forward: Addressing Reliance on Ratings, Due Diligence and Disclosure

To improve the accountability and effectiveness of CRAs, there are three main areas of reform that are being explored and that should be further pursued, particularly in Canada. Those three areas have been aptly identified by the International Financial Stability Board.[55]

The first pertains to the elimination of regulatory references to ratings. Initiatives in this respect are already underway in Europe and in the United States. However, Canada appears to be lagging as there is no general reform initiative in this respect at the federal or provincial levels despite the frequent use of ratings in legislation and regulation.[56]

The removal of regulatory references to ratings, as explained above, would render investors less dependent on CRAs. It would not, however, leave institutions without the means of assessing the creditworthiness of securities (White 2010). There exist alternatives such as in-house research, reliance on outside advisers or the market for credit swap (Zelmer 2007).[57] To the extent that CRAs are no longer central in the regulatory framework, the need for comprehensive regulation of CRAs would be lessened.

The second reform area relates to the obligations of institutional investors to conduct their own due diligence assessments of the creditworthiness of assets so as not to rely mechanistically on ratings. The European Union is moving in that direction. In a similar vein, Canadian regulators should look into the development of clearer obligations on the part of institutions (Bergevin 2010). In doing so, regulators should take into account the purpose for which ratings were used, the securities involved and the differences in the size, expertise and role of the various institutional investors (Theis and Wolgast 2012).

The final area of reform concerns the disclosure of information by issuers of structured products to investors with respect to underlying assets. This would help investors, especially institutional investors, make their own assessments of asset-backed securities. Initiatives in this regard have been launched in Europe and the United States. In Canada, the CSA should continue moving forward with their proposed new disclosure framework for asset-backed securities and other

55 See also Theis and Wolgas (2012).

56 See Nicholls (2005). The slow pace of reform in Canada may be attributed to the small size of the debt and asset-backed securities markets in comparison with the US markets.

57 For a sceptical view, see Hill (2011).

securitized products.[58] Further, the CSA should examine whether their proposed disclosure regimes contribute to creating a level playing field among CRAs, investors and issuers.

We appreciate that these three areas of reform imply important changes to the current landscape. Hence, we acknowledge that the reforms should "be well conceived to maintain the public-good aspects of credit ratings and to avoid unintended consequences such as increased costs and reduced access to capital markets" (Katz et al. 2009). Incremental changes appear, therefore, to be the preferable route.

Conclusion

In the wake of the financial crisis, CRAs have been criticized for having played a significant role in the market turmoil. Numerous reports have identified failures on the part of CRAs that have affected the quality and integrity of the rating process. In light of the critiques, a strong consensus has emerged among policymakers that regulatory intervention is needed. In Canada, the European Union and the United States, policymakers have opted for registration systems.

This paper has argued that the regulatory regimes proposed on both sides of the Atlantic do not appear to be the preferable route for regulating CRAs. Indeed, the registration regimes can stifle competition, induce undue reliance on ratings and burden regulators. From a Canadian perspective, it is unfortunate that the CSA had to move away from the disclosure-based registration regime that they had proposed in *Consultation Paper 11-405* because of compatibility concerns with the European framework.

From this perspective, the paper advocates that three areas of reform be pursued. The first pertains to the elimination of regulatory references to ratings. The second area relates to the development of a due diligence obligation for institutional investors with respect to the creditworthiness of issuers. The final area of reform concerns the disclosure of information by issuers of structured finance products on the underlying assets. Given that these reforms imply important changes to the regulatory landscape, an incremental approach is the preferable route.

58 *Proposed NI 41-103 Supplementary Prospectus Disclosure Requirements for Securitized Products, Proposed NI 51-106 Continuous Disclosure Requirements for Securitized Products, Proposed Amendments to NI 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings, Proposed Amendments to NI 45-106 Prospectus and Registration Exemptions and NI 45-102 Resale of Securities, and Proposed Consequential Amendments*, (2011) 34 O.S.C.B. 3813.

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