Testimony of Professor John C. Coffee, Jr.

Adolf A. Berle Professor of Law
Columbia University Law School

Before the Senate Banking Committee
On September 26, 2007

"THE ROLE AND IMPACT OF CREDIT RATING AGENCIES ON THE SUBPRIME CREDIT MARKETS"

Chairman Reed, Ranking Member Shelby, and Fellow Senators:

I am pleased and honored to be invited to testify here today and will get to the point without delay.

I. Introduction

Let me begin with a basic generalization: When a debacle occurs in the financial markets—whether it be the crisis triggered by the failure of Enron and WorldCom in 2002, the contemporary mortgage meltdown, or earlier problems in the junk bond market—one can usually identify a "gatekeeper" in whom investors have lost confidence. By the term "gatekeeper," I mean those professionals on whom investors necessarily depend to provide certification and verification services: auditors, securities analysts, credit rating agencies, investment banking firms and sometimes corporate attorneys. These professionals develop "reputational capital" over many years and many clients that leads investors to rely on them, in part because investors know that the gatekeeper will suffer a serious reputational injury if it is associated with a fraud or unexpected insolvency. Because this injury should be greater than any amount the issuer can pay the gatekeeper to acquiesce in fraud, it should deter the gatekeeper from involvement in fraud.[1] From this perspective, "reputational capital" is in effect "pledged" by the gatekeeper in support of the issuer's statements. But when the market learns that the gatekeeper failed to uncover fraud or related problems (or that it blinked at them), the resulting loss of confidence, both in the gatekeeper and the market's mechanisms generally, can produce a sharp decline in stock market values, a liquidity crisis as buyers flee the market, or even, in an extreme case, a panic. Recent market developments suggest that there has been such an erosion in investor trust and confidence.

Thus, when accounting irregularities and financial statement restatements soared in the period between 1998 and 2002, and eventually culminated in the Enron and WorldCom insolvencies, investors lost confidence in audited financial statements, and stock market prices collapsed. As a result, Congress enacted the Sarbanes-Oxley Act to eliminate conflicts of interest and restore confidence in the auditing profession. Controversial as that statute may have been, it basically worked.

Today, attention has shifted to the performance of a different gatekeeper: the credit-rating agency. Functionally, it plays much the same role for debt purchasers that auditors and securities analysts perform for equity investors. Structured finance particularly relies on the credit-rating agency because investors have no ability to evaluate on their own the securitized pools of financial assets that structured finance creates. That is, while a sophisticated debt purchaser might be able to evaluate the creditworthiness of the bonds of a major corporation by examining the corporation's financial statements, the debt purchaser has no corresponding ability to assess the risk level of a mortgage pool backing an issue of collateralized debt obligations ("CDOs") and so must rely on a "gatekeeper"—here, the credit rating agency.

The market for mortgage-backed securities is particularly dependent on gatekeepers. The day is long past when bankers behaved like Jimmy Stewart in "It's A Wonderful Life" and made mortgage loans based on their evaluation of the character and integrity of the borrower. The connection has been irrevocably severed between making the loan and bearing responsibility for its performance. Instead, the lending institution has become simply an "originator"; its loans are aggregated, along with those of many other financial institutions, into large pools of financial assets that investment banks market to institutional debt purchasers. Obviously, there is an incentive for the "originator" to transfer its more risky loans to the securitization pool, rather than keeping them on its own books. To counteract this tendency and because the debt purchaser cannot individually evaluate the strength of the loans in the pool, the debt purchaser must rely on the credit rating agency (and, probably to a lesser extent, the investment bank syndicating the mortgage-backed debt).

The evaluation of structured finance products is obviously more difficult than simply evaluating a public corporation's creditworthiness—and thus it is also more profitable for the rating agency to rate these often complex and exotic products. The structured finance market has grown exponentially over the last decade, and this in turn has vastly increased the revenues of the principal rating agencies. No serious person can doubt that the growth of the structured finance industry has been socially desirable because it has expanded housing opportunities. But for precisely this reason, the performance of the gatekeepers central to this market is also a matter for public and Congressional concern. Until recently, the market for debt ratings seemed to be working smoothly, but it has always had some unique characteristics.

II. An Overview of the Debt Ratings Market

Let me stress four characteristics of this market:

(a) Market Concentration. The debt rating market has always been highly concentrated, with only three major players (Moody's, Standard & Poor's, and Fitch). This concentration is partly attributable to the facts that (a) reputational capital is not easily acquired and (b) the SEC long discouraged new entrants into this market. Although the Credit Rating Agency Reform Act of 2006 will encourage new entrants, it does not follow that this market will soon become competitive. Barriers to entry remain. Debt purchasers fear new, "fly-by-night" rating agencies and will prefer to rely on the established players. Absent real competition, conscious parallelism can become the norm and thus the dominant players may acquiesce to client pressures for liberal grading.

(b) Conflicts of Interest. At first glance, credit rating agencies are better insulated from client pressures than most other gatekeepers. Because they rate thousands of clients, no one client is material to their revenues. Even more importantly, little prospect exists that the individual rater can be "captured" by the client. In contrast, the audit partner of a major accounting firm is far more vulnerable because the partner may serve only one (or a few) clients and the partner's future career depends on whether he or she can hold the principal client. Thus, David Duncan, the Arthur Andersen audit partner for Enron, had more reason to be loyal to Enron than to Arthur Andersen. Lose the client, and your career is eclipsed. But this is not true in the case of credit rating agencies. There, the actual rater has not a single client, but maybe thirty or forty. In addition, the individual rater is a relatively low ranking employee, is paid far less than a partner of a law or accounting firm, and typically possesses less individual discretion; critical decisions tend to be made at the committee level. The prospect of client capture thus seems more remote.

But this insulation has its limits. The major change that destabilized rating agencies appears to have been the rise of structured finance. Not only are the process and criteria for rating a securitized pool of financial assets opaque, but major investment banks that assemble these pools bring them to the rating agency for advance negotiation over the rating before they are marketed. The process can become one of extended negotiation, because if an investment grade rating is initially denied, the investment bank can seek to supplement and/or improve the quality of the asset pool. This is a qualitatively different process than the evaluation of the financial statements of a corporate issuer, whose financial statements cannot be changed or improved in response to criticism in the short run. As a consequence, the rating agency is no longer facing an atomized market of clients who each come to it only intermittently (and thus lack market power), but instead large repeat clients who have the ability to take their business elsewhere. Today, structured finance accounts for a major share of some rating agencies' total revenues; equally important, these amounts are paid by a small number of investment banks that know how to exploit their leverage—and get the rating just over the line and into the promised land of investment grade.

(c) Stale Ratings and Tardy Downgrades. In principle, the debt market wants current, updated ratings. Yet, rating agencies have been notoriously slow to adjust their ratings downward. For example, Enron was not downgraded until just four days before it filed for bankruptcy,[2] well after its problems were a matter of public knowledge. The mortgage meltdown intensified this last July, when Moody's downgraded several billion dollars worth of mortgage-backed collateralized debt obligations ("CDOs"). The general view is that these downgrades were long overdue (in part, as discussed later, because of the high default rates on CDOs). Why then are rating agencies slow to downgrade? A rating agency earns no additional revenues from downgrading outstanding securities, but it does risk offending powerful clients—the issuer, its investment bank, and the institutional investors that hold the rated securities in their portfolio. No one is made happier by a downgrading, and many are outraged (as was clear this July). Thus, downgradings tend to be delayed and may be motivated mainly by the fear that investment grade-rated debt securities might imminently default. In this respect, ratings downgrades are often less prophecies of the future than slightly premature obituaries for terminally ill bonds.

(d) The Prospect of Retaliation. A final factor that may compromise some rating agencies is the ease with which business can be moved from one rating agency to another. In contrast, firing an auditor is difficult because SEC rules require full disclosure of the circumstances surrounding the termination and permit the auditor to comment. Also, when the auditor is fired, there is great uncertainty about what the incoming auditor will do; perhaps, it will be even tougher, and certainly, it has leverage over the client. Precisely because issuers usually hire multiple rating agencies, they can drop one with less visibility or adverse consequences. In any event, the evidence clearly shows that there is a market penalty for downgrading one's ratings. Moody's has reported that since it downgraded a series of structured finance offerings in July, 2007, its market share in the relevant market for mortgage-backed securitizations has dropped from 75% to 25%.[3] In short, business in the market for ratings is mobile, retaliation is relatively costless, and hence the gatekeeper can become compromised, particularly with regard to structured finance products.

If the rating agency is subject to more pressure in the case of structured finance offerings than in the case of corporate bond offerings, this diagnosis leads to a testable prediction: default rates should be higher on structured finance products than on corporate bond offerings for securities having the same ratings grade. Currently, the evidence appears to corroborate this prediction that debt ratings are more likely to be inflated on structured finance products than on corporate bonds. Looking at the default rate on Moody's lowest investment grade rating (Baa), two financial economists recently reported that the five year cumulative default rate on corporate bonds receiving a Baa rating from Moody's between 1983 and 2005 was only 2.2%, but the same five year cumulative default rate for CDO's receiving the same Baa rating from Moody's between 1993 and 2005 was 24%—more than ten times higher.[4] Moody's informs me that they consider the default or impairment rate for 2005 to be aberrational for several reasons,[5] and they have advised me that the comparable five-year cumulative default rates ending in 2006 (as opposed to 2005) were 2.1% for corporate bonds and 17% for CDOs. But even on their preferred comparative basis, the ratio is still over 8 to 1 (as opposed to over 10 to 1).

Even as so modified, the most plausible interpretation of this disparity is that ratings were inflated on CDOs (at least more so than on the corporate bonds), probably because only the issuers of the former had sufficient leverage with the rating agency. This hypothesis is not presented as established fact or as a permanent tendency, but it is exactly the type of issue that the SEC should focus on in its investigation: what were the default rates for individual underwriters' offerings? Until rebutted, the most reasonable inference is that the underwriters that did the most business with a rating agency had a higher rate of default on their offerings.

III. <u>What Can Be Done?</u>

If the gatekeeper has been compromised, what reforms would make sense? A variety of options are possible, but first it is important to recognize what will not work.

Free market theoreticians may argue that nothing need be done because the market will restabilize on its own. But this is a market uniquely prone to failure—and not simply because of the usual problem about conflicts of interest. In other markets, a professional whose advice was demonstrably inaccurate would lose business. But this does not necessarily hold true in the market for debt ratings, because the service providers in this market are not simply providing information through their ratings. They are also conferring a governmentally-delegated permission to buy upon institutional investors that are legally restricted to purchasing securities rated investment grade.[6] This is the real significance of the SEC's Nationally Recognized Statistical Rating Organization (or "NRSRO") designation, because only a rating agency with this designation can render debt securities eligible for purchase by many investors.[7] Put bluntly, an NRSRO can sell its services to issuers, even if the market distrusts the accuracy of its ratings, because it is in effect licensing the issuer to sell its debt to certain regulated investors. This is a power that no other gatekeeper possesses. But such a market in which the gatekeeper is dispensing permission as much as providing information is more likely to produce inflated ratings, because there is less of a penalty for inaccuracy.

More generally, another feature of this market is that not one constituency unambiguously favors objective information over optimistically biased information. To be sure, debt purchasers want the truth at the outset <u>before</u> <u>they</u> <u>purchase</u>. But once they have placed the issuer's bonds in their portfolios, institutions are unhappy with any downgrading of the issuer's debt. Because debt securities trade in the secondary market far less frequently than do equity securities, it also follows that the constituency of prospective buyers (who do want the objective truth) is far smaller than the constituency of debt holders (who may not).

Given these problems, what forces can counteract this inherent tendency for optimism? The most obvious candidates are litigation and bureaucratic regulation, but as next discussed, neither option is promising.

A professional who makes inaccurate judgments is often subject to legal liability on any of a number of grounds. Yet, litigation against the credit rating agencies looks more feasible in theory than in practice. The plaintiffs' bar will assert that a debt rating is a statement subject to Rule 10b-5 and that recklessness satisfies the obligation to show scienter under that rule. Still, to date, plaintiffs have never been able to hold a rating agency liable. Even in Enron, where the rating agencies reduced Enron's debt to below investment grade only four days before its bankruptcy, the agencies escaped liability on both securities fraud and malpractice grounds.[8] Their defense has long been that their ratings constitute First Amendment-protected speech, much like newspaper's editorials.[9] The rating agencies have even invoked, with some success, press shield laws to protect them from having to respond to subpoenas.[10] In 2003, the Second Circuit refused to uphold this extension of the press shield law to one rating agency,[11] but it did so on a narrow ground. Finding that Fitch only rated the debt of issuers that hired it, the Second Circuit decided that Fitch was not a true journalist. However, the Second Circuit also noted that Fitch's practice of rating only its own clients "contrasts noticeably with Standard & Poor's practice ... of rating nearly all public debt issuances regardless of whether it was hired to do so or not."[12] The implication then is that S&P and Moody's would qualify for protection under these statutes.

Even if the rating agencies' First Amendment theory seems overbroad, they probably receive even more effective insulation from the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which requires a plaintiff to plead with particularity facts giving rise to a strong inference of fraud. The relationship between rating agencies and their investment bank clients is far from transparent, but discovery is not available under the PSLRA until its high pleading standard is first satisfied. As a practical matter, plaintiffs have a fighting chance in court only if they can obtain extra-judicial access to documents or emails that show that the rating agency had contemporaneous doubts or concerns that were not revealed in its rating. Even then, the failure to downgrade a rating may not be actionable at all, because in the words of Basic v. Levinson, silence is not actionable absent a duty to disclose.[13] My assessment is not that plaintiffs can never win, but that the barriers to victory are so high that private litigation is not an effective disciplining force.

Finally, even if litigation against rating agencies were more feasible, this might only aggravate, rather than cure, the problems of this market. The case for a ceiling on liability is probably stronger in the case of rating agencies than in the case of auditors. Rating agencies each rate thousands of securities for a relatively modest fee and thus would face potential liability in the trillions on all the debt offerings that they have rated. Without a ceiling, they might face extinction if they were liable under simply a recklessness standard.

If litigation then seems unpromising, tough bureaucratic regulation could arguably be the best alternative. Former SEC Chairman Arthur Levitt has called in a recent Wall Street Journal Op-Ed piece for closer SEC oversight, the elimination of conflicts of interest, and possibly the creation of an agency similar to the Public Company Accounting Oversight Board ("PCAOB") to monitor the rating agencies.[14] Potentially, these reforms seem desirable, but they are not easy to implement. Although conflicts of interest are critical, it is far from clear that they can simply be eliminated. The fundamental conflict is that the issuer hires the rating agency to rate its debt (just as the issuer also hires the auditor to audit its financial statements). It is not easy to move to a different system. To be sure, until the early 1970s, the rating agencies were paid by their subscribers, not the issuer. But they barely broke even under this system. More generally, the deeper problem with subscription-funded ratings is that there is no way to tax the free rider. A first user of a rating can pass the rating information along to its friends and allies, possibly in return for reciprocal favors. Thus, Pension Fund A could subscribe to Moody's and Pension Fund B could subscribe to Standard & Poor's, and they could exchange the information they receive from both, meaning that both agencies would not receive the full market value of the information that they produce. The same problem makes it infeasible to have investors pay auditors for their services. As discussed below, it is possible that subscriber-paid credit rating agencies could enter this field (and some have), but they are likely to play more of a watchdog role than to serve as one of the principle raters. Subscription-funded ratings is a niche market at best.

Bureaucratic regulation faces other problems. It does not seem within the effective capacity of the SEC, or any more specialized agency, to define what an investment grade rating should mean or the process by which it is determined. Such efforts would only produce a telephone book-length code of regulations, which skilled corporate lawyers could easily outflank. Here again, rating agencies are different than auditors. The PCAOB as a reform worked well because there already was a pre-existing methodology governing how audits should be conducted. The Sarbanes-Oxley Act simply re-assigned the responsibility for monitoring compliance from a private body, the American Institute of Certified Public Accountants (or, "AICPA"), to a public body, the PCAOB. In contrast, no recognized methodology exists for assigning debt ratings. Indeed, Moody's and S&P differ in their approach. S&P is known to be more quantitative and rule bound; Moody's, more qualitative and subjective, leaving most decisions to a committee. Absent any professional consensus, it seems premature to expect either the SEC or a specialized agency to adopt rules governing what an investment grade rating should mean.

The SEC could, of course, do many things, but to date, its focus has not shifted from its traditional concern that competition will produce laxity. In June, it issued a massive release to implement the Credit Rating Agency Reform Act of 2006.[15] As in the past, its primary concern appears to be the danger of fly-by-night rating agencies and the proverbial race to the bottom. Even if this concern is justified, it overlooks the danger that the established rating agencies may also have become compromised. If so, more detailed record-keeping and greater procedural formality, as the SEC contemplates in its new release, will not have much useful impact.

What then could work? I will make three proposals, all premised on the idea that the least intrusive remedies are the best:

<u>Proposal One: Disclose Default Rates On Each Rating Grade For Each Product</u>. One of the more effective regulatory initiatives directed at consumers requires automobile manufacturers to disclose estimated gas mileage (both for urban and highway

driving) on the window stickers of new automobiles. Correspondingly, the SEC could calculate the five year cumulative default rates on different classes of financial products for each rating agency and disclose this data on one centralized web site. Admittedly, Moody's already discloses such information on its own web site, but others do not, and it is the comparison that is critical.

Today, it is doubtful that most debt purchasers were aware that the five year cumulative default rates on CDOs rated investment grade by Moody's recently ranged between 17% and 24% (as discussed above). Moreover, Moody's is generally thought to be the most conservative and cautious of the rating agencies. In any event, if the SEC were to maintain one centralized web site, it could employ common criteria to compute default rates and display reliable comparative data on every rating agency registered with the SEC under the 2006 legislation. This would assist the market to understand the different approaches of different raters (and it would thereby encourage rating agencies to compete to establish a reputation for quality). It would also compel the SEC to focus on the relative success of different raters, instead of simply monitoring the procedural steps each followed. As next discussed, rating accuracy, not the procedural due care of the rater, is both the critical focus and the only data that has objective meaning.

<u>Proposal Two: Forfeiture of NRSRO Status</u>. In principle, rating agencies should compete in terms of their relative accuracy. But the market does not appear to penalize inaccuracy very heavily, and corporate issuers may prefer the rater with the most optimistic bias. The best response to this problem is to make the rating agency's status as an NRSRO depend upon maintaining an acceptable level of accuracy. As noted earlier, Moody's cumulative five year default rate for CDOs that it rated Baa (or its minimum

investment grade) was between eight and ten times higher than its default rate for corporate bonds that it similarly rated Baa. The SEC should define a maximum default rate for each letter grade rating and should measure compliance with this standard separately for corporate bonds and structured finance products. For example, the SEC might specify an 8% default rate for Moody's Baa rating and a tighter 3% default rate for its AA ratings. If the credit rating agency's default rate for any particular rating or product exceeded these parameters over a defined period, it should forfeit the ability to serve as an NRSRO for the given rating or product as to which it was demonstrably inaccurate. Thus, institutional investors could still receive and consider the agency's rating, but they would be unable to rely on such a rating for purposes of determining the legality of an investment by them. The duration of this suspension as an NRSRO should continue until the particular agency's five-year default rate fell back to within the acceptable parameters for that rating. Ideally, a new rating agency should not obtain NRSRO status until it could demonstrate that it had a default rate within these acceptable parameters.

This proposal would not bar a rating agency from continuing to issue ratings during any period in which it was disqualified as an NRSRO, but such ratings would be useful only for their informative value, not their legal impact. The goal here is to sever the link between providing information and conferring legal protection, with the latter being made dependent on the rater's level of accuracy. The net result should be to create an incentive for more conservative ratings that might counterbalance the current incentives for grade inflation.

In reality, this proposal creates a reputational penalty that would be painful, but not fatal. Conceivably, it could happen that all the major ratings agencies might forfeit their NRSRO status (for at least some ratings or some products), but even this very unlikely event would still cause no disaster. Their institutional clients would be required to fall back on their own analyses to satisfy their obligations as a prudent trustee. Moreover, in light of the 2006 legislation, which should result in a number of new NRSROs, it is increasingly unlikely that all credit rating agencies would fail the reasonable accuracy criteria mandated by the SEC.

Ultimately, the SEC has a choice; it can look to procedural criteria: such as the number of hours spent determining a rating, the educational qualifications of the rater's staff, or the number of institutions that claim to rely on the particular rater. Or, it can look to the objective results: did the agency's ratings accurately predict the risk levels of the securities over an extended period? The first option will produce voluminous records of dubious value. The second option makes more sense.

<u>Proposal Three: A Transparency Rule: Encourage the Growth of Subscription-Based Rating Agencies By Giving Them Access to the Same Data Made Available By the Issuer to Any Other Rating Agency</u>. As noted earlier, the major rating agencies are paid by the issuer to rate its securities. In contrast to this dominant issuer-paid format, some new rating agencies are seeking to establish themselves as subscription-funded rating agencies. The latter seldom receive access to the same material, non-public data that the issuer-paid traditional agencies receive. Although I doubt that subscription-funded agencies will displace the traditional rating agencies, subscription-funded rating agencies are less conflicted, and they could play an important watchdog role. But such

new entrants face barriers, as issuers may not wish to deal with them or disclose sensitive information. Indeed, the issuer may withhold access to non-public information for precisely the same reason that public companies use to withhold data from securities analysts who were skeptical of them: to punish them. Thus, some have sensibly proposed that an equivalent of Regulation Fair Disclosure ("Reg FD") should be adopted to require "equivalent disclosure" to all NRSROs of any information that is given by an issuer to any NRSRO.[16] Such disclosure would be conditioned on the recipient NRSRO's undertaking to maintain the confidentiality of the disclosed information. The key goals of this proposal are both to assure rater independence and objectivity and to promote greater competition.

IV. Conclusion

For competition to work in this special context, it must be facilitated. These proposals are intended to work toward that goal in common: (1) an SEC clearinghouse that would compute default data by rating grade and product for each rating agency; (2) the forfeiture of NRSRO status by agencies that fail to satisfy minimum accuracy standards; and (3) a Reg FD restriction on "selective disclosure" to assist new entrants in gaining access to issuer information and to assure rater independence.

The alternative course is that the SEC will persist in its prior antipathy to new entrants in this market and/or will assume the role of a traditional bank examiner, overseeing the rating agencies. This would accomplish little, but would generate much wasted motion and require a bureaucracy of some size. As an overseer, the SEC would predictably focus its attention on new entrants, but recent events suggest that no rating agency should be above suspicion. All should be held accountable and this requires that objective criteria be applied evenly to all.

Endnotes

[1] For a fuller discussion of this concept of “reputational intermediaries” who develop and pledge their reputational capital to make their opinions and certifications credible, see John C. Coffee, Jr., GATEKEEPERS: The Professions and Corporate Governance (Oxford University Press 2006) at 2-3.

[2] Id. at 18-19; see also Claire Hill, Rating Agencies Behaving Badly: The Case of Enron, 35 Conn. L. Rev. 1145 (2003).

[3] See Aaron Lucchetti, “Ratings Firms’ Practices Get Rated,” The Wall Street Journal, September 7, 2007, C1 at C2.

[4] See Charles Calomiris and Joseph Mason, “Reclaim Power from the Ratings Agencies,” Financial Times, August 24, 2007 at 11.

[5] They believe that 2005 statistics “were driven mostly by the poor performance of 1997-1999 vintage high yield corporate bond obligations.” Also, “many of the impairments that had occurred in earlier years were cured in 2006 and were therefore removed from the statistics.” (Email dated September 20, 2007 to the author from Richard Cantor of Moody’s). It is open to some debate whether the curing of a default really should remove it from the statistics, and the 1997-1999 CDOs were at the height of the real estate bubble when investment bankers were packaging risky portfolios of mortgage loans (and investors were relying on credit rating agencies to protect them).

[6] For the best statement of this critique, see Frank Partnoy, The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit-Rating Agencies, 77 Wash. U. L. Q. 619 (1999).

[7] This term, which has been used by the SEC since the mid-1970s, is now defined in Section 3(a)(62) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(62). This author discusses the long debate over the NRSRO designation, and its use as a "regulatory license," in Coffee, supra note 1, at 288 to 302. While this author is skeptical about the value of the NRSRO designation, it is unlikely to be discarded in the immediate wake of the 2006 legislation that codified it.

[8] See In re Enron Corp. Sec., Derivative & ERISA Litig., 2005 U.S. Dist. LEXIS 4494 (S.D. Tex. Feb. 16, 2005).

[9] See, e.g., Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., 175 F.3d 848, 856 (10th Cir. 1999) (Moody's negative evaluation is a "protected expression of opinion" subject only to an actual malice standard); County of Orange v. McGraw Hill Cos., 245 B.R. 151, 157 (C.D. Cal. 1999) ("The First Amendment protects S&P's preparation and publication of its ratings.").

[10] See In re Pan Am Corp., 161 B.R. 577, 580-82 (S.D.N.Y. 1993); In re Scott Paper Co. Sec. Litig., 145 F.R.D. 366, 369-70 (E.D. Pa. 1992).

[11] In re Fitch, Inc., 330 F.3d 104 (2d Cir. 2003).

[12] Id. at 110.

[13] 485 U.S. 224, at 239 n. 17 (1988).

[14] See Arthur Levitt, Jr., "Conflicts and the Credit Crunch," The Wall Street Journal, September 7, 2007 at A-15.

[15] See Securities Exchange Act Release No. 34-55857 (June 5, 2007) ("Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations").

[16] This idea originates with Multiple Markets, which has already advanced this idea in correspondence with Congressional committees.