

THE MOTIVATING FORCE OF A BONUS POOL, AND OTHER OBJECTIONS

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Credit rating agencies sometimes make egregious mistakes; because they are enormously influential, their mistakes can have calamitous consequences. Exhibit A is, of course, the misrating of subprime securities, a significant cause of the financial crisis from which we are still recovering.

In *On Duopoly and Compensation Games in the Credit Rating Industry*,¹ Robert Rhee proposes a novel and ingenious solution to the credit rating agency problem. Rhee's solution is to pay the rating agencies for good performance. The payments would come from the agencies with the vast bulk of the market: Moody's, Standard and Poor's (S&P's), and Fitch, known as the "Big Three." Five percent of their revenue would comprise a "bonus pool" to be paid to the best-performing agency of the three.² If a smaller agency performs sufficiently well, Rhee's solution would include a payment to them from this bonus pool.³

What makes Rhee's solution novel and ingenious is its compatibility with the "issuer-pay" business model used by the Big Three (and most other rating agencies). In the issuer-pay model, the issuers choose and pay the agencies that rate their securities. Issuers have therefore been able to pressure the agencies to give them their desired (inflated) ratings or face loss of business and market share. Changing this business model would be exceedingly difficult. Rhee's solution would retain the issuer-pay model but provide a counterweight to issuer pressure for inflated ratings: a bonus for good performance.

This Response plays devil's advocate, challenging Rhee to answer a few objections to his proposed solution.

I. SOME HISTORY

Business firms generally try to do a good job. They are concerned about attracting and retaining business and avoiding lawsuits. They want to be viewed as honest and competent, especially if what they are selling is their assessment—their opinion—and not a tangible product that consumers could value highly even if they had low regard for the firm that produced it.

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¹ Robert J. Rhee, *On Duopoly and Compensation Games in the Credit Rating Industry*, 108 NW. U. L. REV. 85 (2014).

² The 5% is meant as an illustration—Rhee is clearly not wedded to it. *Id.* at 115.

³ *Id.* at 125.

Firms worry that if they are not viewed as honest and competent, they might lose their reputation and customers. And these concerns are warranted. Bad performance can, and not infrequently does, result in loss of business; especially where honesty is called into question, legal liability is also possible.

Contrast this picture with that of the Big Three rating agencies. Over the years, both their honesty and their competence have been called into significant question. Examples abound on both fronts. And yet they remain the Big Three, whose market share dwarfs that of their competitors.⁴

Much of the recent negative publicity about rating agencies has concerned dishonesty in the form of conflicts of interest. The main example is the 2008 financial crisis. Agencies gave ratings they knew were inflated to keep the business of the issuers who otherwise would have gone to another agency. Enormous percentages of subprime mortgage securities, originally highly rated, were downgraded.⁵ In testimony before the Financial Crisis Inquiry Commission, Mark Froeba, a former senior vice president at Moody's, described how Moody's went from being highly professional to being highly compromised:

When I joined Moody's in late 1997, an analyst's worst fear was that he would contribute to the assignment of a rating that was wrong, damage Moody's reputation for getting the answer right and lose his job as a result.

When I left Moody's, an analyst's worst fear was that he would do something that would allow him to be singled out for jeopardizing Moody's market share, for impairing Moody's revenue or for damaging Moody's relationships with its clients and lose his job as a result.

....

There were two ways that Moody's senior management imposed the new culture on Moody's analysts. First, they "reeducated" Moody's rating analysts—primarily structured finance analysts—that cooperation with the new culture would be rewarded and opposition punished. Essentially, they used intimidation to create a docile population of analysts afraid to upset investment bankers and ready to cooperate to the maximum extent possible. Second, they emboldened investment bankers, gave them confidence that they could stand up to Moody's analysts and gave them reason to believe that Moody's management would, where necessary, support the bankers against its own analysts.⁶

⁴ See STAFF OF THE U.S. SEC. & EXCH. COMM'N, 2012 SUMMARY REPORT OF COMMISSION STAFF'S EXAMINATIONS OF EACH NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION 5–7 (2012), available at <https://www.sec.gov/news/studies/2012/nrsro-summary-report-2012.pdf>.

⁵ See generally Claire A. Hill, *Why Did Rating Agencies Do Such a Bad Job Rating Subprime Securities?*, 71 U. PITT. L. REV. 585 (2010).

⁶ *Credibility of Credit Ratings, the Investment Decisions Made Based on Those Ratings, and the Financial Crisis: Hearing Before the Fin. Crisis Inquiry Comm'n* 4, 7 (2010) (testimony of Mark Froeba, former senior vice president at Moody's), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0602-Froeba.pdf.

Rating agencies also have been roundly criticized for incompetence. The rating agencies rated Enron “investment grade”—the lowest investment grade, but still investment grade—four days before Enron declared bankruptcy. Then-Senator Joe Lieberman painted a damning picture:

[T]he credit rating agencies were dismally lax in their coverage of Enron. They didn’t ask probing questions and generally accepted at face value whatever Enron officials chose to tell them. And while they claim to rely primarily on public filings with the SEC, analysts from Standard and Poor’s not only did not read Enron’s proxy statement, they didn’t even know what information they might contain.⁷

And Lieberman’s remarks were just part of the general condemnation of the agencies. Not only were there congressional hearings,⁸ but the agencies’ role in Enron was heavily negatively reported in the press.⁹ Around the same time as the rating agencies were misrating Enron, they were also misrating WorldCom, Adelphia, and Global Crossing,¹⁰ misratings that also received considerable negative publicity. A few years before these misratings, the agencies were misrating Washington Public Power Supply System (WPPSS, often pronounced “whoops”),¹¹ Orange County,¹² and Asian sovereigns,¹³ among others.¹⁴

⁷ Joseph Lieberman, *Financial Oversight of Enron: The SEC and Private-Sector Watchdogs*, HOMELAND SECURITY & GOVERNMENTAL AFF. COMMITTEE (Oct. 7, 2002), http://www.hsgac.senate.gov/media/majority-media/financial-oversight-of-enron_the-sec-and-private-sector-watchdogs.

⁸ See *Rating the Raters: Enron and the Credit Rating Agencies: Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. (2002), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg79888/pdf/CHRG-107shrg79888.pdf>.

⁹ See, e.g., Claire A. Hill, *Why Did Anyone Listen to the Rating Agencies After Enron?*, 4 J. BUS. & TECH. LAW 283 (2009); Peter Spiegel & Jenny Wiggins, *Enron’s Fall May Spark Credit Rating Rethink*, FIN. TIMES, Jan. 19, 2002, at 1.

¹⁰ FRANK PARTNOY, *INFECTIOUS GREED* 369 (2009); Kreag Danvers & B. Anthony Billings, *Is the SEC Going Soft on Credit Rating Agencies?*, CPA J. ONLINE (May 2004), available at <http://www.nysscpa.org/cpajournal/2004/504/perspectives/nv6.htm>.

¹¹ See Charles P. Alexander et al., *Whoops! A \$2 Billion Blunder*, TIME, Aug. 8, 1983, at 58; see also Claire A. Hill, *Regulating the Rating Agencies*, 82 WASH. U. L.Q. 43, 78 & n.143 (2004).

¹² See Debora Vrana, *Orange County in Bankruptcy: Do Ratings Agencies Share Blame for Fiasco?*, L.A. TIMES (Dec. 8, 1994), http://articles.latimes.com/1994-12-08/business/fi-6631_1_orange-county-s-bankruptcy; see also Hill, *supra* note 11, at 78. These examples also reflect conflicts of interest that may be partly subconscious: had the issuers not been the agencies’ clients, the agencies might have looked more critically and concluded lower ratings were warranted.

¹³ See Steven Irvine, *Caught with Their Pants Down?*, EUROMONEY, Jan. 1998, at 51.

¹⁴ See Hill, *supra* note 11, at 78–79. Rating agencies have been caught “with their pants down,” as a memorable *Euromoney* magazine cover had it, when they failed to “diagnose” the Asian flu until it was quite widespread. Irvine, *supra* note 13. While many of the precrisis misratings principally called rating agencies’ competence into question, their integrity had also been questioned. Moody’s fought off allegations that it cowed companies into paying for ratings by threatening to rate the companies less favorably based on public information. See Hill, *supra* note 11, at 51–52 nn.38–41 and accompanying text.

Other ratings sometimes characterized as misratings have at times been attributed to anti-European sentiment (sovereign downgrades in the last few years) or anti-U.S. sentiment (S&P's downgrading of the United States).¹⁵

II. SOME QUESTIONS AND POSSIBLE ANSWERS

Why do the Big Three rating agencies live to rate another day? This is a difficult question. A response could be, “with notably rare exceptions, the agencies perform well.” But—“with notably rare exceptions, Mrs. Lincoln enjoyed the play.”¹⁶ These debacles command enormous attention and involve enormous quantities of money. Not to speak of, in one case, tanking much of the world's economy.

The Big Three rating agencies do not just survive; they continue to thrive, remaining influential and retaining their market share. Why would this be the case? There are other rating agencies. But their market shares remain exceedingly small.¹⁷ Why aren't investors flocking to the other agencies?¹⁸ Before the Credit Rating Reform Act of 2006, there was a partial regulatory answer to this question. Many statutes and regulations conferred advantages on acquiring and holding securities rated investment grade by an entity designated by the Securities and Exchange Commission (SEC) as a nationally recognized statistical rating organization (an

¹⁵ See Claire A. Hill, *Limits of Dodd-Frank's Rating Agency Reform*, 15 CHAP. L. REV. 133, 137 & nn.21–22 (2011).

¹⁶ See Ed, Comment to “*With Notably Rare Exceptions*,” CROOKED TIMBER (Mar. 30, 2011, 2:11 PM), <http://crookedtimber.org/2011/03/30/with-notably-rare-exceptions/#comment-353423>.

¹⁷ Until the Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, 120 Stat. 1327, there were very few other agencies that were nationally recognized statistical rating organizations (NRSROs) registered with the SEC. Moody's and S&P had the designation, as did a few agencies that either merged into Fitch or Moody's, as did one other agency. See *Rating the Rating Agencies: The State of Transparency and Competition: Hearing Before the Subcomm. on Capital Mkts., Ins., & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 108th Cong. 128, 130 (2003) (testimony of Annette L. Nazareth, Dir., Div. of Mkt. Regulation, SEC), available at <http://financialservices.house.gov/media/pdf/108-18.pdf>. Other agencies had tried and failed to get the designation, complaining that the SEC's process was opaque. The Act required the SEC to open up the process. SEC Chairman Cox, in announcing the enactment of rules implementing the Act, said: “The heart of the Act calls on the Commission to replace the barriers to entry that had previously existed.” Press Release, U.S. Sec. and Exch. Comm'n, SEC Votes to Adopt Final Rules to Implement the Credit Rating Agency Reform Act of 2006 (May 23, 2007), available at <http://www.sec.gov/news/press/2007/2007-104.htm>. There are now ten agencies registered as NRSROs. U.S. SEC. AND EXCH. COMM'N, <https://www.sec.gov/about/offices/ocr.shtml> (last visited Nov. 9, 2013). As mentioned in the text, NRSRO status is important because various regulatory benefits of ratings have only been available if the rating is from an NRSRO. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 939A, 124 Stat. 1376, 1887 (2010) (codified at 15 U.S.C. § 78o-9 (2012)), starts the process of removing these benefits, so as to decrease reliance on rating agencies.

¹⁸ See Claire A. Hill, *Justification Norms Under Uncertainty: A Preliminary Inquiry*, 17 CONN. INS. L.J. 27, 38–40 (2010). Fitch's ascendance as one of the Big Three is actually comparatively recent; the story of its trajectory is, however, not one that gives much hope to other entrants. I discuss this issue in Hill, *supra* note 11, at 62–64.

NRSRO); there were only four such agencies.¹⁹ But since the enactment of the Reform Act, several additional agencies have been designated as NRSROs. And even before the Act's enactment, there was an NRSRO other than the Big Three. Why haven't these agencies been used more? Can "the devil we don't know" really be worse than the one we do know? Indeed, even Dodd-Frank's move towards eliminating the benefits of NRSRO designation by requiring that statutory and regulatory references to NRSRO ratings²⁰ be eliminated does not seem to be appreciably diminishing the Big Three's influence.

Understanding why the agencies survive and thrive also requires understanding why the agencies are not successfully sued more often. Here, the puzzle is of a different nature, relating to the contents and interaction of various legal doctrines; the doctrinal puzzle is beyond the scope of this Essay.²¹ But there is a remaining puzzle well within the scope: why would rating agencies be as sanguine as they are about legal liability? The agencies have until recently managed to avoid liability, but the basis on which they did so should not have warranted complete confidence that they would continue to do so.

If the prospect of loss of reputation, loss of customer confidence, loss of business, and lawsuits has not motivated rating agencies to do a better job, why should a bonus succeed? If the bonus were truly enormous, perhaps the motivation would suffice, but that does not seem feasible (or what Rhee contemplates). If sticks that seem very large have not worked, why would this carrot work? This is not to say that rating agency motivations are inscrutable. Rating agency motivations make sense—but they may not be such that the possibility of winning a bonus pool will work as standard theory suggests.

Why haven't these sticks worked? My explanation is largely one of agency costs and an aptly named psychological force, "motivated reasoning."²² Rating agency employees, either those being highly compensated for retaining or increasing the agency's market share, or those further down, who experienced the pressure to go along, have had self-serving worldviews that minimized the size of the expected stick.²³ Near-term rewards have been far weightier in those employees' computations than have possible costs of loss of market share, reputation, and legal

¹⁹ See *supra* note 17 and accompanying text.

²⁰ See *supra* note 17 and accompanying text.

²¹ For an article that discusses this doctrinal puzzle, see Jeffrey Manns, *Downgrading Rating Agency Reform*, 81 GEO. WASH. L. REV. 749, 761, 773–76 (2013).

²² I discuss motivated reasoning and other related dynamics (such as confirmation bias and belief perseverance) in Hill, *supra* note 9, at 286–89.

²³ This account is more apt for the subprime securities misratings than for some of the incompetence-reflecting misratings such as Enron. In Enron, the issue of conflicts was a bit more indirect, but even there, incompetence resulted in ratings the client wanted: issuer pays was a necessary feature of the Enron story as well. I discuss this issue in *id.* at 292–93.

liability. In the pure agency cost story, conjured up in Froeba's account, a rating agency employee would compute what was in his interests—inflating ratings to retain market share. His interests overrode what he knew his ultimate employer's (the agency's) interests were, in retaining its reputation for honesty. In the story invoking motivated reasoning, an employee wanting to keep his job—and believing that this entailed somehow getting the client the desired ratings—would conduct his assessments in a manner that allowed him to think he was rating correctly.²⁴ The subprime securities misratings involve both of these stories. Enron and many of the other “incompetence” debacles involve mostly the latter, although “getting ahead” may substitute for “keeping one's job.”

Given rating agency employees' interests in inflating ratings, one hurdle for Rhee's proposal is to make agency employees' interest in having their agencies win the bonus pool stronger than their interest in retaining the business of issuers who might go elsewhere if they do not get the rating they want. This hurdle seems considerable, but it is perhaps surmountable.

But there is another hurdle: how to measure performance. As to measurement, Rhee aptly says that the best is the enemy of the good.²⁵ That may be true—but sometimes, the good is not good enough. Compounding the already considerable difficulties of measuring something as complex as performance, performance measures also may be gameable. Certainly, ratings themselves influence rated firms' prospects: accurate ratings may in part reflect the agencies' influence rather than their prescience. For instance, a highly rated firm will have lower borrowing costs, which will help its financial condition, and hence its retention of its high rating. A downgrade may start a self-reinforcing spiral, from which a firm may never emerge.²⁶ The bonus pool might thus motivate “working to bonus,” which might be different than working towards better performance. Finally, given that the future is uncertain, rating agency employees might conclude that keeping the client happy—trying to justify the ratings the client wants—is a better use of effort than trying to get ratings right. The client is satisfied if it gets the ratings it wants, something that may be—is?—in the rating agency's control. By contrast, the rating agency employee trying honestly to do her job may simply get the future wrong, providing a rating that proves to be incorrect. Granted, rating agency employees would not be judged on being “right” in some absolute sense, just on being “more” right than their competitors. Still, the task is scarcely mechanical, and the rewards for effort may not be linear.

²⁴ I make these arguments in Claire A. Hill, *Who Were the Villains in the Subprime Crisis, and Why It Matters*, 4 ENTREPRENEURIAL BUS. L.J. 323 (2010).

²⁵ Rhee, *supra* note 1, at 131 n.212.

²⁶ I discuss this issue in Hill, *supra* note 11, at 67–68, especially as it relates to arguments made to the rating agencies not to downgrade Enron.

III. ONE MORE OBJECTION

Thus far, I have argued that employees might not be sufficiently motivated to perform better simply by the prospect that their agency might win a bonus pool. Here, I make a different sort of objection: the bonus pool may not be needed.

The subprime misratings came before memories of Enron had had time to recede. Congressional hearings on the rating agencies' performance in Enron cast the agencies in an exceedingly unflattering light.²⁷ But what has come out about the subprime misratings is even worse. Looking incompetent, as the rating agencies did in Enron, was bad, but the agencies could—and did—cast the Enron management as evil geniuses able and willing to fool them.²⁸ But there is real evidence of corruption in the subprime ratings.²⁹

Moreover, the agencies continue to be sued.³⁰ They are winning some cases (typically by having claims against them dismissed before trial),³¹ but settling others, including one for several hundred million dollars.³² Some cases, including the one by the United States against Standard and Poor's seeking five billion dollars in damages,³³ and ones by the states of

²⁷ See *Enron Hearings*, LIBR. CONGRESS, <http://www.loc.gov/law/help/guide/federal/enronhrsgs.php> (last updated Aug. 14, 2013) for a complete listing. The hearing specifically on the rating agencies is *Rating the Raters: Enron and the Credit Rating Agencies*, *supra* note 8.

²⁸ See Hill, *supra* note 9, at 292 & n.58.

²⁹ See generally *Hearings & Testimony: Credibility of Credit Ratings, the Investment Decisions Made Based on Those Ratings, and the Financial Crisis*, FIN. CRISIS INQUIRY COMMISSION (June 2, 2010), <http://fcic.law.stanford.edu/hearings/testimony/credibility-of-credit-ratings-the-investment-decisions>; FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 146–50 (2011), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf; U.S. SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 243–317 (2011).

³⁰ Other recently filed lawsuits are one by the liquidators of two Bear Stearns funds that collapsed against Moody's, S&P, and Fitch, *Varga v. McGraw Hill Fin., Inc.*, No. 652410/2013 (N.Y. Sup. Ct. filed July 9, 2013), and one against the three agencies by ACA, the company that selected the mortgages for inclusion in the notorious ABACUS deal, *ACA Fin. Guar. Corp. v. McGraw Hill Fin., Inc.*, No. 652490/2013 (N.Y. Sup. Ct. filed July 16, 2013).

³¹ See, e.g., *In re Lehman Bros. Mortg.-Backed Sec. Litig.*, 650 F.3d 167 (2d Cir. 2011) (holding that rating agencies are not underwriters for purposes of Section 11 of the Securities Act of 1933 and hence do not have underwriter liability); see also Jonathan Stempel, *Liability Lawsuits Against U.S. Rating Agencies Dismissed*, INS. J. (May 11, 2011), <http://www.insurancejournal.com/news/national/2011/05/11/198068.htm>.

³² Jeannette Neumann, *Cost of Ratings Suit: \$225 Million*, WALL ST. J. (Apr. 29, 2013, 6:02 PM), <http://online.wsj.com/article/SB10001424127887323528404578453292918428224.html>; see also Stephen Foley, *Standard & Poor's and Moody's Settle US Subprime Lawsuits*, FIN. TIMES (Apr. 27, 2013, 6:34 PM), <http://www.ft.com/intl/cms/s/0/27a59708-af46-11e2-ac6f-00144feabdc0.html>.

³³ *United States v. McGraw-Hill Cos.*, No. CV 13-0779 DOC(JCGx), 2013 WL 3762259 (C.D. Cal. July 16, 2013); see also Jeannette Neumann et al., *U.S., S&P Settle in for Bitter Combat*, WALL ST. J.

California and Illinois, are continuing, having survived early-stage motions to dismiss.³⁴ Standard and Poor's lost a case in Australia.³⁵

The SEC is seriously considering creating a board that would assign for particular issuances—issuances of structured finance securities—the rating agency an issuer is to use.³⁶ One result of an assigned agency might be that even though the issuer would still pay the bill, the agency might feel less as though the issuer is its client. Certainly, the issuer would not be able to threaten not to use the agency's services unless the agency gave the desired rating.³⁷ Another result might be that agencies other than the Big Three might become more viable as market participants became more used to their ratings. Indeed, there may finally be a move towards the use of agencies other than the Big Three. If such agencies became more viable, many of the problems presented by rating agencies would diminish, if not disappear: the agencies would all compete on quality.

European rating agency regulation is increasing in both specificity and “teeth,” and includes emphasis on increased use of smaller agencies.³⁸ There is a movement under both Dodd-Frank and European regulation to remove regulatory references to rating agencies,³⁹ and there is increased emphasis on those using ratings to develop their own assessment methodologies and

(Feb. 6, 2013, 6:52 AM), <http://online.wsj.com/article/SB10001424127887324445904578285802822704578.html>.

³⁴ See *People v. McGraw-Hill Cos.*, No. CGC-13-528491 (Cal. Super. Ct. Aug. 14, 2013) (order overruling defendants' demurrers) (Bloomberg Law, Dockets, Req. No. 80); *People v. McGraw-Hill Cos.*, No. 12 CH 02535, 2012 WL 5440768 (Ill. Cir. Ct. Nov. 7, 2012). Connecticut's case is also continuing; in a victory for Connecticut, it was able to get its case against S&P remanded to state court. The case is *State v. McGraw-Hill Cos.*, No. 3:13-cv-311 (SRU) (D. Conn. filed Mar. 6, 2013).

³⁵ See Nadine Schimrozik & agencies, *S&P Guilty of Misleading Investors*, GUARDIAN (Nov. 5, 2012, 12:25 PM), <http://www.guardian.co.uk/business/2012/nov/05/standard-poors-guilty-misleading-investors>.

³⁶ A provision to this effect had been in Dodd-Frank before the reconciliation (the “Franken Amendment”) but was deleted before the bill passed; a compromise was to require a “study.” Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 939F, 124 Stat. 1376, 1889 (2010) (codified at 15 U.S.C. § 78o-9 (2012)). The study has been issued. DIV. OF TRADING & MKTS., U.S. SEC. & EXCH. COMM'N, REPORT TO CONGRESS ON ASSIGNED CREDIT RATINGS (2012), available at <https://www.sec.gov/news/studies/2012/assigned-credit-ratings-study.pdf>. The SEC recently held a roundtable on a variety of topics including the topic of assigned credit ratings, *Credit Ratings Roundtable*, U.S. Sec. & Exch. Comm'n, <https://www.sec.gov/spotlight/credit-ratings-roundtable.shtml> (modified June 10, 2013), and is apparently considering how to proceed.

³⁷ I make this argument in Hill, *supra* note 15, at 147.

³⁸ See Memorandum from the European Commission, *New Rules on Credit Rating Agencies (CRAs) Enter into Force* (June 18, 2013), available at http://europa.eu/rapid/press-release_MEMO-13-571_en.htm; see also Charlie McCreedy, Eur. Comm'r for Internal Mkt. & Servs., *Regulating in a Global Market* (June 16, 2008), available at http://europa.eu/rapid/press-release_SPEECH-08-334_de.htm?locale=EN.

³⁹ For the European regulation, see Council Directive 462/2013, Amending Regulation (EC) No. 1060/2009 on Credit Rating Agencies, 2013 O.J. (L 146). For Dodd-Frank, see Dodd-Frank Act § 939A, 124 Stat. at 1887.

better justify their own credit decisions. All of this is in addition to regulation, both in the United States under Dodd-Frank and in Europe, to improve ratings quality through increased monitoring, potential for liability, and other things.

Perhaps this time really is different. Perhaps the subprime debacle, the evidence that has been unearthed, the fact that previous ratings debacles are comparatively recent, the changes in regulation, the possible change in legal climate, and many other things will finally end the “duopoly plus,” as Rhee refers to it, in which the three agencies that command the bulk of the market remain highly influential notwithstanding egregious lapses in performance.