

**SEC's Amendment of Reg FD
To Remove Exemption for Rating
Agencies Less Than It Seems**

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The SEC yesterday² issued a final rule amending Regulation FD to eliminate the exemption for disclosures made to credit rating agencies. (Exchange Act Release No. 63003) The amendment, which becomes effective upon publication in the Federal Register, was specifically required by the Dodd-Frank Act. We do not view this as a material development as some have suggested.

Companies routinely disclose material, non-public information to credit rating agencies for the purpose of developing a credit rating, including in advance of merger announcements or in connection with significant changes in capital structures. While some commentators have suggested the amendment will require issuers to make public disclosures of material nonpublic information that they disclose to credit rating agencies, the effect of the amendment is less than it seems. The public disclosure requirements triggered by Regulation FD are limited to disclosures by the issuer, or persons acting on its behalf, to certain enumerated persons, generally securities market professionals, investment advisers and holders of the company's securities under circumstances where it is reasonably foreseeable

that the person will purchase or sell the issuer's securities on the basis of the information. In 2006, the Investment Advisers Act was amended to exclude from the definition of investment adviser any nationally recognized statistical rating organization unless it engages in issuing recommendations as to purchasing, selling or holding securities or in managing assets (including securities) on behalf of others.

Thus, credit rating agencies, like the media, should generally not be included in the list of enumerated persons covered by Regulation FD, and issuers could seek assurances from the credit rating agencies in that regard. Even if credit rating agencies were covered, Regulation FD provides a separate exemption for disclosures to persons who agree to maintain confidentiality. It should become routine for credit rating agencies to provide an appropriate confidentiality agreement that would avoid unintended, and unnecessary, public disclosure of confidential information.

We do not expect the removal of the exemption to have a significant impact on how companies deal with credit rating agencies.

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² This memo was originally released September 30, 2010.