

# Torys on Corporate and Capital Markets

C&CM 2010-5  
August 12, 2010

## U.S. Financial Reform Act's Implications for Credit Rating Disclosure in Prospectuses and Registration Statements

By [Andrew J. Beck](#), [Daniel P. Raglan](#), [Glen Johnson](#) and [Cornell Wright](#)

The *Dodd-Frank Wall Street Reform and Consumer Protection Act* signed into law on July 21, 2010 by President Obama repealed Securities Act Rule 436(g), which had exempted credit rating agencies from the heightened liability standards for experts whose reports or opinions are quoted or summarized in a U.S. registration statement or prospectus.

Effective immediately, references to credit ratings in U.S. registration statements and prospectuses will generally require the written consent of the credit rating agency. Some of those agencies have already indicated that they do not intend to provide such consents.

Canadian securities laws continue to exempt credit rating agencies from the requirement to consent to references to their credit ratings in prospectuses, which would otherwise subject the rating agencies to heightened liability as experts. The Canadian securities commissions are currently soliciting comments on a proposed rule governing rating agencies and related disclosure issues, and are specifically seeking feedback on whether this exemption should be eliminated.

The implementation of this new consent requirement in the United States will complicate the disclosure practices of many Canadian issuers that refer to their credit ratings in their U.S. continuous disclosure filings (such as in their annual reports on Form 40-F or reports on Form 6-K). These continuous disclosure filings are then incorporated by reference into U.S. registration statements and prospectuses (such as on Form F-3 or Form F-10). Canadian issuers are required to disclose in their annual information forms any credit or other ratings assigned to their outstanding securities, to explain the rating and to describe it relative to the rating agency's system. Canadian prospectuses must include similar information when rated securities are being distributed. As a result, a Canadian issuer whose annual information form is included as part of its U.S. continuous disclosure filings will be subject to the consent requirement, and the same situation will arise when a Canadian form of prospectus is filed in the United States under the Multijurisdictional Disclosure System procedures.

The SEC provided further guidance on July 22, 2010 to address specific situations affected by this new consent requirement.

### U.S. Registration Statements That Become Effective on or after July 22, 2010

If a U.S. registration statement or post-effective amendment becomes effective on or after July 22, 2010 and includes or refers to rating information that is not limited to disclosure-related rating information (see the exception below), the written consent of the credit rating agency will generally be required.

To discuss these issues, please contact the authors.

For permission to copy or distribute our publications, contact [Robyn Packard](#), Manager, Publishing.

To contact us, please email [info@torys.com](mailto:info@torys.com).

Torys' bulletins can be accessed under Publications on our website at [www.torys.com](http://www.torys.com) or through the Torys iPhone app.

*This bulletin is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this bulletin with you, in the context of your particular circumstances.*

© 2010 by Torys LLP.  
All rights reserved.

## U.S. Registration Statements That Became Effective Before July 22, 2010

If a U.S. registration statement or post-effective amendment became effective before July 22, 2010 and includes or refers to rating information that is not limited to disclosure-related rating information (see the exception below), the issuer can still use the registration statement until the time the next post-effective amendment is filed (provided that no subsequently incorporated periodic or current reports contain rating information, other than disclosure-related rating information). For U.S. shelf registration statements, the Canadian issuer's next annual report on Form 40-F is deemed to be a post-effective amendment and consequently the registration statement cannot be used after the annual report is filed without the written consent of the credit rating agency.

### Exception for Disclosure-Related Rating Information

If the disclosure of a credit rating in an SEC filing is related only to changes to a credit rating, the liquidity of the Canadian issuer, the cost of funds for a Canadian issuer or the terms of agreements that refer to credit ratings, then the credit rating agency's consent is not required. For example, some Canadian issuers note their ratings in the context of a risk factor discussion regarding the risk of failure to maintain a certain rating and the potential impact a change in credit rating would have on it.

---

We recommend that issuers with existing U.S. shelf registration statements and those intending to access the U.S. public capital markets consult with their legal advisers as soon as possible to plan for this new consent requirement.

In view of the potential impact of the consent requirements, issuers should review their current continuous disclosure and registration statement filings with the SEC to determine whether they include or incorporate by reference credit rating disclosure that would not fall within the exception for disclosure-related rating information. Issuers may also want to consider whether it would be appropriate to file an amendment to the continuous disclosure document or registration statement to eliminate the challenging credit rating disclosure. Prospectively, issuers should attempt to limit or eliminate credit rating disclosure where possible. Where this disclosure is provided, it should be expressly identified as disclosure-related rating information, and where possible, expressed in a manner that complies with the interpretive guidance furnished by SEC staff.

We understand that the SEC's Office of International Corporate Finance may agree to the filing of a registration statement or post-effective amendment that is stated to exclude from the documents incorporated by reference that section of a previously filed continuous disclosure document containing credit rating disclosure that would otherwise trigger a consent requirement. A Canadian issuer may also consider approaching the Canadian securities regulatory authorities for exemptive relief, allowing it to exclude certain credit rating disclosure from a Canadian prospectus or other filing that would subsequently appear in a U.S. filing and could not otherwise be caveated or framed to avoid the U.S. consent requirement. Companies would need to consider these possibilities in advance of a planned offering to allow for the required review and approval by regulatory authorities. **1**