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Dear Members of the Committee:

I was asked to provide an objective First Amendment analysis of whether and how credit rating agencies can be regulated, and whether and how they can be held liable for allegedly erroneous ratings. I do not represent any rating agencies, or people or organizations interested in suing rating agencies. Though I do some consulting for the Mayer Brown LLP law firm, I am here solely in my capacity as Professor of Law at UCLA School of Law, and not on behalf of anyone else.

Consumers, businesses, and investors routinely rely on a large range of product and business evaluations. These include newspaper or magazine reviews of consumer products and business products, from cheap to very expensive. They include articles on companies' current performance and future prospects. And they include ratings issued by credit rating agencies, whether by themselves or as part of more extended articles providing specific details.

1. Generally speaking, such speech is presumptively fully protected by the First Amendment, whether it comes from the pages of the *Wall Street Journal* or *Forbes* or from Standard & Poor's. First Amendment law generally provides *the media* with no special immunity from laws that don't target the media;[1] it is therefore usually unnecessary to decide whether Standard & Poor's, a business blog, or a think tank constitutes "the press." Rather, First Amendment law protects *speakers* and *speech*. Credit rating agencies are speakers, and their evaluations, opinions, and factual assertions are speech.[2]

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[1] Cohen v. Cowles Media, 501 U.S. 663, 669 (1991). Some state journalist's privilege statutes do distinguish media defendants from non-media defendants, and some even distinguish different kinds of media, for instance offering protection to newspaper reporters but not to magazine reporters or book authors. *See, e.g.*, Ala. Code § 12-21-142; Fla. Stat. tit. VII, § 90-5015. But in this testimony I am speaking of the broad thrust of First Amendment law, which does indeed generally protect speakers equally, without having to define who counts as the "media" and who doesn't. For some cases deciding whether the journalist's privilege applies to various rating agencies, see, *e.g.*, Compuware Corp. v. Moody's Investors Servs., 324 F. Supp. 2d 860, 862 (E.D. Mich. 2004) (yes, as to Moody's); *In re* Scott Paper Co. Securities Litigation, 145 F.R.D. 366, 370 (E.D. Pa. 1992) (yes, as to Standard & Poor's); *In re* Fitch, Inc., 330 F.3d 104, 109 (2d Cir. 2003) (no, as to Fitch); American Savings Bank v. UBS PaineWebber, Inc., 2002 WL 31833223, *3 (S.D.N.Y. 2002) (no, as to Fitch).

[2] *See, e.g.*, Compuware Corp. v. Moody's Investors Servs., Inc., 499 F.3d 520, 529 (6th Cir. 2007); Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 856 (10th Cir. 1999).

The First Amendment also protects speech about business as much as it protects speech about politics. The Court has indeed at times said that "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values,'"[3] but the public issues on this highest rung have long included "economic, social, and political subjects"[4] and not just the political. That's why labor unions, for instance, are free to express their views about management in their newsletters, leaflets, and advertisements, and in their officials' speeches.[5] It's why the *Wall Street Journal*'s business pages are as protected as its editorials and news pages. And it's why other speakers' statements about a business's prospects are protected as well.

The First Amendment also protects speech that is published by for-profit entities as well as speech published by ideological organizations.[6] Most newspaper, magazine, and book publishers, for instance, are for-profit entities. Neither the subject matter nor the profit motivation of credit rating agencies strips them of First Amendment protection.

2. I began the preceding section, though, with "generally speaking," because there are some important exceptions to the rule. One is that *commercial advertising*—speech aimed at proposing a commercial transaction[7]—is much less constitutionally protected

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[3] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

[4] *Carey*, 447 U.S. at 466.

[5] *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 576 (1988); Thomas v. Collins, 323 U.S. 516, 537-38 (1945); Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (noting that labor speech such as that in *Thomas* doesn't lose its constitutional protection just because the speaker's motive "may have involved financial gain").

[6] *See, e.g.*, Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991); Smith v. California, 361 U.S. 147, 150 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952); Grosjean v. American Press Co., 297 U.S. 233 (1936).

[7] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976). The Court has at times suggested that the commercial speech category may also generally cover speech that is "related solely to the economic interests of the speaker and its audience," Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980), but this can't be right: Consider again the newspaper that discusses business affairs, almost entirely in order to make money by helping its readers do well in business; consider a product review written by its author because he wants to be paid, published by the newspaper because it wants to keep its paying subscribers, and read by readers because they want to know how to best spend their money; consider a union buying TV ads urging people to "Buy American" because that's the best way of maintaining the viewers' (and the union members') standard of living; all are fully protected speech. In fact, every one of the Court's dozens of commercial speech cases has involved speech that advertised a product or service; and more recent precedents, which have generally been shifting in the direction of more protection even for speech that is classified as "commercial speech," have stressed the "proposes a commercial transaction" formulation and largely ignored the "solely economic interests" test. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (referring to the "proposes a commercial transaction" formula without referring to the "solely economic interests" formula) (likewise); U.S. v.

than other kinds of speech (whether about politics, business, science, or what have you). This is why securities regulation, which is directed at speakers who are advertising the sale of securities, is generally constitutional.

This is also why a car ad in a magazine is less protected than the magazines' review of a car. And if an entertainment magazine takes money from Ford in exchange for *positive coverage* (for instance, in exchange for showing celebrities in photos driving Mustangs), such coverage would likely be treated as a form of commercial advertising, even if it's presented to the reader as straight editorial content. Likewise, if an organization—whether a rating agency or a newspaper—takes money in exchange for giving someone a favorable review, that would make the review into commercial advertising.

What if the subject of the speech pays a flat fee for the speaker's evaluation? The Supreme Court has never spoken to this precise situation, but I think this wouldn't make the speech into commercial advertising. Newspapers and magazines routinely receive money from people whose products they review. Car magazines usually carry many car ads, including from companies whose cars the magazine reviews. Newspapers' entertainment sections have movie ads. It's true that the presence of such ads might in theory indirectly pressure the publication to give good reviews, for fear that bad reviews will alienate advertisers. But the possibility of such indirect pressure doesn't make the reviews into less constitutionally protected commercial advertising.

To be sure, a typical advertiser's payment isn't directly linked to whether the product is being reviewed. But the principle is the same: The subject of a review is paying the speaker. The speaker is reviewing the subject's product or company. So long as the payment isn't buying a positive evaluation—so long as the speaker isn't proposing a commercial transaction in which it itself has a financial interest—it seems likely that the evaluation will remain fully constitutionally protected.

3. In libel lawsuits, speech is also less protected when it is seen as involving "no issue of public concern."[8] Opinions and true factual statements are likely still protected even in such a case,[9] but false factual assertions involving "no issue of public concern"

United Foods, Inc., 533 U.S. 405, 409 (2001); Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 421 (1993) (stressing that the Court has been shifting away from the "economic interests" formulation and towards the "proposes a commercial transaction" formulation); Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995) (same); United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (same); Edenfield v. Fane, 507 U.S. 761 (1993) (same).

[8] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757 (1985) (plurality). I will treat the plurality opinion as the view of the Court, because Chief Justice Burger and Justice White, who concurred in the judgment, took an even more pro-plaintiff view of the matter. There were thus five votes for the proposition that in the circumstances described by the plurality, a lower level of First Amendment protection would be provided.

[9] *See* Connick v. Myers, 461 U.S. 138, 147 (1983).

can lead to liability even without a showing that the speaker knew the statements were false or probably false.

Unfortunately, the Court has never provided a clear definition of which issues are "of public concern" and which are not. It has said, in *Dun & Bradstreet, Inc. v. Greenmoss Builders*, that the question is one of "content, form, and context," and that some credit reporting is "subject to reduced First Amendment protection," while other credit reporting retains full protection.[10] And it has pointed to several factors that cut in favor of a statement's being seen as being of purely private concern: that the speech is "solely in the individual interest of the speaker and its specific business audience," that it is "wholly false and clearly damaging to the victim's business reputation," that it is divulged confidentially to a very few subscribers as opposed to the whole world, and that it "is hardy and unlikely to be deterred by incidental state regulation."[11] Moreover, the speech in *Dun & Bradstreet*—an erroneous statement that a construction contractor had filed for bankruptcy—was said about a very small company in a small town. Such speech was thus of concern to only very few members of the public.

It's not clear how the *Dun & Bradstreet* analysis would apply to most of the speech of the major rating agencies. Such speech is indeed chiefly in the speaker's and audience's business interests, but of course that's equally true of much that's in a newspaper's business pages, and for that matter of much speech by labor unions to their members. That alone can't strip speech of full First Amendment protection.[12] Likewise, the speech is hardy and less likely to be deterred by the threat of liability than, say, a newspaper editorial. But again that could equally be said about a large range of historically hardy speech, from religious advocacy to business-related speech by business magazines that have to engage in such speech to stay in business.

Allegedly unduly positive ratings—the matter that people seem to now be concerned with—aren't "clearly *damaging* to the victim's business reputation," so the traditionally recognized legal interest in protecting reputation isn't in play here. (Historically, tort law has provided much more protection to people whose reputation is injured by erroneous public statements than to consumers or investors who are injured by such statements, at least when the statements didn't constitute advertising for the speaker's own product or service.[13]) Moreover, the statements that credit agencies are faulted for making are generally not "wholly false" statements about specific facts—did Greenmoss Builders file for bankruptcy?—but rather supposedly false implications drawn from a

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[10] *Id.* at 761 n.8.

[11] *Id.* at 762-63.

[12] *See supra* note 5.

[13] *See* Jaillet v. Cashman, 189 N.Y.S. 743, 744 (Sup. Ct. 1921), *aff'd without opinion*, 194 N.Y.S. 947 (App. Div. 1922), *aff'd without opinion*, 139 N.E. 714 (N.Y. 1923), and the many cases that cite it; Judge Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 13.8 (describing *Jaillet* as a "seminal case"). *See also* Winter v. G.P. Putnam's Sons, 938 F.2d 1033 (9th Cir. 1991).

credit agency's evaluation. So it's not clear if or how this element, obviously developed in the context of libel law, would carry over to liability for speech that's alleged to be misleadingly positive.

It's also not clear to what extent the size and importance of the rated companies would affect the "public concern" analysis. The *Dun & Bradstreet Builders* decision did not specifically discuss this factor in its analysis, but it seems clear that there is a much greater public concern in the economic health of General Motors than in the economic health of Greenmoss Builders. As the Court held in another "public concern" case (involving the speech of government employees), the question is whether the speech can be "fairly considered as relating to any matter of political, social, or other concern to the community";[14] and lower courts have made clear that "the relevant concern need not be of paramount importance or national scope"[15] to qualify. The financial standing, whether good or bad, of a large bond issuer does relate to a matter of concern to the community.

Finally, the wider the intended dissemination of the statement, the more likely the statement is to be treated as being on a "matter of public concern." If a rating is published to the world by the rating agency, or if the rating agency conveys the rating with the expectation that it will be published to the world by others, then the rating of a large company becomes hard to distinguish from an article about the company in a financial newspaper—surely a matter of "public concern."[16] But if the rating is conveyed to only a few people, who are bound by a confidentiality agreement not to distribute it further, then the analogy to *Dun & Bradstreet Builders* becomes stronger (though still not perfect if the subject of the rating is a large and important company).[17]

4. The discussion so far has assumed that the rating agencies are speaking to the public generally, rather than giving individualized advice to a client. Individually targeted professional-client speech is often very heavily regulated.

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[14] Connick v. Myers, 461 U.S. 138, 146-47 (1983).

[15] Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 132 (1st Cir. 1997).

[16] *See, e.g.*, *In* re Enron Corp. Securities, Derivative & "ERISA" Litigation, 511 F. Supp. 2d 742, 820 (S.D. Tex. 2005) (so concluding); Compuware Corp. v. Moody's Investors Servs., 324 F. Supp. 2d 860, 862 (E.D. Mich. 2004) (so concluding); County of Orange v. McGraw Hill Companies, Inc., 245 Bankr. 151, 155 (C.D. Cal. 1999) (so concluding); *In re* Pan Am Corp., 161 Bankr. 577, 584 (S.D.N.Y. 1993) (so concluding, in reversing a contrary Bankruptcy Court conclusion). *But see In re* Nat'l Century Fin. Enters., 580 F. Supp. 2d 630, 640 (S.D. Ohio 2008) (concluding, in my view unsoundly, that the cases finding protection for speech on matters of public concern do not apply when "the ratings . . . were [not] published to the investing public at large" but rather "were issued by a privately-held company, and . . . targeted to a select class of institutional investors with the resources to invest tens of millions of dollars in the notes").

[17] *Cf.* LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co., 951 F. Supp. 1071, 1095-96 (S.D.N.Y. 1996) (treating a rating agency's speech as less protected because it was "intended for use in the private placement Offering Memoranda, rather than for publication in a general publication").

Lawyers and psychotherapists, for instance, can be barred from giving advice to clients unless they first get a license (which might only be obtainable by those who engage in years of formal study and then pass a grueling and difficult exam). They can also be sued for giving negligent advice, even if there are no false factual statements within the advice. "One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession," and may thus be regulated notwithstanding the First Amendment.[18] But no government body can demand a license of people who write books, scholarly articles, or newspaper columns about law or psychiatry, even when those works contain advice. Nor can someone sue a newspaper columnist for malpractice based on the supposedly poor advice about law that the column provided.

Likewise, a financial advisor or a rating agency that is giving individualized advice to a particular client could be held legally liable for malpractice based on its unsound advice,[19] or even required to have a license in order to give such advice. But speaker who give broad recommendations to the general public, whether the speakers are newspapers, investment newsletters, or rating agencies, do not fit within this professional-client speech exception to First Amendment protection. "Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation . . . becomes regulation of speaking or publishing as such, subject to the First Amendment's command."[20]

5. So if I'm correct about the above, the speech of rating agencies is generally fully protected, at least so long as the agencies aren't paid to write positive reviews (as opposed to reviews generally), and so long as they are communicating to the public as opposed to a few confidential subscribers or a particular entity that hired them to give individualized advice.

In such a situation, the agencies' speech would be entitled to the same level of constitutional protection as that enjoyed by newspapers, magazines, newsletters, Web site operators, and the like. The speakers' opinions would be categorically constitutionally protected. The speakers' factual assertions would also be constitutionally protected, unless a plaintiff can show that the speakers knew that the statements were false or

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[18] Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring in the judgment) (drawing this distinction in the context of investment advisors). Justice White's three-judge opinion in *Lowe* is often cited as authoritative on the matter of professional-client speech and the First Amendment; the majority did not disagree with it on this point.

[19] *See, e.g.*, Commercial Financial Servs., Inc. v. Arthur Andersen LLP, 94 P.3d 106, 110 (Okla. Ct. Civ. App. 2004) (so holding as to rating agencies).

[20] *Id.*; *see also id.* at 207-08 (majority opinion) (agreeing that a contrary view would at least raise serious constitutional problems).

likely false.[21] (That's the "actual malice" standard, though "actual malice" is a legal term of art that has nothing to do with actual malice as ordinary English speakers understand the term.[22])

A rating agency's bare prediction about a company's creditworthiness, captured in the rating itself, will likely be seen as pure opinion. As the Sixth Circuit held in this very sort of case, "a viable defamation claim exists only where a reasonable factfinder could conclude that the challenged statement connotes actual, objectively verifiable facts. A Moody's credit rating is a predictive opinion, dependent on a subjective and discretionary weighing of complex factors. We find no basis upon which we could conclude that the credit rating itself communicates any provably false factual connotation. Even if we could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of Moody's ratings calculation."[23]

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[21] *See* Compuware Corp. v. Moody's Investors Servs., 222 F.R.D. 124, 127 (E.D. Mich. 2004) (applying this to rating agencies); County of Orange v. McGraw Hill Companies, Inc., 245 Bankr. 151, 155 (C.D. Cal. 1999) (same). Note that, "Although these issues traditionally arise in libel or defamation actions, the actual malice standard applies to other causes of action when the plaintiff seeks compensatory damages arising from allegedly false statements. See Hustler Magazine, 485 U.S. 46, 108 S.Ct. 876 (intentional infliction of emotional distress); Blatty v. New York Times Co., 42 Cal.3d 1033, 232 Cal.Rptr. 542, 728 P.2d 1177 (intentional interference with prospective economic advantage); Bose v. Consumers Union, 466 U.S. 485, 493-514, 104 S.Ct. 1949 (1984) (product disparagement action); Time, Inc. v. Hill, 385 U.S. 374, 387-88, 87 S.Ct. 534 (1967) ([false light] invasion of privacy)." *County of Orange*, 245 Bankr. at 155; *see also* Jefferson County School Dist. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 856-57 (10th Cir. 1999) (noting the same).

[22] I will assume throughout the rest of my testimony that the standard is that used for statements on matters of public concern about public figures, as opposed to private figures. It seems likely that companies whose financial instruments are rated by rating agencies will indeed be public figures. But even if they are not, the public/private figure distinction was developed in the law of libel, for reasons specific to the law of libel, chiefly that defamed private figures had less power than defamed public figures to respond via the media with their side of the story, and that defamed private figures hadn't waived their immunity from defamation to the same extent as defamed public figures had. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974). Neither of these rationales counsels in favor of extending the distinction outside the context of a person's suing over an allegedly false statement that is made about him.

[23] Compuware Corp. v. Moody's Investors Servs., Inc., 499 F.3d 520, 529 (6th Cir. 2007); Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 856 (10th Cir. 1999) ("the School District's failure to identify a specific false statement reasonably implied from Moody's article, combined with the vagueness of the phrases 'negative outlook' and 'ongoing financial pressures' indicates that Moody's article constitutes a protected expression of opinion"); *see also* Aviation Charter, Inc. v. Aviation Research Group/US, 416 F.3d 864, 871 (8th Cir. 2005) (concluding that a rating that is "a subjective interpretation of multiple objective data points leading to a subjective conclusion about aviation safety" "is not 'a provably false statement of fact'" and thus not actionable); Wheeler v. Nebraska State Bar Ass'n, 508 N.W.2d 917, 923-24 (Neb. 1993) (using similar logic to conclude that attorneys' numeric evaluations of judges were opinion and thus not actionable as

A textual report about a business, on the other hand, might include facts that might be proven true. And a court could even conclude that the bare rating "impl[ies] a false assertion of fact."[24] In either case, if the speaker sincerely believes that the implicit or explicit factual assertion is true, or is sincerely unaware of a possible factual inference that listeners may draw from the statement, the speaker is not liable. That's the rule under defamation law, when someone is complaining about the implied factual assertions in a negative opinion. And that would presumably be the rule if someone sues over the implied or explicit factual assertions in a supposedly erroneously positive opinion.[25]

So liability for an unduly favorable textual report is theoretically not foreclosed by the First Amendment (though liability for a bare credit rating might be foreclosed, if courts agree with the Sixth Circuit that such a rating is pure unverifiable opinion). But practically such liability would be hard to establish, because there would have to be evidence that the rating agency knew that particular factual assertions that would likely be implied by the statement are false, or at least "in fact entertained serious doubt as to the truth of [its] publication."[26] Mere "failure to investigate . . . even when a reasonably prudent person would have done so," is not actionable, so long as the agency sincerely believed that the statements were true.[27] "[E]rror of judgment" in interpreting the facts would certainly not suffice.[28] And even a jury's finding of "extreme departure from professional standards" of investigation would not be enough to lead to liability.[29]

And this fits well with the logic of the Court's First Amendment cases, especially when an action is based not on the falsity of the specific statement that the rating agency made, but rather on the falsity of the factual implications that a reasonable per-

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defamation). Rating agencies sometimes describe their work as "objective," but that's objective in the sense of not biased, not objective in the sense of having the rating being "objectively verifiable."

[24] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990); *cf. In re* Nat'l Century Fin. Enters., 580 F. Supp. 2d 630, 639 (S.D. Ohio 2008) (concluding that a rating could indeed be legally actionable "if the speaker does not believe the opinion and the opinion is not factually well-grounded"); First Financial Savings Bank v. American Bankers Ins. Co., 1989 WL 168105 (E.D.N.C.) (summarily rejecting the First Amendment argument), *vacated in part on other grounds*, 1991 WL 173055 (E.D.N.C. 1991).

[25] *See supra* note 21.

[26] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[27] Harte-Hanks Comms., Inc. v. Connaughton, 491 U.S. 657, 688 (1989); *In re* Enron Corp. Securities, Derivative & "ERISA" Litigation, 511 F. Supp. 2d 742, 825-26 (S.D. Tex. 2005) (applying this to rating agencies).

[28] Time, Inc. v. Pape, 401 U.S. 279, 292 (1971).

[29] *Connaughton*, 491 U.S. at 664.

son would draw from the statement. How to interpret the facts that a financial analyst acquires, and how many facts need further investigation, is a subjective matter. How to predict the future based on those facts is even more subjective. Even reasonable predictions will often prove mistaken. It's easy for a lay jury, deciding after a prediction has proven wrong, to conclude—using the fuzzy "reasonable person" standard—that the speaker should have reached a different conclusion. But the Court has concluded that such after-the-fact evaluation of reasonableness doesn't provide speakers with enough constitutional protection.[30]

6. All I've said so far relates to rating agencies' liability for past alleged misevaluations, and to direct regulation of agency evaluations. But going forward, Congress could—if it wishes—require that various commercial transactions (for instance, bond offerings) be accompanied with reports that comply with certain guidelines. It could even insist that any entities supplying such reports agree to have their actions reviewed in court under a negligence standard, or under some other standard.[31]

Such a policy would leave people free to express whatever views they wish about whatever financial products they wish (subject to the First Amendment rules I outlined above). Newspapers would remain free to evaluate companies. So would investment newsletters and rating agencies.

But if a business wants to (for example) sell certain bonds, it would be required to get, and provide to the public, the particular sort of report required by statute. Agencies that want to provide such reports, and have the reports be treated as legally adequate for statutory purposes, would have to agree to follow whatever procedures the statute or regulations prescribes, and (if Congress wishes) would have to agree to waive any immunity from liability that they might otherwise possess. If they don't comply with those procedures, and don't waive liability, but just express their opinion, they would be free to do so. It's just that such procedurally noncompliant statements of opinion will not be legally adequate to allow the bond issue to go forward.

This remedy would have the advantage of not asking courts to reduce the constitutional protection offered to speech about business matters, or to broaden the scope of generally regulable commercial advertising, or to define as a matter of purely "private concern" commentary that is obviously of very great public concern. It would simply

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[30] An accountant's or financial provider's liability to a client for individualized advice may indeed be subject to a reasonableness test, but there the speaker is potentially liable only to one plaintiff; if a rating agency is held liable for unduly positive ratings, it could face lawsuits alleging "unreasonable" behavior by many thousands of investors.

[31] I don't want to suggest that this is necessarily good policy. Among other things, Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 Wash. U. L.Q. 619 (1999), which criticizes the rating agencies, suggests that giving rating agencies gatekeeper is part of the problem, not part of the solution. I speak here only of what would be constitutional.

mandate that certain kinds of legally significant statements, to become legally significant, must comply with certain procedures.

I hope this analysis has been helpful, and I would be glad to answer any further questions that anyone from the subcommittee might have.

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