

## **ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11**

### **Financial Contracts, Derivatives and Safe Harbors Advisory Committee**

Full Committee Meeting  
November 15, 2013  
New York, New York

#### MINUTES/SUMMARY

The Financial Contracts, Derivatives and Safe Harbors Advisory Committee ("Committee") of the ABI Commission held a full committee meeting on Friday, November 15, 2013, at the New York offices of Cleary Gottlieb. *The following individuals participated in the meeting:* Co-Chair The Hon. James M. Peck, Co-Chair Seth Grosshandler, Lawrence Brandman, Mark C. Ellenberg, Stephen J. Lubben, Mark J. Roe, The Hon. Christopher S. Sontchi, Shmuel Vasser, Co-Reporter Edward R. Morrison, Co-Reporter Eric G. Waxman III, Commission Research Fellow Temi R. Kolarova, and guest Debra Sohn. Jeffrey Amico, a paralegal at Cleary Gottlieb was also in attendance.

Mr. Grosshandler called the meeting to order at 1:00 p.m. (ET) and the meeting adjourned at approximately 4:00 p.m. (ET). The following matters were discussed during the course of the meeting.

*Opening Remarks:* Mr. Grosshandler welcomed the Committee members and outlined the meeting agenda, including: (a) an overview the ABI Commission's February 2014 meetings and the Committee's participation; (b) discussion of subcommittee work on the executive summary and supply contracts; (c) preparation of the Committee's final reports; and (d) discussion of selected case law and bankruptcy law developments.

#### ABI Commission Meetings

The ABI Commission will conduct meetings in February 2014; Advisory Committee leaders will attend and Committee members are invited. The Committee discussed attendance at the meetings, the presentation of reports and issues, and opportunities for both majority and minority views to be aired.

#### Subcommittee Activities

Chapter 14 Subcommittee. A "Chapter 14" subcommittee was previously established to consider the interaction between non-bankruptcy safe harbor regimes and the Bankruptcy Code. Subcommittee members provided updates of legislative, regulatory, and financial market developments, including efforts to address enforcement of cross-default provisions in qualified financial contracts.

Executive Summary Subcommittee. The executory summary subcommittee was previously established to prepare a report to accompany the Committee's reports on specific issues that are submitted to the ABI Commission. The executive summary would, among other things, provide an overview of the Committee's activities, identify key principles guiding the Committee's approach, and convey both support and opposition to the Committee's recommendations. The

subcommittee described the broad outline of the report and its components, and solicited Committee views.

The Committee engaged in a wide-ranging discussion of the Committee's activities, the scope of its mandate and necessary limitations, and larger issues concerning the utility of safe harbors generally. Spirited exchanges among several members considered the possible impact of safe harbors on the size and structure of financial institutions and the role, if any, of safe harbors in the recent financial crisis. The Committee concluded the discussion by considering how these views, both majority and minority, may be conveyed to the ABI Commission through the Committee reports, the executive summary, and presentation at the February meetings.

Supply Contracts Subcommittee. The subcommittee on physical supply contracts previously delivered a draft report concerning the treatment of supply contracts as qualified financial contracts and, if so, should safe harbor protections be limited to prevent immediate close outs. Among its proposals was a recommendation to exclude from safe harbor protections those contracts for physical delivery of goods used or produced by a debtor unless a dealer was involved. The subcommittee now reported on refinements to the proposal to assure safe harbor treatment if a financial institution was involved.

Committee members revisited issues concerning the utility of forward contracts as hedge transactions and the scope of the proposed treatment. They observed that many forward contracts provide an option for settlement without delivery, but concluded that the option should not preclude application of the protection from immediate close outs. Members also discussed the meaning of "goods," recent case law addressing electricity as a good, and the need for a provision stating that electricity is a good under the proposal. The subcommittee will further refine its proposals and report again at the next Committee meeting.

#### Other Matters

Mr. Grosshandler introduced recent relevant case law developments, including decisions rendering triangular setoff unenforceable in bankruptcy. Committee members discussed the outcome under state law, the market's view and response to decisions, and possible workarounds when mutuality could not be established directly. The Committee briefly addressed contract close outs and resulting claim objection activity in the Lehman bankruptcy and a recent ruling involving enforcement of tax sharing agreements.

\* \* \* \*

#### Conclusion/Next Meeting

Judge Peck and Mr. Grosshandler thanked all participants for their attendance and contributions. The next Committee meeting will be held on Friday, January 10, 2014, at 11:00 a.m. (ET) at the New York City offices of Cleary Gottlieb.