

ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11

Financial Contracts, Derivatives and Safe Harbors Advisory Committee

Full Committee Meeting

April 2, 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 Monday, April 2, 2013, at the New York offices of Cleary Gottlieb. *The following individuals participated in the meeting:* Co-Chair The Honorable James M. Peck, Co-Chair Seth Grosshandler, Commission Reporter Michelle M. Harner, Lawrence Brandman, Mark C. Ellenberg, Mark J. Roe, The Hon. Christopher S. Sontchi, Kimberly Summe, Co-Reporter Eric G. Waxman III, guest Debra Sohn, and Commission Research Fellows Temi R. Kolarova and Knox L. McIlwain. Jeffrey Amico, a paralegal at Cleary Gottlieb was also in attendance.

Mr. Grosshandler called the meeting to order at 11:30 a.m. (ET) and the meeting adjourned at approximately 4:30 p.m. (ET). The following matters were discussed during the course of the meeting.

Opening Remarks: Judge Peck and Mr. Grosshandler welcomed the Committee members, provided a brief re-cap of the February 2013 meeting, and obtained approval of the public minutes from the February meeting. Mr. Grosshandler outlined the meeting agenda: (a) discussion of the ABI Commission May 15, 2013 field hearing, witnesses, and presentation format and (b) subcommittee reports and recommendations.

ABI Commission Field Hearing: Safe Harbor Panels and Witnesses

The ABI Commission will conduct a field hearing in New York City on May 15th. The hearing is hosted by the Commission and the Committee. Testimony will be taken concerning financial contracts, derivatives, and safe harbors. The purpose of the hearing is to gather information helpful for establishing basic principles and goals that will animate the Committee's recommendations to the Commission.

The Committee previously agreed to organize two panels. The first will address the scope of safe harbors. The second will consider the interaction between non-bankruptcy safe harbor regimes and the Bankruptcy Code.

Mr. Grosshandler described efforts to recruit witnesses for the panels and results achieved. The Committee identified and discussed additional nominees representing a range of views. The Committee again acknowledged that the number of attractive witnesses probably exceeded the time available at the May hearing and the option to invite witnesses to present testimony directly to the Committee at its meetings.

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At prior Committee meetings, subcommittees were constituted and asked to provide preliminary reports. Three subcommittees reported to the Committee at the February meeting.

Subcommittee Report on Section 562

A subcommittee provided a status report on its ongoing efforts. Subcommittee members introduced the statutory framework and provided an overview of the issues concerning the timing and calculation of damages related to financial contracts under Bankruptcy Code section 562.

Committee members engaged in an in-depth discussion of valuation, market disruptions, and the availability of alternative determinants of value. They evaluated the need to determine values when markets were not fully functioning and the propriety of deferring a determination to mitigate loss of value.

Members also addressed deference to the parties' contractual damages measures and whether the case law, currently rather limited, should continue to develop before considering statutory revisions. The subcommittee will prepare its preliminary report in light of the discussion.

Subcommittee Report on Walkaway Clauses

A subcommittee previously prepared and presented a preliminary report on the enforceability of walkaway clauses under the Bankruptcy Code. The subcommittee revisited and reviewed its prior recommendation to define walkaway clauses and render them unenforceable if they are part of qualified financial contracts.

Walkaway clauses would be defined as provisions in qualified financial contracts that eliminate the benefit of the contract to a defaulting counterparty even if the contract is "in the money" for that counterparty. The definition would capture so-called "one-way payments" and "limited two-way payments."

The subcommittee recommended that walkaway clauses be rendered unenforceable if the trigger for its enforcement is a default based on the bankruptcy of the counterparty. This proposal would align the Bankruptcy Code with other insolvency regimes, including the Federal Deposit Insurance Act and Title II of the Dodd-Frank Act and would not represent a marked departure from market practice, which tends to favor two-way payment clauses.

Subcommittee members relayed their further consideration of the issue whether to extend the proposal to other contractual provisions that can resemble walkaway clauses, such as flip clauses (reordering priority to collateral in the event of insolvency/bankruptcy) and extinguisher provisions (releasing both parties' obligations if one fails). The Committee also reviewed the impact of certain court decisions. The subcommittee then stated its intention not to include these other clauses in its proposal and its plan to prepare a final report.

Subcommittee Report on Section 546(e)

A subcommittee revisited its prior preliminary report on the scope of Section 546(e) and returned with a revised preliminary report.

Subcommittee members led a wide-ranging discussion of the issues concerning securities transactions and emphasized that they were not addressing other types of contracts, such as repurchase transactions. The subcommittee conveyed unanimous support for safe harbor protection of the securities transfer system covering all transactions (publicly and privately traded) and system participants who act for clients and customers.

The subcommittee then addressed the extension of safe harbor protections to certain types of transactions and certain ultimate transferees. For instance, may beneficial owners of privately traded securities be excluded from safe harbor protection? Subcommittee members expressed support for the extension of safe harbor protections to certain ultimate transferees of publicly traded securities.

A spirited debate followed concerning the identity of those beneficiaries who would receive safe harbor protection and related issues, including the following: Should safe harbor protection be extended to all ultimate transferees of publicly traded securities? Should certain entities who may potentially influence a transaction, such as holders of a meaningful portion of the securities, be carved out from safe harbor protections? Should safe harbors protect markets only rather than particular parties? Can public and private transactions be effectively distinguished? What role, if any, should judicial discretion play?

The discussion concluded with the subcommittee's agreement to formulate certain positions and questions, poll Committee members for their views on those positions, and then further revise its preliminary report.

Conclusion/Next Meeting:

Judge Peck and Mr. Grosshandler thanked all participants for their attendance and contributions. The next Committee meeting will be held on Wednesday, May 15, 2013, at 12:30 p.m. (ET) at the midtown New York offices of Cleary Gottlieb, prior to the ABI Commission field hearings later that afternoon.