

ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11

Financial Contracts, Derivatives and Safe Harbors Advisory Committee

Full Committee Meeting
December 14, 2012
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, December 14, 2012, 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, Commissioner Donald S. Bernstein, Commission Reporter Michelle M. Harner, Mark C. Ellenberg, Stephen J. Lubben, Mark J. Roe, The Hon. Christopher S. Sontchi, Kimberly Summe, Shmuel Vasser, Co-Reporter Edward R. Morrison, Co-Reporter Eric G. Waxman III, 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 11:00 a.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: Judge Peck and Mr. Grosshandler welcomed the Committee members and Commissioners to the meeting and reviewed the meeting agenda. Procedural matters and Committee resources were reviewed.

Ms. Harner addressed the Commission request for an interim report and the Committee discussed the topic, timing, and content of the interim report.

Each participant provided some background and biographical information and initial viewpoints on the treatment of qualified financial contracts under the Bankruptcy Code.

Initial Topics: The Committee's scope was addressed, both the overlap with other committees' topics (*e.g.*, avoiding powers) and other law (banking statutes, Dodd-Frank). Mr. Bernstein stated that the Commission process was "interactive" and communications with other committees was encouraged. Regarding statutory scope, the Committee acknowledged its focus on the Bankruptcy Code, but that other laws and insolvency regimes "would be taken into account."

Topics from the Preliminary Assessment:

Prior to the meeting, subtopics of the Preliminary Assessment of Safe Harbors for Qualified Financial Contracts were assigned to Committee members, who prepared discussions/overviews of the assigned subtopics for presentation at the meeting.

Justification and Scope of Safe Harbors for Qualified Financial Contracts: Messrs. Roe, Ellenberg, and Lubben led an in-depth discussion of the justifications for and scope of safe

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harbors for qualified financial contracts and the extent to which these safe harbors complement or come into tension with reorganization principles under the Bankruptcy Code. Mr. Roe summarized issues regarding systemic risk and other insolvency regimes. Mr. Ellenberg explored the importance of safe harbors, particularly in the Lehman bankruptcy, and the markets' need for predictability. Mr. Lubben commented on alternative ways that market concerns may be addressed. With each presentation, Committee members engaged in spirited and candid discussions from the perspective of all stake holders in the bankruptcy process.

Scope of Safe Harbors. If safe harbors are justified for one or more types of qualified financial contracts, then what should be the contours of the safe harbors? Messrs. Morrison and Waxman led the discussion of this question and related issues. Mr. Morrison addressed possible policy considerations for immediate versus temporarily stayed close-out rights. Mr. Morrison and Mr. Waxman provided the views of several commentators on the stay issue and variations that may depend on the type of collateral involved and the identity of the non-debtor counterparty.

Other Subtopics: The breadth, depth, and duration of discussions with respect to the foregoing topics precluded the group from addressing other subtopics at the meeting; the remaining subtopics will be addressed at the next Committee meeting. The Committee also identified possible topics for an interim report.

Conclusion/Next Meeting: Judge Peck and Mr. Grosshandler thanked all participants for their attendance and contributions. The next Committee meeting will be Friday, January 25, 2013, from 11:00 a.m. (ET) to 4:00 p.m. (ET) at the New York offices of Cleary Gottlieb.