

Securities Regulation Daily Wrap Up, CREDIT RATING AGENCIES— C.D. Cal.: Former treasury secretary must reply to written evidence request, (May 14, 2014)

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By Mark S. Nelson, J.D.

Former Treasury Secretary Timothy F. Geithner must respond to a discovery request by Standard & Poor's Financial Services LLC (S&P) in a case brought by the U.S. government against S&P and another rating agency. Yesterday's ruling arose from S&P's claim that the government had engaged in selective prosecution (*US v. McGraw-Hill Companies, Inc., et al.*, May 13, 2014, Carter, D.).

S&P asked the court to let it discover evidence related to phone calls Geithner and a New York Fed official had with Harold McGraw III. Geithner, a non-party to the case, argued that S&P was not entitled to discovery because it did not make the required showing. But the court said its prior order from a month ago found that S&P offered some evidence that the government's purpose in bringing the case was improper.

Lawyers for Geithner also argued that the Supreme Court's 1941 *Morgan* opinion, which held the secretary of agriculture should not have been deposed, may apply beyond the context of a deposition. Geithner's motion to quash cited the 2010 *Thomas* opinion by the U.S. District Court for the Eastern District of California, in which a former California governor had to partially respond to a written discovery request. The court, however, de-emphasized *Morgan* because written discovery is rarely within its scope and S&P asked only for documentary evidence.

The court here said it would require Geithner to respond to S&P's discovery request on an "incremental" basis. For now, Geithner must respond to S&P's documentary discovery request for written evidence related to its selective prosecution claim. The court noted that the telephone calls at issue likely could not be discovered any other way. But the court will not rule on whether Geithner must respond to a depositional discovery request until later. The court said this result strikes the right balance between S&P's interest in pursuing its selective prosecution claim and protecting top government officials' "autonomy."

The case is No. CV 13-0779-DOC (JCGx).

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Companies: Standard & Poor's Financial Services LLC; McGraw-Hill Companies, Inc.

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