

## Securities Regulation Daily Wrap Up, CREDIT RATING AGENCIES—S&P claims the U.S. improperly redacted discovery documents, (Aug. 13, 2014)

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By Matthew Garza, J.D.

Standard & Poor's Financial Services has moved to compel the government and former Treasury Secretary Tim Geithner to produce unredacted documents as part of its defense against a fraud suit filed by the U.S. against the credit ratings agency. The suit, brought pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), claims S&P misrepresented the objectivity of ratings assigned to residential mortgage backed securities and collateralized debt obligations prior to the collapse of the mortgage market.

As part of its defense, S&P claimed that the suit was filed in retaliation for its downgrade of the U.S. government credit rating, and that its credit ratings were independent and issued in good faith. S&P also argued that it was singled out for issuing a downgraded rating. The CDOs and RMBS at issue received similar ratings from other credit rating agencies, S&P pointed out, but only S&P downgraded the U.S. rating, and only S&P has been sued by the DOJ.

A memo filed yesterday in U.S. District Court in California, itself heavily redacted, noted that the court determined on April 15 that the government must produce discovery relevant to the company's First Amendment retaliation/selective prosecution defense, and on May 13 confirmed that the same was true with regard to Geithner.

**Privilege.** Although S&P sought communications between the DOJ, Treasury, and the Executive Office of the President, which could be protected by special presidential privilege, it said it is not now seeking documents protected by that privilege. "Rather, the Government's position is that it will not even look for any document that might involve the EOP privilege, let alone seek to determine if the documents meet the rigorous requirements needed to invoke that privilege," S&P stated in the memo.

The U.S. argued that the redacted information is protected as work product or is non-responsive to the issue, but the government has provided no basis to distinguish the work product it has already turned over and the work product that it is redacting, S&P said. Redacted portions near "detailed discussions (and excoriations) of S&P" were of special interest to the ratings agency. "It is hard to think of information more likely to be potentially relevant to an evaluation of motives and actions with respect to S&P's downgrade," the company argued.

The S&P memo argues that the court should: (1) order the government to produce unredacted versions of all documents related to its First Amendment retaliation/selective prosecution affirmative defense; (2) search for all documents in the possession of DOJ or Treasury related to its defense, and prepare a log of those it believes are protected by presidential privilege.

Arguments on the motion are scheduled to be heard September 9 in Judge David O. Carter's courtroom in Santa Ana, California.

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

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