

January 25, 2017

## Court Orders Production in ISDAfix Civil Litigation of Materials Presented to Regulators

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### **White Papers, Presentations, Letters, and Briefs Provided to Regulators or Prosecutors During Government Investigations Held Subject to Discovery in Civil Litigation**

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#### **SUMMARY**

On January 20, 2017, Judge Jesse Furman in the Southern District of New York ordered defendants in the ISDAfix class-action litigation to produce white papers, presentations, letters, and briefs they had provided to government authorities in connection with investigations of potential manipulation of ISDAfix. Significantly, the court ordered production of materials that had been “merely shown, and not physically provided,” to the authorities.

The court found that the production of these materials to the government waived work-product protection over them, on the ground that voluntary disclosure of these materials during a government investigation with the intent to dissuade the government from bringing charges was inconsistent with the rationale behind the work-product doctrine. The court found it significant that none of the defendants had entered into written agreements with the government to maintain the confidentiality of the produced materials.

Judge Furman’s decision underscores the risk of collateral civil-litigation consequences inherent in providing factual and advocacy materials in the course of a government investigation – even where copies of those materials are not physically produced to the authorities. While a written confidentiality/non-waiver agreement with the government may help protect against waiver, such an agreement may not be sufficient. Companies should consult with counsel and carefully consider the risks associated with the affirmative presentations and work product that they provide to the government in enforcement investigations.

## BACKGROUND

U.S. Dollar ISDAfix is a benchmark interest rate incorporated into a broad range of financial derivatives, such as interest-rate swaps and swaptions.<sup>1</sup> In 2012, the Commodity Futures Trading Commission (CFTC) and other government agencies began investigating whether certain financial institutions and brokers manipulated ISDAfix rates.<sup>2</sup>

In 2014, plaintiffs brought a purported class-action lawsuit in the Southern District of New York alleging that financial institutions and brokers conspired to manipulate ISDAfix rates in violation of the antitrust laws and state common law.<sup>3</sup> During discovery, defendants refused to produce a wide variety of materials that they had prepared and produced to government authorities in the course of their investigations.<sup>4</sup> After initially losing a motion to compel production of these materials, plaintiffs “narrowed their requests to a targeted subset of regulatory materials, including white papers, presentations, written memoranda, or briefs shown or provided to the [CFTC] or the [Department of Justice (DOJ)] about ISDAfix manipulation.”<sup>5</sup> Defendants again refused to produce these materials, and plaintiffs moved to compel.<sup>6</sup> Plaintiffs specifically requested “documents that were shown to, but not retained by, the CFTC or DOJ,”<sup>7</sup> and defendants refused to produce slide decks and PowerPoint presentations created by counsel and presented to the CFTC; letters to the CFTC concerning cooperation, substantive defenses, and specific trades; and compilations of documents shown but not produced to the CFTC.<sup>8</sup>

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## THE DECISION

On January 20, 2017, the court granted plaintiffs’ motion to compel, holding that defendants had waived work-product protection over these documents by voluntarily disclosing them to the government.<sup>9</sup>

The court expressed “skeptici[sm]” of defendants’ argument that waiver can be avoided by entering into “explicit written confidentiality and non-waiver agreements with the government agencies.”<sup>10</sup> Applying the Second Circuit’s decision in *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993), the court reasoned that a confidentiality agreement is “just one of several factors to be considered,” and was insufficient here, because the documents were “generated by counsel during a government investigation, with the specific intent to dissuade the government from bringing suit,” which “is inconsistent with the purposes behind the attorney work[-]product doctrine.”<sup>11</sup> The court further noted that “three of the four [d]efendants opposing [p]laintiffs’ requests do not even appear to have entered into an explicit agreement” with the government.<sup>12</sup> Finally, the court rejected a defendant’s “creative suggestion that waiver of the work-product doctrine does not apply where materials are merely shown, and not physically provided, to a government agency.”<sup>13</sup>

## IMPLICATIONS

The court's decision underscores the waiver risks that companies face when providing a broad variety of materials to the government in the course of a regulatory enforcement investigation. All manner of communications, including advocacy pieces, tolling agreements, and interview memoranda, are subject to later production in civil litigation if produced to the government. Notably, sharing information only orally or using materials that are shown to but not provided physically to the government provides no assurance against waiver.

The decision also recognizes both the potential value and limitations of entering into written confidentiality and non-waiver agreements with the government before providing materials in regulatory or criminal investigations. While some courts have held that such agreements go "a long way to a finding of non-waiver,"<sup>14</sup> others courts, including Judge Furman, appear to believe they carry only modest weight, and are no guarantee against a subsequent finding of waiver.

Companies should consult with counsel and carefully consider the risks of waiver in the materials they provide to the government, orally or in writing.

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## ENDNOTES

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- <sup>1</sup> *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 49-51 (S.D.N.Y. 2016).
- <sup>2</sup> *Id.* at 51-52; *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2016 WL 6779901, at \*1 (S.D.N.Y. Nov. 16, 2016).
- <sup>3</sup> *Alaska Elec. Pension Fund*, 175 F. Supp. 3d at 51-52.
- <sup>4</sup> *Id.*
- <sup>5</sup> *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 14-CV-7126 (JMF), ECF No. 357 at 1-2 (internal quotation marks omitted).
- <sup>6</sup> *Id.*
- <sup>7</sup> *Alaska Elec. Pension Fund*, 14-CV-7126 (JMF), ECF No. 338 at 1 n.1.
- <sup>8</sup> *Alaska Elec. Pension Fund*, 14-CV-7126 (JMF), ECF No. 349 at 2-4.
- <sup>9</sup> *Alaska Elec. Pension Fund*, 14-CV-7126 (JMF), ECF No. 357 at 2-4 (internal quotation marks omitted).
- <sup>10</sup> *Id.* at 3 (internal quotation marks omitted).
- <sup>11</sup> *Id.* at 3-4 (internal quotation marks omitted).
- <sup>12</sup> *Id.* at 4-5 (internal quotation marks omitted).
- <sup>13</sup> *Id.* at 6.
- <sup>14</sup> *Id.* at 4-5 (quoting *In re Natural Gas Commodity Litig.*, 2005 WL 1457666, at \*8 (S.D.N.Y. June 21, 2005)).

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