

Credit Event, or not? Is another Market being Manipulated?

As investors and market participants become increasingly aware of the regulatory failures that allowed for manipulation of LIBOR, FOREX, municipal bond bidding and certain commodities markets, **regulatory sources are increasingly expressing concern that they have paid too little attention to potential manipulations of an arguably larger, more systemically important and less regulated market – the CDS market** as self-governed, through ‘regulatory license’ⁱ, by the International Swaps and Derivatives Association (ISDA).

It appears regulators are now turning their attention toward the CDS market, its problematic self-regulatory structure, the myriad of conflicts of interest, the potential avenues for manipulation by large dealers and the opaque and potentially self-serving manner in which **determinations of “credit events”** are privately decided by ISDA’s Determinations Committees (DCs)ⁱⁱ. A growing volume of news stories, the publication of several new academic papers, the reversal of Dodd-Frank’s “Push-Out” rule which would have forced banks to move their derivatives out of the depository, and the DCs’ handling of several recent questions have only served to increase regulatory concerns and cause some to point out numerous similarities between the various manipulation scandals, the possibility of manipulations in the CDS marketⁱⁱⁱ and the implications to the global economy.

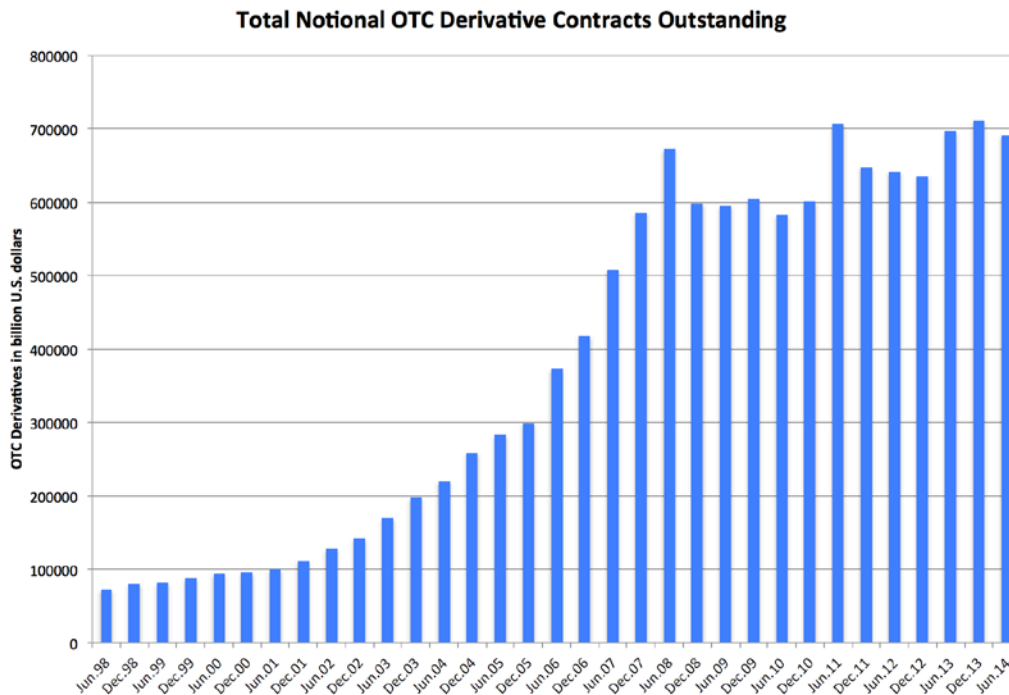
Figure 3: Membership of the G14 on Libor and DC panels (as of May 1, 2013)

The G14	Libor Panel Bank	DC Member (Americas)
Bank of America	✓	✓
Barclays	✓	✓
BNP Paribas	✓	✓
Citigroup	✓	✓
Credit Suisse	✓	✓
Deutsche Bank	✓	✓
Goldman Sachs		✓
HSBC	✓	✓
JPMorgan Chase	✓	✓
Morgan Stanley		✓
Royal Bank of Scotland	✓	
Société Générale	✓	✓ (consultative)
UBS	✓	✓
Wells Fargo		

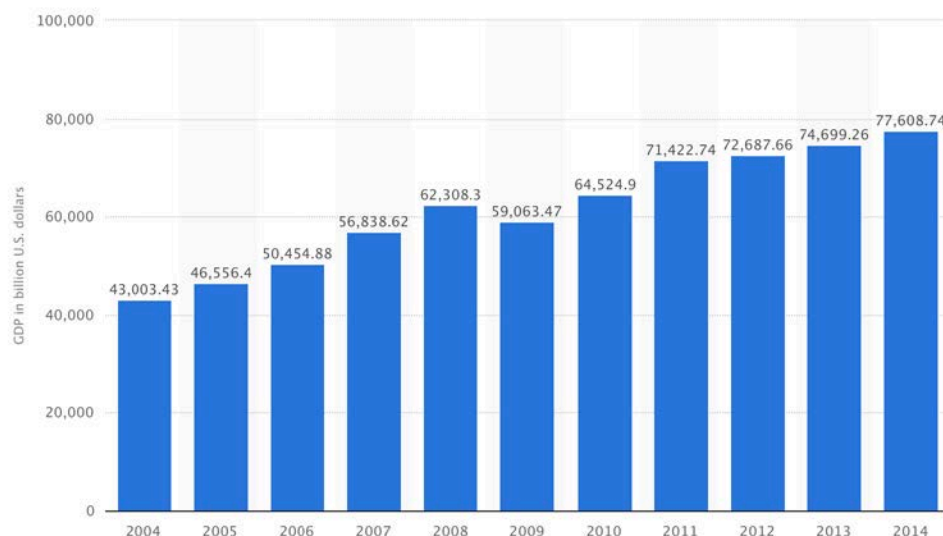
Source: Dan Awrey

Since 2000, and the insertion of language into the 2000 Commodity Futures Modernization Act which exempted CDS from regulation by the Commodity Futures Trading Commission, the U.S. derivative market has been largely self-regulated. After the global financial crisis, the President's Working Group on Financial Markets (PWG)^{iv} recognized that the opaque world of derivatives needed substantial changes. However, **the President's Working Group left implementation of needed changes and oversight to the industry. In effect, the same sell-side driven derivatives market that led the world to crisis was told 'Sinner, heal thyself'.**

Today, as a result of the rapid growth of the OTC Derivatives market, including CDS, the systemic risks posed by this market and the obvious conflicts of interests inherent in its current oversight, regulators are finally casting a close eye on the actions and decisions of this self-regulatory regime.



Global gross domestic product (GDP) at current prices from 2004 to 2014 (in billion U.S. dollars)



In each global region, determinations regarding credit events are made by 15 of the largest users of credit default swaps^v. Ten voting members are sell-side firms, and five are buy-side firms. The voting members are the institutions rather than the individuals voting on their behalf. These users of CDS, who vote to determine when a credit event has occurred and therefore whether there will be a payout on the swaps, appear likely to have positions in nearly every issue they are tasked to decide^{vi} – and their

decisions are binding on all market participants and issuers. **The determinations of these DCs, which are less regulated than rating agencies and expressly shielded from certain types of legal liability^{vii}, have become more powerful and of more importance those of the ratings firms^{viii}. The DCs' disclosure language highlights the problems inherent in the current process:**

The procedures of the Determinations Committees are set forth in the DC Rules. The DC Rules may be amended by a Determinations Committee in accordance with the DC Rules. None of ISDA, the institutions serving on the Determinations Committees or any external reviewers owes any duty to you in such capacity, and you may be prevented from pursuing claims with respect to actions taken by such persons under the DC Rules. Institutions serving on *a Determinations Committee may base their votes on information that is not available to you, and have no duty to research, investigate, supplement or verify the accuracy of information on which a determination is based. In addition, a Determinations Committee is not obligated to follow previous determinations or to apply principles of interpretation such as those that might guide a court in interpreting contractual provisions.* Therefore, a Determinations Committee could reach a different determination on a similar set of facts. *If we or an affiliate serve on a Determinations Committee, we may have an inherent conflict of interest in the outcome of any determinations.* In such capacity, we or our affiliate may vote and take other actions without regard to your interests under a Credit Transaction.^{ix}

Yet, more troubling, the Determinations Committees' Rules^x appear to actively court trading ahead and/or manipulation. These rules do not offer any meaningful guidance regarding Determinations Committees' members' conflicts of interests; ability to vote on issues in which they have a financial interest; recusal from voting; or sharing of information regarding discussions and determinations of DCs with others (including traders) within their own firms. Even those rules that exist appear meaningless given that ISDA doesn't appear to monitor compliance and, given that it is a trade association, is unlikely to sanction its own members even if there were a mechanism to do so^{xi}. **As a result, it is not impossible to believe that in cases in which a vote is delayed for another meeting, or in cases in which a second vote occurs, a DC member may use any delay to reposition their book in anticipation of a final determination.**

The ISDA Determinations Committees wields unprecedented, largely unbridled and unchecked power to declare corporations and sovereigns in, or not in, default^{xii}, and they are therefore in a position to define the contractual solvency of their member firms.

Recently, it has been proven that without governmental oversight, there are many opportunities for ISDA member banks and the voting members of the DCs to secretly

manipulate markets for their own benefit. As example, recent lawsuits^{xiii} have been filed based on CFTC referrals to the Department of Justice. The CFTC has claimed that criminal behavior has been found^{xiv} which demonstrates ISDA member banks manipulated “ISDAFIX”^{xv}, a benchmark used to set rates on trillions of dollars of derivatives. If proven, the scale of these manipulations may be far larger than LIBOR, FOREX or the municipal bid-rigging^{xvi} manipulations.

As witnessed through the lens of AIG’s failure, in which the majority of CDS that AIG insured were used by banks and investment banks for regulatory relief^{xvii}, CDS have become a means for banks to engineer a reduction of their risk-weighted assets and raise their capital ratios.

The potential use of CDS to artificially manipulate corporate solvency^{xviii}, the imbalances in the amounts of CDS outstanding relative to referenced debt^{xix} and ongoing allegations that **ISDA’s Determinations Committee is deeply conflicted^{xx} and “operates as a quasi-Star Chamber or cartel”^{xxi}**, are finally being scrutinized.

As one source recently suggested, **“It would be a surprise if determinations of default, made by a committee of interested parties, don’t lead to findings of manipulation similar to those found in LIBOR and FOREX”**.

The Problems of Determinations Committees

As highlighted by John Biggins, **“direct public regulation of OTCD trading between sophisticated counterparties in the US was substantially abolished at the turn of the 21st century”^{xxii}**. While Dodd-Frank in the U.S. and regulations overseas have sought to rein in certain activities, move trading to centralized exchanges and move certain exposures out of banks, there has been little done to create direct government oversight of the processes of determining defaults, clearing positions, overseeing auctions or settling trades. The bulk of these activities remain in the hands of private players – some with inherently conflicting roles – such as ISDA^{xxiii}.

When, in the wake of the global financial crisis, the industry saw that it was going to come under increased scrutiny and pressure, ISDA took a lead in lobbying and in the creation of new standards of self-regulation. Included in these was the creation of the Determinations Committees. **Before the DC member selection process was finalized, investors were told that the DCs would be “balanced between dealers and investors” and that “It only works if people believe in it”^{xxiv}**. Yet in fewer than five years since the creation of the Committees, it has become clear that they are neither balanced nor worth meaningful belief.

While ISDA has routinely sought to defend itself from criticism^{xxv}, the realities of the DCs is that even a routine review of their actions undermines their credibility as market gatekeepers.

Claims Versus History

ISDA, in defense of the DCs, claims that clear risks of individual firms voting based on their own books are ameliorated by the process in which 80% of the 15 members are needed to come to a decision. These claims appear dubious given that there is no duty, for the Committees, to disclose a transcript of the meetings or an accounting of their reasoning. **Doubts are only heightened by the almost inevitable, seemingly impossible, cartel-like unanimity of the Committee's determination votes. As example, for at least the last three years, every single one of the dozens of the Determinations Committee for the America's has been unanimous^{xxvi}.** As one observer pointed out:

“Doesn't it potentially create a dynamic where no one wants to be seen to be dissenting? Does this stifle genuine debate and put pressure on those who may have a different opinion? Wouldn't true transparency mean that DC members disclosed the financial interests of their firm and their votes?”^{xxvii}

The fact that Pimco's Chief Investment Officer criticized the decision that Greece had not triggered its CDS, even though Pimco was part of the unanimous vote making that determination^{xxviii}, is profoundly troubling to say the least. The discrepancy appears to suggest that the official votes of DC members do not necessarily reflect the actual views of those members and that the voting process has thus been perverted. The fact that the DC has no obligation to “research, investigate, supplement or verify the accuracy of information on which a determination is based” and members “may have an inherent conflict of interest in the outcome of any determinations”^{xxix} only **adds credence to suggestions that the “CDS market is being manipulated and gerrymandered by the all-powerful investment banks”^{xxx}.**

Questions about the CDS and reference debt held by Committee members are almost certain to be the subject of regulatory and legislative inquiry given the importance of Committee votes, to investors and issuers – including sovereign governments. While the public rarely has the ability to know where a specific conflict exists on the books of a Committee member, there have been circumstances in which the conflicts appear clear. Last summer, the DC met to decide whether Argentina's failure to pay holders of exchange bonds was a triggering credit event. Given the decade-long dispute between Elliott Management – who is a voting member of the Determinations Committee - and Argentina, one has to wonder **why, with obvious conflicts, Elliott didn't recuse itself^{xxxi}, or was it not forced to recuse itself, from the vote. One also has to wonder why ISDA doesn't appear to have any policies governing either public disclosures of conflicts or requirements for recusal where a conflict may color a member's vote.**

Perhaps ISDA will state, in its defense, that in circumstances in which members' views – or financial interests – make it difficult to come to the required decision by 80% of the Committee members, the determinations are subject to an external panel to review and make the determination^{xxxii}. To be sure, external review is a good and healthy process, to the extent that it is conducted properly. **In fact, one could easily argue that truly independent and non-conflicted reviewers should vet all credit event determinations in the first instance, and that the DC itself is unnecessary, serving largely as a superfluous vehicle for potential market manipulation. However, external review does not appear to happen nearly often enough.** Instead, it seems reasonable to suspect that the infrequency with which external reviews occur is the result of a more frequent outcome in which most or all of the committee members (likely frequently the ten bank members) vote in unanimity and then sway at least two or more of the remaining committee members (likely frequently the investors), after which the remaining committee members fall in line.

Even the process by which issues are submitted to external review appears biased in favor of the ten banks, given the likelihood that they often vote largely as a block^{xxxiii}. On the positive side, unlike Committee determinations, External Reviews are required to provide the DC with a summary of the reasoning for their decisions and that reasoning is required to be disclosed publicly^{xxxiv}. **Also, although the external review process does require the reviewer to make a judgment as to whether it has any conflicts of interest regarding the issue at hand, it is unclear whether such disclosures and/or recusals have ever occurred.** Moreover, given that the reviewer is supposed to consider, as conflicts, only issues “with respect to either the Reviewable Question or the related DC Questions which may be deliberated by the Convened DC”^{xxxv}, the rules do not appear to prohibit reviewers from having conflicts relating to financial remuneration historically received by them from members of the Committee. It seems obvious, given that the external reviewers are proposed by Committee Members, that these types of conflicts are commonplace. In fact, even a cursory Internet search for pool members turned up external reviewers who clearly receive income from Committee Member firms^{xxxvi}.

These questions seem particularly timely given the DC's meeting on December 24th to determine whether Caesars' failure to pay all of the interest and principal owed on December 15, 2014^{xxxvii} triggered a failure to pay credit event. Section 4.01 of the relevant 2nd lien indenture states that “[a]n installment of principal of or interest shall be considered paid on the date due if on such date the Trustee or the Paying Agent holds as of 12:00 p.m. Eastern time money sufficient to pay *all principal and interest then due* ...”. Thus, in the event all principal and interest then due is not paid, which was certainly the case on December 15th, neither principal nor interest is considered paid. This clearly triggers a failure to pay credit event under the relevant ISDA documents. Yet the DC's December 24th meeting concluded with a public announcement that the Committee had postponed a vote until December 29th, and the December 29th meeting concluded with another deferral, this time to January 5th.

Where the language in an indenture is completely straightforward, as appears to be the case in Caesars^{xxxviii}, it is unclear what the reasons for these consecutive postponements may be. One has to wonder whether the DC is deliberating based on the facts or merely seeking to act in the pecuniary interests of the majority of its members. If the former, then why has the committee not yet announced the obvious - that there has been a failure to pay?

Regulatory investigations and legislative inquiries would certainly be timely given the importance of reducing systemic risks, supporting the functioning of fair and transparent markets (in which asymmetries of available information are reduced), and increasing the certainty of rights among issuers, dealers and all investors.

ⁱ John Biggins, “Locking Out the Gatekeepers...Or Locking Them In? The ISDA Credit Derivatives Determinations Committees and OTC Derivatives Market Reforms”, <http://ecpr.eu/Filestore/PaperProposal/74d84d8f-cfa5-466a-ba70-2ce175041031.pdf> (See: “It is contended that these committees may be performing a verification role somewhat similar in spirit to credit ratings agencies and could be considered a new addition to the family of financial market gatekeepers. In particular, it will be contended that recent public regulatory reform proposals may have subtly granted these ISDA Credit Derivatives Determinations Committees, similar to CRA’s, the authority to issue „regulatory licenses” in the OTC CDS markets, thus illustrating the persistence of a somewhat subliminal public- private regulatory balance which is in the process of being calibrated in these markets. Therefore, there are indications that, rather than necessarily being „locked out”, private industry actors, originally partly blamed for the GFC in the first place, have seemingly nevertheless been very much „locked in” to the new regulatory scheme. Additionally, however, these ISDA Credit Derivatives Determinations Committees may also be performing a role which goes beyond verification, diverging in certain respects from the CRA model.”)

ⁱⁱ Dan Awrey, “Hardwired Conflicts: The Big Bang Protocol, Libor and the Paradox of Private Ordering”, (Preliminary Draft) May 9, 2013, http://web.law.columbia.edu/sites/default/files/microsites/law-economics-studies/Awrey_Paper.pdf (See: “The Big Bang Protocol has brought much needed standardization and predictability to what was often a chaotic process for settling CDS upon the occurrence of bankruptcy, restructuring and other events. Simultaneously, however, the parties responsible for resolving contractual issues under the DC mechanism – principally global derivatives dealers – are also counterparties to the vast majority of these contracts. This generates hardwired conflicts of interest: conflicts which, as the paradox predicts, are not adequately addressed by ISDA’s existing contractual documentation or governance arrangements.”)

ⁱⁱⁱ Ibid, p. 28-32.

^{iv} President’s Working Group on Financial Markets, Treasury Department, PWG Progress Summary On OTC Derivatives Operational Improvements, November 14,

2008, <http://www.treasury.gov/resource-center/fin-mkts/Documents/progresssummary.pdf>

^v International Swaps and Derivatives Association, Inc. (ISDA), Credit Derivatives Determinations Committees, Current DC Members (effective April 28, 2014), <http://dc.isda.org/about-dc-committees/current-dc-members/>

^{vi} International Swaps and Derivatives Association, Inc. (ISDA), Credit Derivatives Determinations Committees Rules, September 16, 2014 Version, http://www.isda.org/credit/docs/ICM-2319997111-v10-DC_Rules_2014.pdf

^{vii} International Swaps and Derivatives Association, Inc. (ISDA), Credit Derivatives Determinations Committees Rules, September 16, 2014 Version, Waiver by DC Parties, 5.1, http://www.isda.org/credit/docs/ICM-2319997111-v10-DC_Rules_2014.pdf (See: “**Waiver by DC Parties**. Each DC Party shall be deemed to agree: (i) that no DC Party and no legal counsel or other third-party professional hired by any DC Party in connection with any DC Party's performance of its duties under the Rules shall be liable, whether for negligence or otherwise, to such DC Party for any form of damages, whether direct, indirect, special, consequential or otherwise, that might arise in connection with any DC Party's performance of its duties, or any advice given by legal counsel or any other third-party professional hired by any DC Party in connection with any DC Party's performance of its duties, under the Rules, except in the case of gross negligence, fraud or wilful misconduct on the part of the relevant DC Party, legal counsel or other third-party professional, as applicable; and (ii) to waive any claim, whether for negligence or otherwise, that may arise against any DC Party and any legal counsel or other third-party professional hired by any DC Party in connection with any DC Party's performance of its duties under the Rules, except in the case of gross negligence, fraud or wilful misconduct on the part of the relevant DC Party, legal counsel or other third-party professional, as applicable. Notwithstanding the above, outside legal counsel or a third-party professional hired by a DC Party may still be liable to such DC Party. (b) **Disclaimer by the DC Parties**. No DC Party and no outside legal counsel or other third-party professional hired by any DC Party in connection with any DC Party's performance of its duties under the Rules shall undertake any duty of care or otherwise be liable to any party to a Relevant Transaction for any form of damages, whether direct, indirect, special, consequential or otherwise, that might arise in connection with any DC Party's performance of its duties, or any advice given in connection with any DC Party's performance of its duties, under the Rules, except in the case of gross negligence, fraud or wilful misconduct on the part of the relevant DC Party, legal counsel or other third-party professional, as applicable. No DC Party and no outside legal counsel or other third-party professional hired by any DC Party shall undertake any duty or otherwise be liable to any party to a Relevant Transaction for any action, including one based on negligence, that might arise in connection with any DC Party's performance of its duties, or any advice given by legal counsel or any other third-party professional hired by any DC Party in connection with any DC Party's performance of its duties, under the Rules, except in the case of gross negligence, fraud or wilful misconduct on the part of the relevant DC Party, legal counsel or other third-party professional, as applicable. Notwithstanding the above, outside legal

counsel or a third-party professional hired by a DC Party may still be liable to such DC Party.”)

^{viii} Keith Mullin, “ISDA Trumps Rating Agencies”, *International Financing Review*, May 25, 2011, <http://www.ifre.com/isda-trumps-rating-agencies/636751.fullarticle>

^{ix} International Swaps and Derivatives Association, Inc. (ISDA), ISDA DF Disclosures, September 13, 2014, <http://www2.isda.org/functional-areas/legal-and-documentation/disclosures/> (See: Updated Credit Derivatives Disclosure Annex, September 3, 2014)

^x International Swaps and Derivatives Association, Inc. (ISDA), Credit Derivatives Determinations Committees Rules, September 16, 2014 Version, http://www.isda.org/credit/docs/ICM-2319997111-v10-DC_Rules_2014.pdf

^{xi} Dan Awrey, “Hardwired Conflicts: The Big Bang Protocol, Libor and the Paradox of Private Ordering”, (Preliminary Draft) May 9, 2013, http://web.law.columbia.edu/sites/default/files/microsites/law-economics-studies/Awrey_Paper.pdf (See: “Nor does ISDA appear to actively monitor compliance with DC Rules. Indeed, even if ISDA did monitor compliance, its status as an industry trade association would seem to undermine the credibility of any threat of private enforcement.⁸² Simultaneously, despite ISDA’s assertions to the contrary⁸³, the complexity of CDS markets – and, ultimately, of the balance sheets of many DC members⁸⁴ – might be expected to undermine both the potency of any market-based reputational sanctions and effective supervision and enforcement by public regulatory authorities. Taken together, these factors support the claim that the risk-adjusted costs of exploiting the conflicts of interest embedded within the DC mechanism are relatively low and, accordingly, are unlikely to represent a meaningful constraint on opportunistic behavior. The result is a market structure which, in theory at least, allows DC members to extract private benefits at the expense of other market participants.”)

^{xii} Lisa Pollack, “The Non-precedent Setting, Own-law Making, Secretive CDS Committee Is Having a Seriously Bad Month”, Blog post, FTAlphaville, *Financial Times*, February 13, 2013, <http://ftalphaville.ft.com/2013/02/13/1383992/the-non-precedent-setting-own-law-making-secretive-cds-committee-is-having-a-seriously-bad-month> (See: “Oh boo, the committee that decides on whether credit default swap contracts should payout appears to be having trouble reaching a conclusion about whether the nationalisation of SNS Bank counts as a “credit event”. While the quantity of swaps that hang in the balance is teeny tiny, the issue itself is a big deal because it reveals some of the problems that might crop up in future bank rescues and bail-ins of debt while demonstrating yet again that CDS don’t appear to do what a reasonable person would think they do... In our minds, we are imaging that the committee of 15 is having difficulty weighing up whether they want to strictly interpret the event using the rules they set for themselves in the 2003 Definitions, or find some *errr...* flexibility for appearance sake as well as the functioning/credibly of the CDS market. These guys can vote however they wish, it’s not that they are subject to any law other than that which they set for themselves (hush, hush now, financial stability is safe with them)”)

^{xiii} See example: Alaska Electrical Pension Fund et al v. Bank of America Corporation et al, Case No:14-cv-7126-JMF, United States Southern District Court of New York, October 31, 2014, <http://www.labaton.com/en/cases/upload/Consolidated-Amended-Complaint-10-31-2014.PDF> and The County of Beaver v. Bank of America Corporation et al, Case No: 14-cv-7907, United States Southern District Court of New York, September 30, 2014, http://assets.law360news.com/0583000/583152//mnt/rails_cache/https-ecf-nysd-uscourts-gov-doc1-127114906066.pdf

^{xiv} Matthew Leising and Tom Schoenberg, “CFTC Said to Alert Justice Department of Criminal Rate Rigging”, *Bloomberg*, September 9, 2014, <http://www.bloomberg.com/news/2014-09-08/cftc-said-to-alert-justice-department-of-criminal-rate-rigging.html> and Alaska Electrical Pension Fund et al v. Bank of America Corporation et al, Case No:14-cv-7126-JMF, United States Southern District Court of New York, October 31, 2014, <http://amlawdaily.typepad.com/0000isdafix.pdf>

^{xv} Alison Frankel, "New ISDAfix Rate-rigging Antitrust Case Isn't Just Libor Redux", Blog post, Breakingviews, *Reuters*, September 5, 2014, <http://blogs.reuters.com/alison-frankel/2014/09/05/new-isdafix-rate-rigging-antitrust-case-isnt-just-libor-redux/> (See: “In Libor, there was no connection to commerce,” said Mitchell of Robbins Geller. “Here, they’re affecting the benchmark through actual transactions.” Said Brockett: “This is price-fixing through actual transactions in the marketplace.”) and Bob Van Moris and Matthew Leising, “Barclays, BofA, Citigroup Sued for ISDAfix Manipulation”, *Bloomberg*, September 5, 2014, <http://www.bloomberg.com/news/2014-09-04/barclays-bofa-citigroup-sued-for-isda-fix-manipulation.html> (See: “Barclays Plc (BARC), Bank of America Corp., Citigroup Inc. (C) and 10 other banks were accused in a lawsuit of conspiring to manipulate ISDAfix, a benchmark used to set rates for interest rate derivatives and other financial instruments. The Alaska Electrical Pension Fund sued yesterday in Manhattan federal court, claiming the banks colluded to set ISDAfix at artificial levels that allowed them to manipulate payments to investors in the derivatives. The banks’ actions affected trillions of dollars of financial instruments tied to the benchmark, the pension fund said....The banks communicated using electronic chat rooms and other means of private communication, typically submitting identical rate quotes beginning at least in 2009, the Alaska fund said.”)

^{xvi} Matt Taibbi, “The Scam Wall Street Learned From the Mafia”, *Rolling Stone*, June 21, 2012, <http://www.rollingstone.com/politics/news/the-scam-wall-street-learned-from-the-mafia-20120620>

^{xvii} Patrick Augustin, Marti G. Subrahmanyam, Dragon Yongjun Tang and Sarah Qian Wang, “Credit Default Swaps – A Survey”, *Foundations and Trends in Finance*, Vol. XX No. XX 2014, 1-188

^{xviii} Mike Kentz, “CDS allegations surround RadioShack”, *Reuters*, December 15, 2014, [“http://www.reuters.com/article/2014/12/15/radioshack-cds-idUSL1N0TZ0V720141215”](http://www.reuters.com/article/2014/12/15/radioshack-cds-idUSL1N0TZ0V720141215) (See: “Market participants alleged two weeks ago that a group of lenders led by Standard General may have structured a rescue package for the troubled retailer as part of a last-ditch effort to avoid paying out on CDS contracts expiring on December 20.”)

^{xix} Michael Aneiro, “What’s Keeping Radio Shack Afloat? Credit Derivatives”, Blog post, *Barron’s*, December 19, 2014, <http://blogs.barrons.com/incomeinvesting/2014/12/19/whats-keeping-radio-shack-afloat-credit-derivatives/> (See: “After a 60 percent surge this year, the amount of credit-default swaps tied to RadioShack is 28 times its debt, more than any other U.S. company. When the retailer’s biggest shareholder arranged \$585 million of funding in October to help it survive the holidays, much of the money came from hedge funds wagering on the company to avoid default, said people with knowledge of the trading.”)

^{xx} Lisa Pollack, “The conflicted Isda committee”, Blog post, FT Alphaville, *Financial Times*, December 14, 2011, <http://ftalphaville.ft.com/2011/12/14/799341/the-conflicted-isda-committee/> (See: “Knowledge of the game is a sensible prerequisite. Also, the referee shouldn’t be conflicted. For example, anyone who has bet on the outcome of a match probably shouldn’t be the one who awards penalties. And there’s no reason why what’s true of sports referees shouldn’t also be true of market referees, such as the International Swaps and Derivatives Association (Isda). However, Isda picks the members of a committee that determines who has won and lost in the game of credit derivatives by selecting those who have the greatest potential to be conflicted. (And then it indemnifies them.)”)

^{xxi} Jesse Eisinger, “Like Rate-Fixing Scandals? You’ll Love the Credit Default Swap Market” *Propublica*, July 18, 2012, <http://www.propublica.org/thetrade/item/like-rate-fixing-scandals-youll-love-the-credit-default-swap-market> (See: “A proper market would want an organization that was impartial, regulated, transparent and open to appeal. No such luck. The determinations committee has 15 members, 10 of which are the major dealers in credit default swaps, the giant banks that are effectively permanent members. One criterion for dealer members is that they trade a certain amount of derivatives. In the wake of the 2008 financial crisis, there are fewer such firms, and they have consolidated their influence and power over our capital markets. The committee operates as a quasi-Star Chamber or cartel. It makes decisions without having to publish its reasoning and almost never has. There isn’t any appeal process. The committee itself says it isn’t bound by precedent.”)

^{xxii} John Biggins, “Locking Out the Gatekeepers...Or Locking Them In? The ISDA Credit Derivatives Determinations Committees and OTC Derivatives Market Reforms”, <http://ecpr.eu/Events/PaperDetails.aspx?PaperID=7599&EventID=1> (See p. 10.)

^{xxiii} Robert Kuttner, “Chapter 6: “A Greek Tragedy” *Debtor’s Prison: The Politics of Austerity Versus Possibility*, New York: Alfred A. Knopf, 2013, (See: “ISDA epitomizes the power of private regulation. Even though swaps are issued by regulated banks and have the potential to crash the economy and create massive losses absorbed by taxpayers (as they did when AIG collapsed in September 2008), they are largely unregulated, even to this day. In place of transparency and public regulation, the terms are set by ISDA representing their issuers—a gross conflict of interest.”)

^{xxiv} Shannon D. Harrington, “Credit Swaps to Be Overhauled as Dealers Curb Risks”, *Bloomberg*, January 30, 2009,

<http://www.bloomberg.com/apps/news?pid=newsarchive&refer=home&sid=aVkirb6lEsGA>

^{xxv} See example: Christopher Whittall, “Dealers defend ISDA committee's record, as restructuring event put in play”, *International Financing Review*, August 5, 2011, <http://www.ifre.com/dealers-defend-isda-committees-record-as-restructuring-event-put-in-play/648065.fullarticle> and *ISDA media.comment*, “Psst! I’ve Got a Secret”, Blog post, March 1, 2012, <http://isda.mediacomment.org/2012/03/01/psst-ive-got-a-secret/> and Paul Murphy, “ISDA: the “S” seems to stand for “sneer”, Blog post, FTAlphaville, *Financial Times*, March 2, 2012, <http://ftalphaville.ft.com//2012/03/02/906531/isda-the-s-seems-to-stand-for-sneer/>

^{xxvi} International Swaps and Derivatives Association, Inc. (ISDA), Credit Derivatives Determinations Committee, <http://dc.isda.org/credit-default-swaps-archive/>

^{xxvii} Lisa Pollack, “More on the conflicted Isda committee”, Blog post, *Financial Times*, December 14, 2011, <http://ftalphaville.ft.com//2011/12/14/799741/more-on-the-conflicted-isda-committee/>

^{xxviii} Richard Milne and David Oakley, “No insurance pay-out on Greek debt” *Financial Times*, March 1, 2012, <http://www.ft.com/intl/cms/s/0/4f1a03d8-6392-11e1-9686-00144feabdc0.html?siteedition=uk#axzz3NCx1JICw> (See: “Bill Gross, who runs the world’s biggest private bond fund at Pimco, said on CNBC television that the decision not declare a credit event on the writedown of Greek sovereign debt set a dangerous precedent. He said Isda’s decision should be seen as a disappointment to buyers of CDS. However, Pimco is one of the voting members of the Isda determinations committee that decided against a pay-out.”)

^{xxix} International Swaps and Derivatives Association, Inc. (ISDA), <http://www2.isda.org/functional-areas/legal-and-documentation/disclosures/> (See: Updated Credit Derivatives Disclosure Annex, September 3, 2014)

^{xxx} Robin Evans “What’s best for Germany?” Blog post, *Lemmings Can Teach Nothing*, May 3, 2012, <http://lemmingscanteachnothing.wordpress.com/2012/03/02/the-2012-chocolate-fireguard-award/>

^{xxxi} Norman Carleton, “Argentina, Credit Default Swaps, and ISDA”, Blog post. *Washington Outside*, August 8, 2014, <http://washingtonoutside.blogspot.com/2014/08/argentina-credit-default-swaps-and-isda.html> (See: “Whether or not the ISDA committee was correct in its determination for the purpose of credit default swaps (“CDS”), the committee making the decision could hardly be called neutral and objective. Argentina’s principle legal tormentor, Elliot Management, is on the committee and it did not recuse itself. Whether or not Elliot Management holds CDS on Argentinian government bonds, it is obviously conflicted. (Reuters says according to “sources,” the holdout firms do not have positions in CDS on Argentinian government debt. Argentina is investigating.) The other members of the committee likely have positions on one side or the other in CDS on Argentinian government bonds.”)

^{xxxii} See example: International Swaps and Derivatives Association, Inc. (ISDA), Credit Derivatives Determinations Committee, “ISDA Credit Derivatives Determinations

Committee Sends SEAT Question to External Review”, November 28, 2011, <http://www2.isda.org/news/isda-credit-derivatives-determinations-committee-sends-seat-question-to-external-review>

^{xxxiii} International Swaps and Derivatives Association, Inc. (ISDA), “2014 ISDA, Credit Derivatives Determinations Committees Rules”, September 16, 2014, http://www.isda.org/credit/docs/ICM-2319997111-v10-DC_Rules_2014.pdf (See:” shall include the two answers that were supported by the most Convened DC Voting Members during the binding vote held by the Convened DC with respect to the DC Question corresponding to such Eligible Review Question; provided that, if the number of votes in favor of either of the two answers that were supported by the most Convened DC Voting Members is tied with one or more other answers, all such tied answers shall be included in such Eligible Review Question. Each Eligible Review Question falling under Section 3.8(b) (*Other Determinations Relating to the Overall Market*) shall be phrased in the manner Resolved by the Convened DC.”)

^{xxxiv} International Swaps and Derivatives Association, Inc. (ISDA), “2014 ISDA, Credit Derivatives Determinations Committees Rules”, September 16, 2014, (See 4.6(D)(f) at p.53: “**Publishing the Decision.** With respect to each Reviewable Question, the External Reviewers shall notify the DC Secretary by the Decision Deadline of each of their votes with respect to the Presented Positions for such Reviewable Question and will produce a single summary explaining their reasoning and analysis (including any dissenting views). In addition, the External Reviewers shall notify the DC Secretary by the Decision Deadline of the Decision reached in accordance with Section 4.6(d) (*The Decision*). The DC Secretary shall publish the votes of the External Reviewers, the written summary and the Decision on its Website within 5 hours of receiving such information from the External Reviewers (once published, the Decision is a “**Final Decision**”).

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^{xxxv} International Swaps and Derivatives Association, Inc. (ISDA), “2014 ISDA, Credit Derivatives Determinations Committees Rules”, September 16, 2014, http://www.isda.org/credit/docs/ICM-2319997111-v10-DC_Rules_2014.pdf (See 4.3 at p. 48)

^{xxxvi} Attorney Julia Lu, Richards Kibbe & Orbe LLP, <http://www.rkollp.com/attorneys-Julia-Lu-Bio.html> and Timothy Howe QC, Fountain Court Chambers, <http://www.chambersandpartners.com/uk-bar/person/231177/timothy-howe>

^{xxxvii} International Swaps and Derivatives Association, Inc. (ISDA), “Caesars Entertainment Operating Company, Inc.” ISDA Credit Derivatives Determinations Committees, December 19, 2014, <http://dc.isda.org/cds/caesars-entertainment-operating-company-inc-4/>

^{xxxviii} EX-4.39: Indenture among Harrah’s Operating Company, Inc., and U.S. Bank National Association, <http://www.sec.gov/Archives/edgar/data/276310/000119312508260179/dex439.htm> (See p.53: “SECTION 4.01. Payment of Notes. The Issuer shall promptly pay the principal of and interest on the Notes on the dates and in the manner provided in the Notes and in this Indenture. An installment of principal of or interest shall be considered paid on the date

due if on such date the Trustee or the Paying Agent holds as of 12:00 p.m. Eastern time money sufficient to pay all principal and interest then due and the Trustee or the Paying Agent, as the case may be, is not prohibited from paying such money to the holders on that date pursuant to the terms of this Indenture.”)

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