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Why We Still ♥ CDS —
the iHeart Communications Credit Event and What it Means for the CDS Contract

As has been the case now for three years running[1], 2016's December 20 roll date again triggered a set of novel questions for the credit default swap market, this time related to the decision by iHeartCommunications, Inc. ("iHeart") to fail to pay principal on bonds held by one of its subsidiaries. Although the iHeart questions turned out to be easier to resolve than those raised in Caesars or Novo Banco (which both required External Review[2]), they again strained market participants' tolerance for the complexity of the product and the opacity of the process required to manage it. In this memo, we summarize the analytical issues raised by the iHeart event, consider a few market-management issues highlighted by the determinations process in this case and offer some recommendations for the design of the product going forward.

Nevertheless, we think both the product and the process, as complex and opaque as they may be, once again delivered an outcome that was predictable, swift and certain. We hope the guardians of the product keep these principles in mind as ISDA prepares to hand over administration of the product to ICE Benchmark Association.[3]

Despite these latest bumps, we think financial market professionals who want to see analytical effort rewarded should still find CDS worth ♥-ing.

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[1] *See*, *e.g.*, the Failure to Pay question with respect to Caesars Entertainment Corporation, *available at* http://dc.isda.org/cds/caesars-entertainment-operating-company-inc-4/, and the Succession Event question with respect to Novo Banco, *available at* http://dc.isda.org/cds/novo-banco-s-a/, both of which led to External Review.

[2] Capitalized terms used but not otherwise defined in this alert shall have the meanings given to them in the 2014 ISDA Credit Derivatives Definitions (the "Definitions").

[3] News Release: "ISDA Selects Benchmark Administration as Determinations Committee Secretary" (Dec. 16, 2016), *available at* http://www2.isda.org/news/isda-selects-ice-benchmark-administration-as-determinations-committees-secretary.

OVERVIEW

The iHeart event generated two analytical questions under the Definitions, each submitted to the International Swaps and Derivatives Association ("ISDA") Determinations Committee (the "DC") for consideration:

> (1) whether a Failure to Pay Credit Event had occurred with respect to certain of iHeart's outstanding notes (the "Notes") held by Clear Channel Holdings, Inc. ("CCH"), an iHeart wholly-owned subsidiary (the "FTP issue"), and
>
> (2) how accrued interest on the Deliverable Obligations likely to be delivered in the Auction should affect the timing of the Auction and, therefore, the Auction Final Price for CDS referencing iHeart the ("Auction Date issue").

Both issues reinforced the lesson that CDS is a highly technical product governed by objective rules and standards, not one whose performance will be determined by general views of fairness or broad market expectations. Nevertheless, as well-worn as the product is, we think the iHeart event shows there are still technical improvements to be made.

The iHeart event also expanded and tested the market's reliance on the product's unique governance structure. While the FTP issue was well-briefed and telegraphed by market participants and observers; the Auction Date issue was not. We think the difference in the way the Determinations Committee dealt with each issue suggests areas for improvement here as well.

IHEART'S TACTICAL FAILURE TO PAY

Analyzing the performance of iHeart CDS was initially challenging because of an unusual "springing lien" provision contained in certain of iHeart's outstanding debt obligations requiring the company to grant additional collateral to certain of its creditors once the outstanding principal amount of specified iHeart bonds falls below a specific level. Specifically, the "springing lien" would have been triggered if the Company had redeemed all of the outstanding Notes on December 15, 2016 as required under the relevant indenture. Prior to December 12, 2016, market participants had been speculating as to whether iHeart would retire the Notes as scheduled and allow the lien to spring. Market participants were aware, however, that enough of the Notes ($57.1 million) were held by CCH to allow iHeart to avoid that outcome if it could manage to leave the CCH-held Notes outstanding while retiring all of the Notes held by non-affiliates. (Because the cross-default threshold in iHeart's other debt obligations is $100million, this would also avoid a wider iHeart cross-default). It was not clear to market participants, however, exactly how iHeart would achieve that result. Would iHeart somehow direct payment to some beneficial owners of the Notes but not to oth-

ers? Would iHeart amend the indenture to split the obligations and establish that the CCH-held Notes were not due? Would the company pursue some other tactic?

On December 13, 2016, iHeart ended the speculation when it disclosed[4] that, although it intended to repay in full the Notes held by non-affiliated holders on December 15, 2016 as required under the indenture, it had informed CCH that it would not repay the $57.1 million of Notes held by it on the maturity date but would continue to pay interest on those notes as long as they remained outstanding. CCH, in turn, informed iHeart that, while it retains its right to exercise remedies under the Notes in the future, "it does not currently intend to, and it does not currently intend to request that the trustee, seek to collect principal amounts due or exercise or request enforcement of any remedy with respect to the nonpayment of such principal amount under the Legacy Notes Indenture."[5] It went on to state that, in its view, the CCH-held Notes would remain "outstanding," and the lien would not spring. In an effort to create greater certainty as to that outcome, iHeart also initiated litigation in Texas state court[6] seeking a declaratory judgment that the CCH-held Notes were still outstanding and would remain outstanding until canceled or repaid.

THE CREDIT EVENT QUESTION

While the status of the springing lien remains unresolved, CDS market participants sought a quick resolution as to whether iHeart's actions nevertheless constituted a Failure to Pay under the standard CDS contract. The DC concluded on December 21, 2016 that a Failure to Pay Credit Event had occurred on December 20, 2016 with respect to iHeart as a result of a Failure to Pay in respect of the Notes held by CCH.[7] While this was not a typical Credit Event, with an issuer clearly in default on its debt obligations generally, the decision was reached unanimously and without the need for postponement for further deliberation. This may in part have been due to the fact that the question had already been debated in public filings submitted to the DC by law

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[4] iHeartCommunications, Inc.'s Current Report on Form 8-K (filed Dec. 13, 2016).

[5] Id.

[6] Petition for Declaratory Judgment filed in *iHeartCommunications Inc., f/k/a Clear Channel Communications, Inc., et al. v. The Bank of New York n/k/a The Bank of New York Mellon Corporation*, No. 2016-CI-21289 (District Court of Bexar County, TX, Dec. 12, 2016) (hereinafter "Declaratory Judgment Petition").

[7] A Failure to Pay could not have occurred any earlier than December 20, 2016 because the Definitions imposed a Grace Period of Three Business Days where none is provided in the terms of the relevant Obligation.

firms on either side of the question[8] — a development that has increasingly become part of the CDS determination process for questions of controversy in the market.

In keeping with past practice, the DC did not detail its reasoning. In our view, once the facts were disclosed by iHeart, the FTP issue became straightforward. Under Section 4.5 of the Definitions, a Failure to Pay occurs when the Reference Entity fails to make a payment when and where due in accordance with the terms of the relevant Obligation. The key question in this case, then, was whether the terms of the Notes could have been considered to have been amended as a result of any agreements between, or other conduct of, iHeart and CCH, as holder of the remaining Notes, such that either the Notes were no longer outstanding or the $57.1 million was no longer due on the original due date.

On the first point, available public information continued to show that iHeart, CCH and the Notes trustee were treating the Notes as being outstanding.[9] Had the Notes been held by iHeart itself, this might have been a more complex question, as an argument could have been made that the Notes would not be considered outstanding in bankruptcy (or, indeed, for certain other purposes); though we believe that, even then, the DC would likely have made the determination as to whether the Notes were still outstanding on the basis of a reading of the technical terms of the Notes.

On the second point, which was the one more directly argued in the Paul Weiss Memorandum and the Linklaters Memorandum, the DC apparently concluded that there was no evidence that the terms of the indenture had actually been amended, and there was therefore no reason to conclude that a Failure to Pay had been avoided. Although Linklaters argued that the agreement by CCH not to pursue remedies in respect of iHeart's nonpayment should be read as a waiver of the Note holders' rights and therefore a constructive amendment of the terms of the Notes, such forbearance agreements have never been construed by the DC as being equivalent to an amendment to the terms of the relevant obligation, except where there was an express agreement by all

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[8] Paul, Weiss, Rifkind, Wharton & Garrison LLP, argued that the non-payment of the CCH-held Notes was a Failure to Pay(*See*, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Memorandum submitted to ISDA Credit Derivatives Determinations Committee re iHeartCommunications, Inc. Failure to Pay Credit Event (Dec. 20, 2016), *available at* http://dc.isda.org/documents/2016/12/iheart-pai-dec-20.pdf, hereinafter, the "Paul Weiss Memorandum"), while Linklaters LP argued the opposite (*See*, Linklaters LP, Memorandum submitted to ISDA Credit Derivatives Determinations Committee re iHeartCommunications, Inc. Failure to Pay Credit Event (Dec. 15, 2016), *available at* http://dc.isda.org/documents/2016/12/iheart-pai-dec-16.pdf, hereinafter, the "Linklaters Memorandum").

[9] In paragraph 76 of the Declaratory Judgment Petition, iHeart explained: "The trustee and paying agent of the [Notes] maintains records of the notes outstanding and includes the notes held by [CCH] as outstanding. iHeart pays interest on the notes held by its subsidiaries in the same manner as it does other outstanding notes. The various trustees and agents of iHeart's other debt also treat and have historically treated debt held by iHeart subsidiaries as outstanding. In addition, the [Notes] have been listed as assets on the books and records of iHeart and its subsidiaries, including the financial statements of [CCH]."

the relevant parties to do so.[10] In this case, it appears that the DC adopted the view espoused by Paul Weiss, that a Failure to Pay could have been avoided had iHeart and the Notes trustee formally agreed to a supplemental indenture amending the maturity date of the CCH-held Notes. As iHeart's 8-K filings would have had to disclose any such amendments, the DC apparently concluded that no such amendment was made.[11]

Possible Technical Fixes for the Product

1) Payment Threshold should be set to equal the lowest cross default threshold in any Obligation with an Outstanding Principal Amount at the time of the purported Failure to Pay of at least $10 million.

2) The Auction terms should be revised to ensure that, as is effectively already the case for a Bankruptcy Credit Event, protection sellers receive the benefit of accrued interest on any Deliverable Obligation up to the Event Determination Date.

POLICY ARGUMENTS AND IMPLICATIONS FOR THE CDS PRODUCT

The iHeart Credit Event highlights what some market participants see as an important weakness in the CDS product as it is currently constituted. Specifically, it is now clear (though in fact it has always been true) that an issuer can arrange to trigger its own CDS by simply issuing an Obligation to its own wholly-owned subsidiary and then failing to pay on the stated maturity date. Third-party investors could potentially benefit from such arrangements in situations in which there is an appreciable gap between the price of long-dated and short-dated CDS. The combination of these factors, however, is likely *ex ante* to reduce some market participants' willingness to trade CDS on that Reference Entity altogether, at least with respect to contracts of relatively longer duration. The end result could be a further reduction in the use of the product to hedge credit risk.

There are at least three ways the product could be revised to address this. One is that the Payment Threshold in the standard contract could be changed from $1 million to instead equal the lowest cross-default threshold in respect of any Obligation of the Reference Entity with an outstanding principal amount above a certain level (e.g., $10 million), to be measured at the time of the purported Failure to Pay. This would not strictly prevent an issuer from arranging to trigger all of its outstanding CDS, but it would make it more likely that doing so would create a more generalized default. Another possible adjustment is to revise the definition of Obligation to exclude any debt held by the Reference Entity or its affiliates. A similar exclusion of affiliate-held debt applies to the definition of Relevant Obligations in respect of Succession Event determinations. A third possible adjustment would be to apply a requirement that an Obligation be held by multiple holders (as is the case for the Restructuring Credit Event when applied in standard contracts). All of these adjustments would require some form of market-wide

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[10] Indeed, the Linklaters Memorandum would seem to make arguments contrary to its author's own published views: "On the other hand, if the creditors merely agree not to enforce their rights or demand payment . . . the due date for payment will remain the same and a default will occur if payment is not made on that date." *Derivatives: Law and Practice*, Simon Firth (Sweet & Maxwell 2003), at Section 2.3.

[11] We note, though, that if an amendment had been made to the Notes, and if (as is not difficult to imagine) it were not possible to determine whether the relevant amendment had become effective as of the instant at which the relevant payment was first due, an interpretative question as to the proper reading of Section 4.5 of the Definitions might have arisen, as it unclear whether the terms of the Obligation must be construed before or after the relevant Grace Period.

protocol, however, as revisions would need to occur simultaneously on all outstanding CDS contracts (at least with respect to any particular Reference Entity).

THE TIMING OF THE AUCTION AND THE TREATMENT OF ACCRUED INTEREST

Immediately after declaring that iHeart's intentional non-payment constituted a Failure to Pay, the DC became aware that the iHeart Credit Event would raise a second controversial question - whether protection sellers or protection buyers should get the benefit of accrued interest owed on the Deliverable Obligations whose value would likely determine the market-wide settlement price. The issue struck most market participants as a matter of first impression because, unlike most (though not all) Credit Events, iHeart continues to meet its payment obligations, including in respect of interest on bonds that might be delivered in connection with the transactions formed in the CDS settlement Auction. Furthermore, because the Deliverable Obligation considered most likely to be the "cheapest to deliver" in the Auction is the iHeart's 14% Senior Notes due 2021 (the "14% Notes"), the amount of interest to be accrued prior to its Feb 1, 2017 bi-annual payment date amounts to over 600 basis point of value that could be allocated to either protection sellers or protection buyers, depending upon the date of the Auction.

In the Auction used to determine the settlement price for standard CDS contracts, the Auction Final Price is set according to market participants' bids and offers for the least valuable (or "cheapest to deliver") Deliverable Obligation of the defaulted Reference Entity that they believe would be delivered by CDS protection buyers seeking to physically settle their contracts. In a Bankruptcy Credit Event the allocation of accrued interest on such obligations is not affected by the Auction Date, as holders of Deliverable Obligations typically have no claim for interest accrued beyond the date of the Bankruptcy Credit Event. As a result, the settlement date for transactions in the Auction does not directly affect the Auction Final Price. Where the Reference Entity continues to perform, however, the price of its Deliverable Obligations will, all other things being equal, rise in proportion to the amount of interest accrued ahead of the payment date, and then fall again, immediately at the beginning of the next interest period, by an amount equal to the interest paid on that date. If the amount of accrued interest on Deliverable Obligations delivered in the Auction is material, the Auction Final Price for all market-standard CDS contracts will be affected by the timing of the Auction.

The iHeart event was not the first time the DC faced the question of how to allocate accrued interest in the Auction; the Commonwealth of Puerto Rico and Pacific Exploration & Production Corporation Credit Events also involved Reference Entities that were still performing on their debt obligations. In those cases, the DC clarified in the relevant Auction Settlement Terms that protection sellers would not need to pay protection buyers for any accrued interest that might apply to a Deliverable Obligation at the time

of its transfer.[12] This was consistent with the treatment of accrued interest in the more commonly occurring Bankruptcy Credit Events, in which protection sellers also do not make any payment to protection buyers in respect of interest accrued prior to the date of the bankruptcy filing (leaving such amounts to constitute a portion of the claim that the protection seller, once it receives the Deliverable Obligation, has against the Reference Entity). For those two Credit Events, however, market participants generally did not view accrued interest as material to the Final Price determination, so the timing of the Auction was not debated.

THE DC'S SWIFT (BUT OPAQUE) DECISION TO DELAY THE AUCTION

In the case of iHeart, however, with accrued interest on the most relevant Deliverable Obligations amounting to over 600 basis points, market participants understood that the timing of the Auction would be critical. Anticipating this, a few market participants submitted statements urging that the DC delay the Auction until after the relevant interest payment date of February 1, 2017 "to avoid confusion." Hoping to give the market clear direction quickly, the DC issued a brief statement on the afternoon of December 23 - the last business day before Christmas - clarifying that the Auction would take place after February 1, rather than on January 13, the date the DC's rules would normally have dictated, and that a further statement of explanation would be issued in due course.[13]

But the DC's pre-Christmas statement did not create complete certainty in the market. Instead, during the week between Christmas and New Year's Day, and continuing into the first week of January, market participants continued to file public statements with the DC on an ad hoc basis arguing either side of the question as to when the Auction should occur and why. Without the benefit of a statement from the DC as to the reasons for its decision, market participants were left to offer their own arguments - and respond to one another - for two full weeks, until the DC finally published a more detailed explanation for its determination on January 10.[14]

The DC's stated reasons for delaying the Auction were two-fold. First, standing on the principle that the Auction should not create a result that would be materially different

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[12] *See* amendments (with the definition of "Representative Auction Settled Transaction") to Section 8.5 of the Definitions in Commonwealth of Puerto Rico Credit Derivatives Auction Settlement terms, *available at* http://dc.isda.org/documents/2016/07/puerto-rico-ast.pdf., and to Section 8.18 of the Definitions in Pacific Exploration & Production Corporation Auction Settlement Terms, *available at* http://dc.isda.org/documents/2016/04/pacific-ast-april-1.pdf.

[13] Americas Determinations Committee Meeting Statement (Dec. 23, 2016), *available at* http://dc.isda.org/documents/2016/12/iheart-vote-dec-23.pdf.

[14] Americas Determinations Committee Meeting Statement (Jan. 10, 2017), *available at* http://dc.isda.org/documents/2017/01/dc-meeting-statement-jan-6.pdf.

than that which would apply if the contracts were physically settled, the DC argued that a protection buyer in a physically settled contract would have been able to delay delivery of the Deliverable Obligation until after the interest payment date, allowing the protection buyer to retain the benefit of the accrued interest in any event. Second, the DC stated that it would also be possible for protection buyers (i.e., sellers of bonds) in the transactions created in the Auction (known in the Auction Settlement Terms as "Representative Auction Settlement Transactions" or "RASTs") to wait to transfer the relevant Deliverable Obligations until after the Feb 1 payment date.

ASSESSING THE DC'S AUCTION DATE DECISION

Potential Lessons for the Process

(1) Speed remains essential but precision and commercial awareness also matter, so the decision-maker must retain the necessary skills and inclination to make complex, technical decisions correctly and effectively.

(2) Separating the administration of the product (by ICE), the management of the DC (by its members and their counsel) and the issuance of future modification of the product's standard terms (still by ISDA) could make the product harder to manage and therefore less attractive to market participants.

The DC's decision to delay the Auction exposed two features of the product that, in the eyes of some market participants, tend to reduce its utility. The first of these is that the DC's process for deciding complicated questions of interpretation can still be opaque, even to sophisticated market participants. Here, anecdotal evidence suggests that market participants generally had not priced in the effect that the accrued interest on the 14% Notes would have on the settlement price of CDS, or, if they did, they were not able to know for certain when the Auction (and, more importantly, the resulting settlement) would occur. The profusion of statements filed with the DC on either side of this issue (even after the DC's December 23 statement) give some indication of the market confusion on the point.[15] While the speed with which the DC addressed the Auction Date question probably gave the market a helpful degree of certainty, the fact that so much time elapsed between the DC's just-before-Christmas statement and the publication of its explanation on January 10 may unfortunately have left market participants to wonder whether all the arguments on this issue had been fully vetted at the time of the December 23rd statement. Of course, once the DC made the December 23 statement, most market participants understood the DC could not change course without harming the market.

Second, the Auction Date determination once again showed that on difficult questions of interpretation the DC will tend to seek refuge in a technical reading of the existing product terms, no matter how arcane the relevant provisions may be, even when there is a strong argument that doing so will result in an economic outcome that most market participants would not expect.[16] Here, the DC's decision to, in practice, allow the Auction Final Price to be roughly 600 basis points lower than it would have been if the

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[15] 2016 ISDA Credit Derivatives Determinations Committees Rules (January 20, 2016 Version), *available at* http://dc.isda.org/wp-content/files_mf/1453298092DC_Rules__Jan_2016_Update.pdf.

[16] This tendency has arguably become more pronounced over time, as the individuals serving on the DC are now more fully separated from the individuals actually trading the product. *See*, News Release: "ISDA Determinations Committees Vote to Change DC Rules" (Jan. 11, 2016), *available at* http://www2.isda.org/news/isda-determinations-committees-vote-to-change-dc-rules.

Auction settled before the February 1 payment date relied on two separate interpretations of the settlement timeline for CDS contracts. First, the DC concluded that the timeline for physical settlement could last beyond the interest payment date (though only by assuming the maximum use of each element of the delivery timeline, including the buy-in timeline, a feature of the product that, as one commenter pointed out,[17] was not originally considered to be part of the normal delivery timeline). The DC also needed to conclude, however, that its current rules, which would normally have caused the Auction to occur on January 13, would also have permitted a protection buyer in a RAST to wait to deliver its Deliverable Obligations until after February 1. This was only the case, however, because of a provision added to Auction Settlement Terms in certain prior Credit Events that set the Final Notice of Physical Settlement Date at fifteen days after delivery of the Notice of Physical Settlement, rather than some earlier time. The fact that such an economically important outcome turned on such an obscure provision caught many market participants off guard.

DID THE AUCTION DATE ISSUE EXPOSE THE DC'S ACHILLES HEEL?

Finally, though most market participants may not have focused on it, the DC's swift pre-Christmas decision to delay the Auction Date may have helped to protect what is perhaps an Achilles Heel of the finely balanced DC decision-making process. Had the Auction Date issue become contentious, it would have become clear that, unlike all other decisions of economic import (such as Credit Event and Deliverable Obligation determinations) the Auction Date is set by a mere majority vote, a potentially unsatisfactory position for a matter with direct economic consequences and an equal number of winners and losers on either side. One of the unique features of the Determinations Committee as a quasi-adjudicative body is the fact that it was designed with the expectation that many of its members would, at the time of any determination, likely hold contract positions affected by the relevant question and that, as a result, any decision of economic consequence would (a) require an 80% supermajority to pass and (b) be constructed as a Yes/No question so that if a supermajority could not be achieved, a clear question could be passed to an External Review Panel. Certain decisions, however, such as determining the Auction Date or making specific amendments to the Auction Settlement Terms, are not easily framed as binary questions. In these cases, the DC Rules simply require a majority vote.[18] As the iHeart event demonstrates, however, it is still possible under the DC Rules for a question of economic value to rest on a potentially self-interested-driven vote between protection buyers and protection sellers.

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[17] Memorandum 2017010503 re iHeartCommunications, Inc. Auction Date (Jan. 5, 2017), *available at* http://dc.isda.org/cds/iheart-communications-inc-5/.

[18] *See*, *e.g.*,Section 3.2(b) of the DC Rules, pursuant to which a majority of the ten Dealer Members on the DC determine the Auction Date.

CONCLUSION: HOW COULD THE PROCESS CHANGE TO ADDRESS THESE PROBLEMS?

The iHeart event presents an opportunity to reflect on the DC process and how to improve the product. As ever, speed, precision and commercial awareness remain essential. The DC must retain the necessary skills and inclination to make complex, technical decisions correctly, effectively and relatively quickly. Nevertheless, the iHeart event suggests that it might be helpful for the DC, in advance of an actual, foreseeable event, to solicit briefs from market participants on the relevant questions. In the case of the FTP issue, the DC's deliberations seem to have been enhanced and sped up by the briefing provided ahead of time. For the Auction Date issue, however, the lack of a clear question having been presented in respect of the Auction Date, however, resulted in a messy string of submissions that were not helpful for market order. In addition, it is clear that the product retains a delicate balance between the product's explicit terms, the DC Rules, and the customs and procedures of the DC itself. Given that these standards will be governed by three different entities in the near future (ICE Benchmarks,, the DC members and their counsel, and ISDA), there is potential for confusion that could make the product harder to manage and therefore less attractive to market participants. Going forward, CDS users will need to consider carefully how they will stay in touch with developments as they unfold, and ensure that they are receiving timely, accurate advice when novel questions, such as those raised in the iHeart event, arise in the CDS market.

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