



Disclosure Obligations in Capital Restructurings

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Recently, the SEC instituted a cease-and-desist order against Fifth Third Bancorp in connection with its redemption of trust preferred securities (TruPS) in May 2011. The SEC charged that in effecting the redemption Fifth Third “selectively disclosed,” in violation of Regulation FD, that it would redeem a class of its TruPS for about \$25 per share. At the time the securities were trading at about \$26.50 per share. The SEC stated Fifth Third did not issue a Form 8-K or other public notice of the redemption until it became aware that investors who appeared to have learned of the redemption had been selling the securities to buyers who appeared to be unaware of the redemption. Fifth Third, which compensated harmed investors and agreed to adoption and implementation of various additional policies and procedures, settled the SEC’s enforcement action without admitting or denying the allegations.

Fifth Third’s early redemption of their TruPS in May 2011 was triggered through Dodd-Frank’s phasing out of Tier 1 Capital treatment for TruPS generally. As indicated in our July 2010 client memorandum “[Potential Opportunities for Issuers of Trust Preferred Securities under the Collins Amendment](#),” bank holding companies have taken the opportunity presented by Dodd-Frank to redeem relatively costly TruPS under the regulatory capital provisions of their particular issuances where applicable. As noted in that memo, employing this redemption strategy requires careful coordination with regulators and consideration of all applicable circumstances, importantly including disclosure obligations.

Apart from their changing capital treatment and related redemptions, TruPS have frequently been a sort of fulcrum security in acquisitions of troubled institutions. Several notable transactions, including Ford Financial’s recapitalization of Pacific Capital in 2010, included conditions around effecting discounted tender offers of TruPS which have often proven difficult in execution. Several other deals, including BB&T’s recently announced BankAtlantic transaction, have

attempted to solve the issue of TruPS at the holding company level by focusing on bank-level transactions.

It is clear that in the coming months TruPS will continue to be a focus in numerous capital and strategic transactions. Companies considering redemptions or other transactions involving their TruPS, while coordinating closely with their bank regulators and other relevant constituencies, should not lose sight of the various “capital treatment events” in the underlying trust documents as well as related corporate and securities law issues.