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Corporate and Financial Weekly Digest

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SEC/Corporate

New Guidance on "Say-on-Pay" Voting and CEO/CFO Certification Requirements for TARP Recipients

On February 17, President Obama signed the American Recovery and Reinvestment Act of 2009 (ARRA) into law. The ARRA amends and entirely replaces the compensation provisions in Section 111 of the Emergency Economic Stabilization Act of 2008 (EESA) and applies to institutions that have already received financial assistance under the Troubled Asset Relief Program (TARP) as well as those who will participate in TARP in the future. The ARRA includes provisions for a non-binding shareholder vote on the compensation of executives as disclosed in a proxy statement, commonly known as a "Say-on-Pay" proposal, and the filing of a certificate signed by the CEO and CFO to the effect that the TARP recipient is in compliance with the compensation provisions of EESA, as amended.

The ARRA does not provide a stated effect date for the compensation provisions, but does state that the U.S. Treasury Department will promulgate regulations to implement the compensation provisions of the ARRA. However, on February 20, Senator Christopher Dodd, Chairman of the Committee on Banking, Housing and Urban Affairs, sent a letter to Mary Schapiro, Chairman of the Securities and Exchange Commission, stating that the provision requiring a non-binding shareholder vote on the compensation of executives would apply to preliminary and definitive proxy statements (other than definitive proxy statements which relate to preliminary proxy statements filed on or before February 17) filed after February 17 and requesting that the SEC provide further guidance for public company recipients of TARP funding. In response, on February 24, the SEC's Division of Corporation Finance issued a Compliance and Disclosure Interpretation (CDI) which was further updated on February 26. The CDI includes the following:

- A separate shareholder vote on executive compensation is not required for any meeting other than the annual or special meeting of shareholders for which proxies will be solicited for the election of directors.

- Smaller reporting companies which are TARP recipients are not required to provide compensation discussion and analysis under Item 402 of Regulation S-K even though EESA Section 111(e), as amended, requires a shareholder vote on the compensation of executives, including matters such as the compensation discussion and analysis, the compensation tables, and any related material.

- A company that determines to comply with EESA Section 111(e)(1), as amended, by including its own proposal to have shareholders approve executive compensation will be required to file a preliminary proxy statement pursuant to Rule 14a-6(a) of the Securities Exchange Act of

SEC/CORPORATE

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1934. If the company faces special circumstances and would like to request acceleration of Rule 14a-6(a)'s 10-day review period, it is advised to contact the assistant director of the office that reviews the company's filings to discuss the special circumstances the company faces and how the 10-day review period could be accelerated.

- A separate shareholder vote on executive compensation is required regardless of whether a shareholder proposal on executive compensation is received, and the separate vote must be an "actual, non-binding vote" on the full range of executive compensation, not just on adopting a "Say-on-Pay" policy.

In his letter to the SEC, Senator Dodd also stated that because the certification requirement under EESA Section 111(b)(4) relates to compliance with executive compensation and corporate governance standards that have yet to be established by the Treasury, it is his view that the certification requirement is not yet effective and therefore CEOs and CFOs of TARP recipients will not be required to certify as to their company's compliance with such standards that have yet to be established.

On February 26, Katten issued a *Client Advisory* on the broader implications of the ARRA on executive compensation of TARP recipients.

http://banking.senate.gov/public/_files/022009_ChairmanDoddlettertoSECChairmanSchapiroonexecutivecompensationlegislation.pdf
http://www.sec.gov/divisions/corpfin/guidance/arrainterp.htm

SEC Commissioner Elisse Walter Provides Top Five List on Corporate Governance

On February 18, Securities and Exchange Commissioner Elisse B. Walter addressed the Master Class on Corporate Governance at the Practising Law Institute New York Center. The class focused on the role of corporate governance in restoring investor trust. Commissioner Walter expressed her view that the Commission should move forward with actions to enhance shareholder participation and promote greater board accountability in five areas:

- proxy access,
- upgrading disclosures to shareholders on director nominees,
- harnessing technology to improve shareholder access to company information,
- acting on proposed NYSE amendments to eliminate uninstructed broker votes in director elections, and
- adopting rules instituting "Say-on-Pay" for shareholders of all public companies.

Commissioner Walter acknowledged the conflicting views that led to the stalemate on proxy access in 2007, and expressed her strong belief that shareholders should "have a real say in determining who will oversee the management of the companies that they own." In particular, she advocated lessening disclosure requirements for shareholders seeking proxy access (which would exceed those required in proxy contests), substantially scaling back the 5% ownership threshold in prior proposals, but considering a tiered approach in the case of smaller public companies.

Commissioner Walter called for the inclusion of additional information in proxy statements, beyond a mere recitation of a director nominee's prior jobs and educational background, to help investors make more informed voting decisions.

Commissioner Walter suggested the SEC enhance shareholder participation through the use of technology and the elimination of uninstructed broker votes in director elections. Despite the significant drop in shareholder participation in 2007 when the SEC attempted to improve the proxy process via e-Proxy, Commissioner Walter encouraged information gathering through the Internet and electronic communications, and suggested that improvements be made to fix the e-Proxy process. With respect to broker votes, Commissioner Walter recommended that the SEC push forward in determining whether to adopt the NYSE's proposed amendments to Rule 452, which would eliminate uninstructed broker votes from director elections.

As a final note, Commissioner Walter encouraged directors and managements to take the burden upon themselves to improve accountability by setting a "tone at the top" honoring the responsibilities that arise from the trust placed in them by investors. In this regard, Commissioner Walter recommended that companies allow "Say-on-Pay" on their ballots as a measure to restore investor trust and increase accountability of board members and corporate management. She also noted that the American Recovery and Reinvestment Act signed by President Obama on February 17 requires Troubled Asset Relief Program recipients to permit a non-binding, "Say-on-Pay" vote in their proxy materials and also requires the SEC to issue final rules and regulations within the next year. See also "New Guidance on 'Say-on-Pay' Voting and CEO/CFO Certification Requirements for TARP Recipients" above.

http://www.sec.gov/news/speech/2009/spch021809ebw.htm

Litigation

Arbitration Ordered Despite Party's Participation in Litigation

The Sixth Circuit upheld the lower court's holding that a contract dispute should be referred to arbitration despite the fact that the parties had engaged in litigation for several months.

Crossville Medical Oncology, P.C. (Crossville) entered into a written agreement with Glenwood Systems, Inc. (Glenwood Inc.) to provide medical billing services. Glenwood Inc.'s sole shareholder was also the owner of Glenwood LLC, a medical billing services company. Crossville brought an action against Glenwood LLC d/b/a/ Glenwood Inc. for breach of contract. Crossville's suit was dismissed because its agreement with Glenwood Inc. contained a mandatory arbitration clause.

On appeal, Crossville argued that Glenwood LLC waived its right to arbitrate by engaging in litigation for eight months before seeking to arbitrate. The Court held that Glenwood LLC's actions were "not inconsistent" with its right to arbitrate, and Crossville was not prejudiced by Glenwood LLC's delay in asserting its right. The Court noted that neither party had served discovery requests, exchanged any documents nor deposed any witnesses, and that Glenwood LLC asserted the arbitration clause as an affirmative defense in its answer to Crossville's complaint. The Court also rejected Crossville's argument that Glenwood LLC could not enforce the arbitration clause because it was not a party to the agreement at issue, finding that Glenwood Inc. was an "alter ego" and a "mere instrumentality" of Glenwood LLC. (*Crossville Medical Oncology, P.C. v. Glenwood Systems, LLC*, 2009 WL 383680 (6th Cir. Feb. 17, 2009))

District Court Dismisses Class Action Securities Lawsuit Against Pharmaceutical Company

A district court has dismissed a class action lawsuit filed by investors in Pozen Inc. (Pozen), a pharmaceutical company, in which they alleged that Pozen, its

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CEO and several other officers violated Sections 10(b) and 20(a) of the Exchange Act.

Plaintiffs alleged that defendants made false or misleading statements concerning the Food and Drug Administration's (FDA's) anticipated approval of Pozen's drug Trexima. Specifically, plaintiffs alleged that defendants misled investors by stating that the FDA had expressed concern about Trexima's "safety," when in fact it had expressed concern about the drug's "genotoxicity"—i.e., its propensity to cause cancer by altering DNA, and that defendants did not have a reasonable basis for their statement that Trexima could be FDA-approved by August 2007 considering that the drug had tested positive for genotoxicity in two separate studies. Plaintiffs alleged that Pozen CEO's sale of stock during the Class Period created an inference of scienter.

The Court granted the motion to dismiss. First, the Court held that defendants' use of the word "safety" to describe FDA's concerns about Trexima was not misleading because plaintiffs failed to show why a "genotoxicity" concern is more serious than any other "safety" concern. Second, plaintiffs failed to show why the positive results of two Trexima genotoxicity studies rendered the possibility of FDA's approval of Trexima highly unlikely. As noted by the Court, the relevant FDA guidelines permitted approval despite the positive results of the two studies, and FDA did in fact ultimately approve Trexima in 2008. Moreover, defendants' forward-looking statements about the anticipated launch of Trexima in August 2007 were protected by the Private Securities Litigation Reform Act's Safe Harbor provision because they were accompanied by "meaningful, cautionary language," and plaintiffs failed to show that defendants had actual knowledge that such statements were false when made. Finally, the Court held that defendant CEO's sale of his Pozen stock during the Class Period did not give rise to an inference of scienter where he sold only 6.7% of the stock, his sales were made pursuant to a Rule 10b5-1 plan, and the two other individual defendants did not sell any stock during the same period. (*Johnson v. Pozen Inc.*, 2009 WL 426235 (M.D.N.C. Feb. 19, 2009))

Broker Dealer

FINRA Announces New Regulation NMS Trade Reporting Modifiers

The Financial Industry Regulatory Authority (FINRA) will require the use of two new trade reporting modifiers to report transactions exempt from the Securities and Exchange Commission's "trade-through" rule that would apply to certain transactions (i) to correct bona fide errors in the execution of customer orders, and (ii) that offer print protection to displayed customer orders when trades are reported at prices inferior to such orders. Any such transactions must be in accordance with applicable SEC guidance relating to Regulation NMS Rule 611 to qualify for the trade-through exemptions. The FINRA notice announcing the change included an updated trade reporting modifier chart providing a uniform methodology for reporting trade modifiers including the new additions referenced above. The use of the "error correction" and "print protection" modifiers becomes mandatory under FINRA trade reporting rules on July 1, 2009.

http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117992.pdf

SEC Approves Rule Change Regarding Trading Ahead of Customer Limit Order

The Securities and Exchange Commission has approved a proposed rule change amending NASD Interpretive Material (IM) 2110-2 (Trading Ahead of Customer Limit Order) with respect to the determination of the minimum price improvement obligation in an over-the-counter equity security priced below

BROKER DEALER

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$1.00 where there is no published current inside spread or there is only a one-sided quote. The amended IM-2110-2 provides that where there is no published current inside spread, member firms may calculate a current inside spread by contacting and obtaining priced quotations from at least two unaffiliated dealers, and the highest bid and lowest offer obtained must be used as the basis for calculating the current inside spread for purposes of determining the member's minimum price improvement obligation. Members must document (i) the name of each dealer contacted, and (ii) the quotations received that were used as the basis for determining the current inside spread.

http://www.sec.gov/rules/sro/finra/2009/34-59382.pdf

NYSE and NYSE Alternext File Rule Changes Regarding DMMs

The New York Stock Exchange LLC (NYSE) and NYSE Alternext US LLC (formerly known as the American Stock Exchange) filed tandem rule proposals to reflect that Designated Market Makers (DMMs) on each exchange will no longer have agency responsibilities for orders entered on the exchanges' marketplaces. The changes became necessary after the NYSE recently filed a series of rule changes to replace specialists with DMMs. Because the DMM no longer functions as agent for orders displayed on the exchange's book in the current market structure, the proposed filings were introduced to amend legacy rules that retain the concept of the exchange market maker as agent.

http://www.sec.gov/rules/sro/nyse/2009/34-59415.pdf
http://www.sec.gov/rules/sro/nysealtr/2009/34-59416.pdf

Structured Finance and Securitization

House Financial Services Committee and House Judiciary Committee Issue Details on Mortgage Cramdown Legislation

On February 24, the House Judiciary Committee and the House Financial Services Committee (HFSC) released details of the combined housing bill H.R. 1106. The measure will combine the Judiciary Committee provisions to allow bankruptcy judges to modify mortgages on primary residences, and the HFSC legislation providing a servicer safe harbor, Hope for Homeowners improvements, FHA changes, and reforms to the FDIC insurance fund. On February 25, HFSC Chairman Barney Frank introduced a servicer safe harbor amendment to the legislation that would insulate servicers who implement any U.S. Treasury Department loan modification plan from litigation.

http://docs.house.gov/rules/111_hr_housing.pdf
http://www.rules.house.gov/111/AmndmentsSubmitted/hr1106/frank32_111_hr1106.pdf.

UDAP Legislation Re-Introduced in Senate; Senate Banking Committee Holds Hearing on Credit Cards

On February 12, Senate Banking Committee Chairman Christopher Dodd (D-CT) re-introduced S. 414 (The Credit Card Accountability, Responsibility and Disclosure Act) to amend the Consumer Credit Protection Act, ban abusive credit practices, enhance consumer disclosures and protect underage consumers. The bill limits fees and penalties, retroactive interest rate increases, unfair payment allocation practices, and double-cycle billing. The legislation also requires issuers to lower penalty rates imposed on a cardholder after six months if the cardholder meets the obligations of the credit card terms and provides each federal banking agency the authority to prescribe regulations governing unfair or deceptive practices by the institutions they regulate. On the same day, the Senate Banking Committee held a hearing entitled, "Modernizing Consumer Protection in the Financial Regulatory

STRUCTURED FINANCE AND SECURITIZATION

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System: Strengthening Credit Card Protections." The hearing featured testimony from representatives of the private sector including the Consumer Federation of America and the American Bankers Association, as well as professors of law and economics.

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s414is.txt.pdf
http://banking.senate.gov/public/index.cfm?Fuseaction=Hearings.Detail&HearingID=d8561426-8765-479e-9f0d-00c069cb3544

CFTC

CFTC Proposes Amended Requirements for Segregated Funds Acknowledgment Letters

The Commodity Futures Trading Commission has proposed to amend CFTC Regulations 1.20, 1.26 and 30.7 to require the inclusion of specified representations in acknowledgment letters obtained by futures commission merchants (FCMs) and derivatives clearing organizations (DCOs) from depositories with which the FCM or DCO holds customer segregated funds and/or secured amount funds. The additional representations include acknowledgments by the depository that customer funds are not subject to any right of setoff or lien for liabilities of the FCM or DCO, that the depository must treat such funds in accordance with the Commodity Exchange Act (CEA) and CFTC regulations, and that the depository must immediately release such funds upon proper notice and instruction by the FCM, DCO or CFTC. The CFTC proposals would leave intact that portion of Regulation 1.20 that makes it unnecessary for an FCM to obtain an acknowledgment letter from a DCO whose rules provide for the segregation of customer funds in accordance with the CEA and CFTC regulations. The CFTC proposal would further require FCMs and DCOs to obtain updated acknowledgment letters within 180 days after the publication of final regulations in the Federal Register.

The comment period for the CFTC proposal expires on March 23.

http://www.cftc.gov/newsroom/generalpressreleases/2009/pr5617-09.html

CFTC Proposes Amendments to CPO Reporting Requirements

The Commodity Futures Trading Commission has proposed amendments to its regulations relating to the content of periodic and annual reports by commodity pool operators (CPOs) to their investors. The amendments make a number of changes that affect pools operated by CPOs that are "fully registered," as well as pools that are offered in reliance on the reporting, disclosure and recordkeeping exemptions provided by CFTC Regulation 4.7 (4.7 pools).

Among the changes, the CFTC proposal would require the periodic account statements for 4.7 pools to disclose either the net asset value per outstanding participation unit or the total value of the applicable participant's interest in the pool as of the end of the reporting period. The amendments also specify certain specific information that would be required to be included in the monthly, quarterly or annual reports for fully registered pools and 4.7 pools that have multiple series or classes of ownership interests. For fully registered and 4.7 pools that operate as funds-of-funds, the amendments increase the maximum extension period for filing and distributing annual reports from 60 to 90 days (for a total of 180 days) and codify prior CFTC staff positions on the reporting of investee fund fees and expenses to investors. Reporting requirements for fully registered and 4.7 pools that are liquidating would also be streamlined under the proposed amendments. A number of other CFTC staff positions on the proper accounting treatment and presentation of special allocations of ownership equity and the combined presentation of gains and

CFTC

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losses for strategies involving both futures and related non-futures trading activities would be codified under the CFTC proposal, as would prior staff positions permitting offshore pools to prepare financial statements in accordance with International Financial Reporting Standards (IFRS), rather than U.S. generally accepted accounting principles, in certain circumstances. Finally, the CFTC proposal would remove the requirement that financial statements for pools that are operated by CPOs that are exempt from registration with the CFTC under Regulation 4.13 be prepared in accordance with U.S. GAAP.

The comment period for the CFTC proposal expires on March 26.

http://www.cftc.gov/newsroom/generalpressreleases/2009/pr5619-09.html

CFTC Approves Amendments to NFA Forex Requirements

The Commodity Futures Trading Commission has approved and set effective dates for a series of amendments to certain National Futures Association (NFA) requirements relating to Forex Dealer Members (FDMs) and forex customer statements.

The first set of amendments will take effect on April 1, 2009. These include changes made to NFA Compliance Rule 2-36 and require that hypothetical results used in forex promotional material comply with NFA Compliance Rule 2-29(c) and the related NFA Interpretive Notice to the same extent as performance results for futures contracts. FDMs and their associates also will be prohibited from exercising discretionary trading authority over customer accounts for which the FDM acts as counterparty.

Beginning on April 1, FDM weekly reports must be submitted by a supervisory employee who is, or is supervised by, a listed principal of the firm who is registered as an associated person, and FDMs will be required to have in place a written policy detailing their procedures for calculating rollover charges and payments.

Additional amendments will take effect as of June 1, including the implementation of new NFA Compliance Rule 2-44, which specifies the information that must be included in FDM confirmations and monthly statements and requires that customers be provided with access to daily statements. Amendments to NFA's Interpretive Notice to Compliance Rule 2-36(e), relating to FDMs' obligations to supervise the use of electronic trading systems, will take effect at the same time and will, among other things, require an FDM to notify NFA of the trading platform(s) that it uses, audit its trading system annually (which audit must be performed by an outside party initially and on a biennial basis thereafter), provide customers with certain disclosures about the system and its potential risks, and provide both customers and NFA with reports of realized and unrealized profits and losses (at year-end and upon request, respectively).

http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=2253
http://www.nfa.futures.org/news/PDF/CFTC/CR2_36_2_39_FRSec13_InterpNotc112408.pdf
http://www.nfa.futures.org/news/PDF/CFTC/CR2-44_Forex_Interp_Notc_112408.pdf
http://www.nfa.futures.org/news/PDF/CFTC/IntNotc_CR2-36e_Elec_Trading_Systems_112408.pdf

NFA Proposes Amendments to Alternative Net Capital and Security Deposit Requirements for FDMs

On February 23, the National Futures Association (NFA) submitted to the Commodity Futures Trading Commission for approval proposed amendments to NFA Financial Requirements Section 11 and the Interpretive Notice regarding Forex Transactions applicable to FDMs. The amendments would revise the alternative net capital requirements in Section 11(a). Currently, an FDM must maintain minimum adjusted net capital equal to the greater of (i) $15 million (to be raised to $20 million on May 16, 2009) or (ii) 5% of all liabilities owed to forex customers. As proposed to be revised, the rule will require FDMs to maintain adjusted minimum net capital equal to $15 million ($20 million as of May 16, 2009) plus 5% of all forex customer liabilities in excess of $10 million. FDMs using straight-through-processing for all customer transactions would not be required to take the additional 5% charge.

NFA also proposed amendments to NFA Financial Requirements Section 12, which relates to security deposits that must be maintained by FDMs. The amendments would retain the current security deposit requirement of 1% of the notional value for certain "major currencies" and a 4% of the notional value for all other currencies, but delete the exemption from the security deposit requirement for FDMs that maintain adjusted net capital equal to or in excess of 150% of their capital requirements.

http://www.nfa.futures.org/news/PDF/CFTC/FRSec11_IntNotc021909.pdf
http://www.nfa.futures.org/news/PDF/CFTC/FRSec12_IntNotc021909.pdf

Private Investment Funds

President's Budget Outline Proposes to Tax Carried Interest as Ordinary Income

On February 26, President Obama and the Office of Management and Budget (OMB) released the President's budget outline for Fiscal Year 2010. Summary Table S-6, which sets out proposals that will either increase or decrease deficits by certain amounts for 2009-2014, contains a line item proposing to tax carried interest as ordinary income beginning in 2011. The "carried interest" currently retains the character of the income of the fund's investments and may be taxed as ordinary income, long-term capital gain or short-term capital gain. The tax rate on long-term capital gain realized by individuals is currently 15%, but is proposed to increase to 20% in 2011. The maximum federal income tax rate on ordinary income is currently 35%, with the pre-2001 maximum rate of 39.6% proposed to be reinstated.

http://www.whitehouse.gov/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf

Three Bills Proposed in Connecticut General Assembly

Three bills concerning investment funds have recently been introduced in the Connecticut General Assembly that would limit eligible investors, require annual licensing, and prescribe certain disclosures of portfolio information to Connecticut-domiciled pension funds. The bills are titled "An Act Concerning Hedge Funds", "An Act Concerning the Licensing of Hedge Funds and Private Capital Funds" and "An Act Requiring the Disclosure of Financial Information to Prospective Investors in Hedge Funds and Private Capital Funds", respectively. The introduction of the bills evidences the continued suspicion and activism against private investments funds, and activism by state legislators and regulators.

PRIVATE INVESTMENT FUNDS

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Federal Legislation. See also the January 30, 2009, edition of *Corporate and Financial Weekly Digest*, covering the federal Hedge Fund Transparency Act referred to the U.S. Senate Committee on Banking, Housing and Urban Affairs on January 29.

http://www.cga.ct.gov/2009/TOB/S/2009SB-00953-R00-SB.htm
http://www.cga.ct.gov/2009/TOB/H/2009HB-06477-R00-HB.htm
http://www.cga.ct.gov/2009/TOB/H/2009HB-06480-R00-HB.htm

Banking

FinCEN Releases Latest Yearly Mortgage Fraud Report

On February 25, the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Treasury Department, released its latest mortgage fraud analysis entitled *Filing Trends in Mortgage Loan Fraud*.

Among other things, this report outlines a 44% increase in the filing of suspicious activity reports (SARs) by financial institutions in the 12 months ending June 2008 as compared with the prior year. In total, from July 1, 2007, through June 30, 2008, the number of SARs filed by financial institutions reporting mortgage loan fraud totaled 62,084, up from 43,053 reported between July 1, 2006, and June 30, 2007. In total, nearly 900 filing institutions filed SARs that detailed suspected mortgage fraud.

The 62,084 filings by financial institutions related to suspected mortgage loan fraud represent 9% of all depository institution SARs filed during the relevant period. The report also notes that, in the last two years FinCEN has conducted this review, mortgage loan fraud was the third most reported activity characterization, with the general category of Bank Secrecy Act/structuring/money laundering characterizations being first and check fraud characterizations being second.

http://www.fincen.gov/news_room/nr/pdf/20090225.pdf

FDIC Closes $1.45 Billion Sale of Loans Through Private/Public Partnership Transactions

The Federal Deposit Insurance Corporation (FDIC) announced on February 26 the conclusion of the sale of $1.45 billion of performing and nonperforming residential and commercial construction loans in distressed markets through the use of two private/public partnership transactions. In the two recent transactions, the FDIC placed the loans, which were exclusively from the failed First National Bank of Nevada, into a limited liability corporation (LLC). The FDIC retained an 80% interest in the assets with the winning bidder acquiring an initial 20% stake. Once certain performance thresholds are met, the FDIC's interest drops to 60%. Any future expenses and income will be shared between the purchaser and the FDIC based on their respective percentage ownership interests. By retaining a participation interest in the structure, the FDIC as receiver will benefit in the future return of the portfolio in addition to receiving immediate proceeds from the purchaser for its 20% interest in the portfolio.

The closure of this sale brings the total amount of assets sold utilizing private/public partnership transactions to approximately $3.2 billion over the last year, in five separate transactions. Based on “the success of the program and the positive feedback received from the private sector,” the FDIC anticipates it will utilize this and similar sales strategies in the future.

http://www.fdic.gov/news/news/press/2009/pr09026.html

BANKING

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Fed Issues New Guidance to CPP Participants on Dividends and Capital Redemptions and Repurchases

On February 24, the Board of Governors of the Federal Reserve System (Federal Reserve) issued a supervisory letter (Letter) intended for distribution to all entities regulated by the Federal Reserve. The letter, SR 09-4, advised bank holding companies (BHCs) and state-member banks to use care before declaring dividends, particularly with respect to trust preferred securities, or repaying outstanding debt obligations, if such entities have received assistance under the Troubled Asset Relief Program's Capital Purchase Program (CPP). While the guidance issued under new SR 09-4 largely restated existing Federal Reserve guidance with respect to preserving the holding company as a source of strength, the Letter also stated as follows: "[A] recipient of taxpayer funds through [new governmental capital programs such as the CPP] should consider and communicate reasonably in advance to Federal Reserve supervisory staff how the BHC's proposed dividends, capital redemptions, and capital repurchases are consistent with the requirements applicable to its receipt of capital under the program and its ability to redeem, within a reasonable period of time and with Federal Reserve consent, its outstanding capital issuance under the program. While not expressly prohibited, BHCs are discouraged from using proceeds of the CPP or other public investment to pay dividends on trust preferred securities or repay debt obligations. If the financial condition of a CPP or other program participant deteriorates significantly, it may be appropriate for that BHC to cease paying dividends on the investment, as well as on trust preferred securities. Likewise, participants in such programs should ensure that stock redemptions and repurchases are consistent with program requirements and, if permissible, are consistent with redemption of capital issued under the program as soon as reasonably feasible and appropriate."

Under the standard terms of the CPP, so long as dividends are current on outstanding preferred stock issued to the U.S. Treasury Department, dividends to existing shareholders are not prohibited. It is not clear at this time whether the Letter is intended, via regulatory fiat, to change the terms of the CPP documents. Consultation with the Federal Reserve is therefore recommended on an individual institution basis.

http://www.federalreserve.gov/boarddocs/srletters/2009/SR0904.htm

UK Developments

FSA Publishes *Market Watch 31*

On February 26, the UK Financial Services Authority (FSA) published issue 31 of its *Market Watch* newsletter. This issue of *Market Watch* focuses on transaction reporting. In particular, the FSA emphasized that regulated firms must have in place appropriate systems and controls covering all aspects of transaction reporting, since the FSA's ability to identify and investigate possible market abuse depends on it receiving complete and accurate transaction reports from firms. The FSA drew attention to its Transaction Reporting User Pack, which summarizes how transaction reports should be completed, and issue 29 of *Market Watch,* which includes transaction reporting information to be considered by firms when assessing their system and controls.

http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter31.pdf

UK DEVELOPMENTS

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European Leaders Advocate Enhanced Regulation

A group of European heads of government and finance ministers held a summit in Berlin on February 22 ahead of the Group of 20 summit scheduled to take place in London on April 2. Representatives of the European Commission and eight leading European financial centers including Germany, France and the UK agreed on seven key points. They issued a joint statement in which they endorsed a plan to create a comprehensive international regulatory framework. Although the details remain to be worked out, the statement endorsed a plan to create a regulatory framework covering "all financial markets, products and participants—including hedge funds and other private pools of capital which may pose a systemic risk."

The joint statement continued: "Private investment companies, including hedge funds, should also be subjected to international control. If left uncontrolled they can always become a threat to the stability of the global financial system." The European leaders added that rating agencies should also be "registered and monitored" in light of the influence they exercised and recommended the imposition of sanctions on tax havens and other countries allowing non-transparent and improper business transactions.

http://www.bundeskanzlerin.de/nn_127694/Content/EN/Artikel/2009/02/2009-02-22-g20-eu-vorbereitungsgipfel__en.html

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* Click here to access the *Corporate and Financial Weekly Digest* archive.

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