

## Corporate and Financial Weekly Digest



February 6, 2009

### SEC/Corporate

#### SEC Issues Rules Requiring Issuers to Provide Financial Information in Interactive Data Format

On January 30, the Securities and Exchange Commission issued final rules requiring issuers to provide financial information in interactive data format using eXtensible Business Reporting Language (XBRL) in periodic reports and registration statements filed with the SEC. As reported in the December 19, 2008, edition of [\*Corporate and Financial Weekly Digest\*](#), the interactive data will be filed as an exhibit to an issuer's financial statements and will supplement disclosure filed using the SEC's traditional EDGAR electronic filing format. The XBRL requirements apply to domestic and foreign companies using U.S. Generally Accepted Accounting Principles, and will eventually apply to foreign private issuers using International Financial Reporting Standards issued by the International Accounting Standards Board.

To create interactive data files, issuers will be required to tag their financial statements using labels from a standard list of tags. In the first year of an issuer's interactive data reporting, financial statement footnotes and schedules would only be tagged in block text (each financial statement note would require only one tag). Thereafter, issuers would also be required to tag detailed disclosures contained within their footnotes and schedules.

The principal changes in the final rules from the proposing release published by the SEC on May 30, 2008, include:

- Modified treatment of liability for the interactive data files under the federal securities laws only will be available for interactive data files that a filer submits within 24 months of the time the filer first is required to submit interactive data files and no later than October 31, 2014.
- The filers that will be phased in during year one will first be required to submit an interactive data file for a periodic report on Form 10-Q, Form 20-F or Form 40-F containing financial statements for a fiscal period ended on or after June 15, 2009. Filers that are phased in during years two and three will be treated in a similar manner. Filers that first become subject to the requirement to submit interactive data after year three will first be required to submit an interactive data file for a quarterly report on Form 10-Q or annual report on Form 20-F or Form 40-F, as applicable.
- The final rules require that interactive data be submitted with a registration statement filing under the Securities Act of 1933 only after a price or price range has been determined and any later time when the financial statements are changed, rather than requiring interactive data submissions with each filing.

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- The final rules require issuers to submit interactive data for financial statements contained in additional forms—Securities Act registration statements on Forms F-9 and F-10 and periodic reports on Forms 40-F as well as reports on Forms 8-K and Form 6-K that contain revised or updated financial statements.
- A filer must post the interactive data exhibit on its corporate website not later than the end of the calendar day it submitted or was required to submit the interactive data exhibit, whichever is earlier. As proposed, website posting would have been required by the end of the business rather than calendar day.
- Interactive data will be required to be posted for at least 12 months on an issuer's website. The proposing release did not specify a time period.
- While the final rules require filers to tag separately each amount within a footnote or schedule (i.e., monetary value, percentage, and number), the final rules will permit, but not require, filers to tag, to the extent they choose, each narrative disclosure within a footnote.

<http://www.sec.gov/rules/final/2009/33-9002.pdf>

### **SEC Adopts Amendments to Existing Rules and Proposes New Rules for Nationally Recognized Statistical Rating Organizations**

On February 2, the Securities and Exchange Commission adopted amendments to existing rules and re-proposed new rules for Nationally Recognized Statistical Rating Organizations (NRSROs).

First, the SEC adopted rule amendments updating Form NRSRO to provide increased disclosure of performance measurements statistics and the procedures and methodologies used by NRSROs in determining credit ratings for structured finance products and other debt securities. Second, the SEC adopted rule amendments requiring NRSROs to make, keep and preserve additional rating records and to require a portion of these records to be made publicly available. Third, the rule amendments require NRSROs to make publicly available in eXtensible Business Reporting Language (XBRL) format on their websites a random sample of 10% of the ratings history for each class in which they are registered and have issued 500 or more issuer-paid credit ratings, with each new ratings action to be reflected in such histories no later than six months after they are taken. Finally, the SEC adopted an amendment requiring NRSROs to provide the SEC with an additional annual report.

The SEC also proposed rules requiring NRSROs to publicly disclose in XBRL format their credit rating histories for all outstanding issuer-paid credit ratings issued on or after June 26, 2007. This amendment would, as proposed, permit NRSROs to delay publicly disclosing a rating action for up to 12 months. The SEC additionally re-proposed an amendment that would prohibit an NRSRO from issuing an issuer-paid rating for a structured finance product unless the information about the product provided to the NRSRO to determine the rating and thereafter monitor it is made available to other persons. Finally, the SEC requested comment regarding the benefits of applying its disclosure rules for issuer-paid credit ratings to subscriber-paid credit ratings.

<http://sec.gov/rules/final/2009/34-59342.pdf>

<http://sec.gov/rules/proposed/2009/34-59343.pdf>

## SEC Extends Comment Period for Roadmap for Use of Financial Statements Prepared in Accordance with IFRS

On February 3, the Securities and Exchange Commission extended the public comment period for a proposed roadmap and amendments related to the use of financial statements prepared in accordance with International Financial Reporting Standards (IFRS) in SEC filings by U.S. issuers. The comment period, which was originally due to expire on February 19, has been extended until April 20.

As described in the November 21, 2008, edition of [\*Corporate and Financial Weekly Digest\*](#), the proposed roadmap sets forth milestones that, if achieved, could lead to the required use of IFRS by U.S. issuers by 2014 if the SEC believes it to be in the public interest and for the protection of investors. The SEC's proposal would permit earlier use of IFRS by a limited number of U.S. issuers.

<http://www.sec.gov/rules/proposed/2009/33-9005.pdf>

## Litigation

### Court Denies Motion to Dismiss Insider Trading Action

The Securities and Exchange Commission brought an action against the senior vice president of a sporting goods company and four other individuals for the alleged misappropriation of material, nonpublic information about the company's plans to acquire a competitor. The SEC alleged that the VP told his father, who told three of his friends, who in turn purchased shares of the competitor in advance of the acquisition and sold shortly after it was announced, collectively profiting approximately \$160,000.

In denying the motion to dismiss of one of the defendant-friends, the Western District of Pennsylvania held that the SEC adequately pleaded its claims under the Supreme Court's standard in *Bell Atlantic Corp. v. Twombly*. Under *Twombly*, the court must determine that the complaint's factual allegations "raise a right to relief above the speculative level". Furthermore, without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only "fair notice," but also the "grounds" on which the claim rests. The court also found that actions by the SEC need not satisfy the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 (articulated by the Supreme Court in *Tellabs v. Makor*) because the SEC is not a private litigant. Because the allegations satisfied the *Twombly* standard as well as the requirement for pleading fraud with particularity under Federal Rule of Civil Procedure 9(b), the court held that the SEC had satisfied its pleading burden.

The court also rejected defendant's contention that the action be dismissed for lack of personal jurisdiction because actions by the SEC are authorized under a nationwide service of process statute. Although only one of the five defendants was a Pennsylvania resident, the court held that actions by the SEC may be brought in "any forum within the United States," without consideration of the defendant's contacts with the state in which the court sits. (*SEC v. Queri*, 2009 WL 186017 (W.D. Pa. Jan. 26, 2009))

### Plaintiff Alleges Sufficient Facts to Satisfy *Tellabs* Standard

The Southern District of Mississippi denied a motion to dismiss claims brought against a corporation and its executives under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder stemming from certain alleged misstatements in the defendants' filings with the Securities and Exchange Commission that led to a restatement of earnings for previous quarters. The court, analyzing the motion under the Supreme Court's standard in *Tellabs v. Makor*, held that several of the plaintiff's allegations "give rise to a

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strong inference of scienter.” Under *Tellabs*, a complaint will survive a Rule 12(b)(6) motion to dismiss “only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.” *Tellabs* requires that the complaint, when considered in its entirety and upon consideration of plausible opposing inferences, give rise to a strong inference of scienter.

The court found that the plaintiff’s complaint met the *Tellabs* standard and dismissed the motion. It cited specific allegations which it found created a strong inference of scienter, including, among other things, the alleged specific knowledge of the defendants, the timing of an amendment to an employment contract which would affect the corporation’s earnings, and the financial incentives for defendants in underreporting income in the relevant and subsequently restated quarters. (*Beightol v. Navarre Corp., Inc.*, 2009 WL 169069 (S.D. Miss. Jan. 26, 2009))

## Broker Dealer

### CBOE Amends Price Requirement for Underlying Securities

On February 2, the Securities and Exchange Commission approved an amendment by the Chicago Board Options Exchange (CBOE) eliminating the \$3 market price per share requirement for continued listing and for listing of additional options series on an underlying security. The amendment eliminates from CBOE Rule 5.4.01 the \$3 underlying price requirement for the continued approval of an underlying security, and also eliminates from CBOE Rule 5.4.02 the prohibition against listing additional options series on an underlying security with a price less than \$3. The CBOE believes the \$3 underlying price requirement could have a negative effect on investors in the current volatile market environment. Securities underlying options traded on the CBOE remain subject to other minimum standards for continued approval and for listing of additional option series.

<http://www.sec.gov/rules/sro/cboe/2009/34-59336.pdf>

### FINRA Adopts Anti-Intimidation/Coordination Rule

On February 2, the Securities and Exchange Commission approved a proposed rule change by the Financial Industry Regulatory Authority (FINRA) to adopt as FINRA Rule 5240 the National Association of Securities Dealers’ Anti-Intimidation/Coordination Rule (NASD Interpretive Material 2110-5) without material change. NASD IM-2110-5 identifies three general types of conduct inconsistent with just and equitable principles of trade: (i) coordinating activities by members involving quotations, prices, trades and trade reporting (e.g., agreements to report trades inaccurately or maintain certain minimum spreads); (ii) “directing or requesting” another member to alter prices or quotations; and (iii) engaging in conduct that threatens, harasses, coerces, intimidates or otherwise attempts improperly to influence another member or person associated with a member. NASD IM-2110-5 also sets forth seven specific exclusions that identify bona fide commercial activity that is permitted (e.g., bona fide negotiations and unilateral decisions regarding spreads).

<http://www.sec.gov/rules/sro/finra/2009/34-59335.pdf>

### NYSE Arca Proposes to Increase Maximum Term for Flexible Exchange Options

The Securities and Exchange Commission is seeking comments on NYSE Arca’s proposed rule change to increase the maximum term for Flexible Exchange (FLEX) Options. The maximum term generally is three years for FLEX Equity Options and five years for FLEX Index Options. NYSE Arca proposes to increase the maximum term for all FLEX Options to 15 years and

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to eliminate the requirement that a FLEX Post Official make a liquidity assessment. NYSE Arca believes that expanding the eligible term for FLEX Options will meet investor interest in expanding the maximum term and accommodate investor desire to bring trades that are otherwise conducted in the over-the-counter market to an exchange environment.

Comments are due by February 24.

<http://www.sec.gov/rules/sro/nysearca/2009/34-59305.pdf>

## Structured Finance and Securitization

### REMIC Reform Legislation Proposed

On February 4, Senator Jack Reed issued the text of the Real Estate Mortgage Investment Conduit (REMIC) Improvement Act of 2009, an amendment to the American Recovery and Reinvestment Act of 2009 (Economic Stimulus Bill). The amendment to the Economic Stimulus Bill would allow REMICs to dispose of loans under the Troubled Asset Relief Program (TARP) without endangering the REMIC status of the trust and would require existing REMICs to meet certain eligibility criteria related to loan modification or risk losing their REMIC status. Unless the servicer of a REMIC securitization seeks and obtains a waiver from the Secretary of the Treasury, governing documents would need to be amended to satisfy the eligibility criteria within 3 months of the amendment's enactment or the securitization would risk REMIC status disqualification. The amendment provides that if a REMIC, which is defined by section 860D(a) of the Internal Revenue Code of 1986, modifies or disposes of a troubled asset under TARP, such action will not be treated as prohibited under section 860F(a)(2) and that any proceeds from the modification or disposition will be treated as amounts received under qualified mortgages. The amendment also requires the establishment of a home mortgage loan relief program under TARP and related authorities established under the Emergency Economic Stabilization Act.

[http://www.kattenlaw.com/files/upload/REMIC\\_Legislation.pdf](http://www.kattenlaw.com/files/upload/REMIC_Legislation.pdf)

### House Financial Services Committee Passes Hope for Homeowners and Servicer Safe Harbor Legislation

On January 27, Representative Barney Frank introduced H.R. 703 to promote bank liquidity and lending through changes to deposit insurance rules, changes to the HOPE for Homeowners (H4H) refinancing program and other enhancements, as reported in the January 30, 2009, edition of [\*Corporate and Financial Weekly Digest\*](#). On February 4, the House Financial Services Committee (HFSC) held a markup hearing of legislation to modify H4H (H.R. 787), provide a safe harbor for servicers who engage in specified loan modifications (H.R. 788), and make permanent the increase in the deposit insurance limit of the Federal Deposit Insurance Corporation (H.R. 786). The committee passed the amended forms of all three bills. H.R. 787 was amended to reinstate several anti-fraud provisions which were taken out of the Emergency Economic Stabilization Act. Additionally, the HFSC passed an amendment to H.R. 788 clarifying that borrowers would retain their rights to claims against servicers who are originators.

[http://www.house.gov/apps/list/speech/financialsvcs\\_dem/mu020409.shtml](http://www.house.gov/apps/list/speech/financialsvcs_dem/mu020409.shtml)

Please see **“SEC Adopts Amendments to Existing Rules and Proposes New Rules for Nationally Recognized Statistical Rating Organizations”** in [\*\*SEC/Corporate\*\*](#).

Please see **“Treasury Announces New Restrictions on Executive Compensation Under TARP”** in [\*\*Banking\*\*](#).

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## CFTC

### CFTC Launches New Monthly Report

On February 4, the Commodity Futures Trading Commission announced a six-month trial launch of a new monthly report entitled, "This Month in Futures Markets" that will be generated by the CFTC's Office of the Chief Economist to add transparency to the information provided by the CFTC to the public regarding regulated futures markets. Drawing from the CFTC's Commitment of Traders data, the report will display detailed market statistics for 22 actively traded commodity markets, including commercial and non-commercial holdings, position and net position percentages of open interest by category, spreading, and concentration ratios for the positions held by the largest four and eight traders.

<http://www.cftc.gov/newsroom/generalpressreleases/2009/pr5607-09.html>

## Private Investment Funds

### SEC Commissioners Support Increased Hedge Fund Oversight

In a speech at the Investment Company Institute's Board of Governors Winter Meeting on January 26, Commissioner Luis Aguilar of the Securities and Exchange Commission repeated his view that Congress should "close the glaring loopholes in securities regulation by unequivocally stating that the SEC has jurisdiction and the ability to regulate hedge fund advisers and derivatives..." In a speech earlier in January this year to the North American Securities Administrators Association's Winter Enforcement Conference, he explained in more detail his view of the need for congressional action to authorize SEC oversight of hedge funds and funds of funds as well as their advisers and financial derivatives. He is joined by SEC Commissioner Elisse Walter, who expressed support for hedge fund registration in a recent interview with Reuters, and new SEC Chairman Mary Schapiro, who stated in her Senate confirmation hearings that she believes "all systemically important financial institutions need to be regulated" and that she "would specifically endorse the registration of hedge funds."

Senators Charles Grassley and Carl Levin introduced the Hedge Fund Transparency Act as a bill in the Senate on January 29, which would require a form of SEC registration for privately offered funds with assets of \$50 million or more. The bill was referred to the Senate Committee on Banking, Housing and Urban Affairs, as reported in the January 30, 2009, edition of [\*Corporate and Financial Weekly Digest\*](#).

<http://www.sec.gov/news/speech/2009/spch012609laa.htm>  
<http://www.sec.gov/news/speech/2009/spch011009laa.htm>  
<http://uk.reuters.com/article/hedgeFundsNews/idUKLNE51304A20090204>  
<http://levin.senate.gov/newsroom/supporting/2009/PSI.SchapiroResponses.012209.pdf>

## Banking

### Treasury Announces New Restrictions on Executive Compensation under TARP

On February 4, the White House announced that the U.S. Treasury Department will be issuing new guidelines (Guidelines) on executive compensation affecting companies that are receiving financial assistance from the U.S. government under the Troubled Asset Relief Program (TARP).

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Pursuant to the Guidelines, all companies that have received or will receive government assistance under TARP must provide initial and annual certifications to the Treasury that such company has strictly complied with statutory, Treasury and contractual executive compensation restrictions. In addition, the compensation committees must detail how their senior executive compensation program discourages excessive and unnecessary risk-taking.

The Treasury will issue proposed guidance, subject to public comment, with respect to executive compensation requirements as they relate to *future* generally available capital access programs (i.e., programs that have the same terms for all recipients). Components of this proposal will include the following:

- Senior executives at such companies will be limited to \$500,000 in total annual compensation plus restricted stock unless such restriction is waived with full public disclosure and a non-binding “say on pay” shareholder resolution (if such vote is requested). All such companies must review and disclose the reasons that compensation arrangements of both the senior executives and other employees discourage excessive and unnecessary risk-taking.
- Such companies will be required to “claw back” bonuses and incentive compensation from up to 25 senior executives if the executives are found to have knowingly engaged in providing inaccurate information relating to the financial statements or performance metrics used to calculate their own incentive pay.
- The top five senior executives at such companies will not be allowed a “golden parachute” payment greater than one year’s compensation.
- The boards of directors of such companies will be required to adopt a company policy relating to approval of luxury expenditures.

With respect to companies that will receive “exceptional assistance” from the Treasury (i.e., such company is receiving more assistance than is widely available under a standard Treasury assistance program), senior executives at such companies will be limited to \$500,000 in total annual compensation except for restricted stock awards. Payments to executives at such companies in excess of \$500,000 annually must be made in restricted stock or other similar long-term incentive arrangements, and such restricted stock generally may vest only when the U.S. government has been repaid with interest. Moreover, companies that receive exceptional assistance in the future must have in place a process enabling such company to “claw back” bonuses and incentive compensation from any of the company’s top twenty-five senior executives. Finally, future exceptional assistance recipients will be required to (i) ban golden parachute payments upon severance from employment for the top ten senior executives at such companies; and (ii) limit golden parachute payments to the next twenty-five senior executives (at a minimum) to one year’s compensation upon severance from employment. It appears that these rules will not apply retroactively to companies that have already received extraordinary assistance.

Finally, the Guidelines detail certain actions the White House and the Treasury believe should be undertaken in efforts to promote long-term regulatory reform with respect to compensation structures and risk management. Among those items to be considered include: (1) a requirement that all compensation committees of public financial institutions review and disclose strategies for aligning compensation with sound risk management; (2) use of long-term perspective in the development of compensation packages for top executives; (3) utilization of “say on pay” shareholder resolutions with respect to executive compensation; and (4) a conference hosted by the Treasury with shareholder

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advocates, major public pension and institutional investor leaders, policy makers, executives, academics and others on executive pay reform at financial institutions.

<http://www.treasury.gov/press/releases/tg15.htm>

## Financial Markets

### **House Agriculture Committee Holds Hearings on the Derivatives Markets Transparency and Accountability Act of 2009**

The House Agriculture Committee held hearings on February 3 and 4 on the Derivatives Markets Transparency and Accountability Act of 2009, a draft bill prepared by Committee Chairman Collin Peterson. As proposed, the legislation would amend the Commodity Exchange Act to, among other things, (i) require the Commodity Futures Trading Commission to establish speculative position limits for all commodities, (ii) narrow the definition of bona fide hedging transactions that would be excluded in calculating speculative positions, (iii) mandate clearing of essentially all over-the-counter transactions, and (iv) ban “naked” credit default swaps by making it unlawful for a party to enter such a contract unless it had a direct exposure to financial loss should the credit event occur. Witnesses at the hearings addressed these and other provisions.

[http://agriculture.house.gov/inside/Legislation/111/PETEMN\\_001\\_xml.pdf](http://agriculture.house.gov/inside/Legislation/111/PETEMN_001_xml.pdf)  
<http://agriculture.house.gov/hearings/statements.html>

### **Senator Harkin Reintroduces Legislation for the Regulation of Derivatives**

On January 15, Senator Tom Harkin introduced the Derivatives Trading Integrity Act of 2009, the text of which had been introduced in the previous Congress. The proposed legislation would amend the Commodity Exchange Act to (i) eliminate regulatory exemptions and exclusions that were created by the Commodity Futures Modernization Act of 2000, and (ii) require that all futures contracts, swaps and other over-the-counter derivatives contracts be traded on a regulated exchange. The bill was referred to the Committee on Agriculture, Nutrition and Forestry, of which Mr. Harkin is Chairman.

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:s272is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s272is.txt.pdf)

### **Legislation Proposed in House to Create Commission on Financial Accountability**

Representative John Larson, together with 17 other members of the House, sponsored the Commission on Financial Crisis Accountability Act of 2009. The legislation would “establish a commission on the tax and fiscal implications of the regulation of financial products and arrangements” and would “study the current financial crisis, its causes and impact on the Federal deficit and tax revenues.” The bill was introduced and referred to the House Financial Services and the Ways and Means Committees on January 28.

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h768ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h768ih.txt.pdf)

\* Click [here](#) to access the *Corporate and Financial Weekly Digest* archive.

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