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Corporate and Financial Weekly Digest

JULY 10, 2009

## SEC/CORPORATE

**NYSE Proposes Permanent Reduction of Market Capitalization Threshold to $15 Million**

On June 30, the New York Stock Exchange, LLC proposed to make permanent the current temporary reduction of its global market capitalization continued listing standard from $25 million to $15 million.
As amended, Rule 802.01B of the NYSE's Listed Company Manual would provide that suspension and delisting procedures will be initiated for companies (including limited partnerships and real estate investment trusts) which have an average global market capitalization over a consecutive 30 trading-day period of less than $15 million.

In the NYSE's submission to the Securities and Exchange Commission, the NYSE cited reduced stock prices as a reason for the permanent rule change, stating that it originally increased its market capitalization continued listing threshold from $15 million to $25 million in 2004, when stocks were priced "far higher" than they are now. The NYSE further asserted that, as a result of its recent experience with a $15 million market capitalization threshold, it has concluded that companies which are in compliance with all other NYSE rules remain "viable enterprises and suitable for auction market trading."

As previously reported in the January 30 and March 6 editions of *Corporate and Financial Weekly Digest*, the NYSE temporarily reduced its market capitalization threshold to $15 million effective January 22, 2009, and then extended such reduction through June 30, 2009.

Under the SEC's rules, a self-regulatory organization's proposed rule change does not become operative until 30 days after the date of its filing with the SEC. However, the NYSE has requested a waiver of this 30-day delay.

Click here to read the NYSE's submission to the SEC regarding the proposed permanent rule change.

## LITIGATION

**Remand Appropriate Because Fraud Claim Did Not Necessarily Raise Federal Issue**

The plaintiff filed a complaint in California state court alleging four state law causes of action, including claims for fraud, in connection with a "hostile takeover" of the plaintiff. The defendant removed the action to federal district court, asserting that federal subject matter jurisdiction was proper because plaintiff's fraud claims involved substantial questions of federal securities law—specifically, interpretation of the Williams Act, an amendment to the Securities and Exchange Act of 1934 regulating tender offers. The plaintiff then moved to remand the case back to state court, arguing that remand was appropriate because there was no federal subject matter jurisdiction.

The court first pointed out that in analyzing whether jurisdiction was proper, it must look solely to the allegations of the complaint, and that there was a "strong presumption" against removal jurisdiction. In determining whether federal subject matter jurisdiction existed, the court applied the Supreme Court's decision in *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, which held that federal jurisdiction is appropriate where: (i) "the state law claim 'necessarily raises a stated federal issue,'" (ii) "the federal issue is 'both actually disputed and substantial,'" and (iii) "a federal forum may entertain the issue 'without disturbing any congressionally approved balance of federal and state judicial responsibilities.'"

The court held that plaintiff's fraud claim did not "necessarily" raise a stated federal issue, and therefore remand was appropriate. Specifically, it found that the claim "does not rely on construction or interpretation of the Williams Act, and the claim may be viable even if no Williams Act violation is found." Further, the court held that remand was appropriate even though the plaintiff's fraud claim "may embrace a point of federal securities law," because "federal law did not create [the] claim and is not essential in determining whether [the plaintiff] has a right to relief." (*Emulex Corp. v. Broadcom Corp.*, 2009 WL 1872694 (C.D. Cal. June 29, 2009))

**Insider Stock Sales That Were Not Unusual Did Not Raise Inference of Scienter**

Plaintiffs, purchasers of the common stock of a sportswear manufacturing company, commenced a class action litigation against the company and two of its officers and directors, alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Plaintiffs alleged that manufacturing difficulties in one of the company's offshore facilities were not disclosed to investors, and that despite defendants' knowledge of the difficulties, defendants continued to issue and reaffirm positive earnings guidance.

Defendants moved to dismiss the complaint, arguing that the complaint failed to allege scienter adequately. Plaintiffs had attempted to allege scienter by, among other things, pointing to the individual defendants' insider stock sales in excess of a combined $96 million during the class period. Analyzing the complaint's allegations under the standard set forth by the Supreme Court in *Tellabs v. Makor Issues and Rights, Ltd.*, the court granted defendants' motion because, among other things, plaintiffs failed to demonstrate that the stock sales were "unusual" or "suspicious."

In particular, the court found that the volume and the value of the insider sales were not unusual, and "occurred weeks before the principal allegation of material misstatement, and many months before the release of any negative information that caused [the] stock price to plummet." Moreover, only two insiders were alleged to have engaged in insider trading and the executives responsible for overseeing the troubled facility were not among those alleged to have made such trades. Further undercutting any inference of scienter, the trades by the defendant whose stock sales comprised over 99% of the total insider trading were made pursuant to a non-discretionary trading plan. (*In re Gildan Activewear, Inc. Sec. Litig.*, 2009 WL 1919618 (S.D.N.Y. July 1, 2009))

## BROKER DEALER

**FINRA Recommends Review of Municipal Securities Activities**

The Financial Industry Regulatory Authority has issued Regulatory Notice 09-35 recommending that firms engaged in municipal securities business review and, if necessary, modify their policies and procedures in light of changes to the Municipal Securities Rulemaking Board's (MSRB) Electronic Municipal Market Access system (EMMA) and changes to MSRB Rule G-32 (governing disclosures in connection with new issues) and MSRB Rule G-36 (relating to the delivery of official statements).

Effective July 1, EMMA includes continuing disclosures submitted by municipal bond issuers and became the sole entity designated by the Securities and Exchange Commission as a nationally recognized municipal securities information repository. The changes reflect recent amendments to Rule 15c2-12(d)(2) of the Securities Exchange Act of 1934, as amended. The amendments also modified the small issuer exemption in Rule 15c2-12(d)(2), and municipal securities underwriters and dealers may need to amend their existing policies and procedures with respect to small offerings.

The changes to MSRB Rule G-32 and MSRB Rule G-36, effective as of June 1, authorize the MSRB to launch EMMA as its primary municipal market disclosure service, allow the MSRB to implement an "access equals delivery" standard for dissemination of official statements, consolidate MSRB Rule G-32 and the official statement filing requirements of MSRB Rule G-36 into new MSRB Rule G-32, implement new requirements when an issue of municipal securities is exempt from Rule 15c2-12 and replace Forms G-36 (Official Statements) and G-36 (Advance Refunding Documents) with new Form G-32.

Click here to read Regulatory Notice 09-35.

**FINRA Requests Comment on Rule Governing Investment Company Securities**

The Financial Industry Regulatory Authority is requesting comment on a proposed FINRA rule regarding the regulation of members' activities in connection with the sale and distribution of registered investment company securities. Proposed FINRA Rule 2341 is based largely on National Association of Securities Dealers' Rule 2830. The proposed rule modifies certain disclosure requirements regarding the receipt of cash compensation, revises certain recordkeeping requirements for non-cash compensation, eliminates the condition that discounted sales of investment company securities to broker-dealers be in conformance with NASD Rule 2040 (regarding dealing with non-members), and, consistent with Securities and Exchange Commission exemptive orders, codifies past FINRA staff interpretations allowing firms to purchase and sell exchange-traded funds at prices other than the current net asset value. Comments must be received by FINRA by August 3.
Click here to read Regulatory Notice 09-34.

**FINRA Develops New Template for FTC Red Flags Rule**

The Financial Industry Regulatory Authority has developed a new, optional template that firms may use as a guide when fulfilling their requirements under the Federal Trade Commission's "Red Flags Rule." If a firm adopts this template as a guide, the firm must modify the template to be reflective of its operations. The Red Flags Rule, which implements obligations imposed by the Fair and Accurate Credit Transactions Act of 2003, as amended, requires specified firms to create a written Identity Theft Prevention Program that is designed to identify, detect and respond to "red flags" (e.g., patterns, practices or specific activities) that could indicate identity theft.

Click here to read the Information Notice.

## PRIVATE INVESTMENT FUNDS

**SEC Inspector General Proposes Recommendations to Improve SEC Oversight**

The Securities and Exchange Commission's Inspector General H. David Kotz provided recommendations to modify federal securities laws based on the recent Madoff investigation and other examinations in a letter to Congressman Paul Kanjorski, the Chairman of the House Financial Services Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises. The letter, which was in response to Chairman Kanjorski's request for such recommendations, included the following suggestions: (i) extend the regulatory jurisdiction of the Public Company Accounting Oversight Board to audit reports prepared by domestic registered or foreign public accounting firms regarding issuers, broker-dealers, investment advisors and any companies subject to U.S. securities laws; (ii) amend the Investment Advisers Act of 1940 to require hedge funds and investment advisors to use an "independent custodian"; (iii) require certifications by all funds of hedge funds and registered investment advisors that they conducted adequate due diligence in connection with investments; and (iv) expand the SEC bounty program, which currently applies only to information leading to a recovery in an insider trading violation, to authorize the SEC to award a bounty for information leading to a civil penalty from any violator of federal securities laws.

To view the text of the letter click here.

## OTC DERIVATIVES

**European Commission Publishes Report on OTC Derivatives**

On July 3, the European Commission issued a Report which outlines the issues that it believes should be considered in connection with improving the regulatory framework for trading over-the-counter (OTC) derivatives in Europe. Similar to the steps that have been proposed in the United States, the Report recommends that further steps be taken to centralize the collection of information regarding OTC derivatives transactions and to encourage the broader use of standardized contracts, electronic affirmation and confirmation services, and automated payment and collateral management facilities. While the Report advocates the clearing of OTC derivatives, it notes that the issue of whether standardized OTC derivatives should be required to be traded on a regulated trading facility requires further consideration.

The Commission has requested that market participants provide feedback on the issues discussed in the Report by August 31. The Commission has stated that it will utilize these responses in crafting any legislative proposals that it may make with respect to OTC derivatives before the end of this year.

A copy of the Report can be found here.

## CFTC

**CFTC Chairman Announces Hearings on Speculative Position Limits; Transparency Initiatives**

Commodity Futures Trading Commission Chairman Gary Gensler announced on July 7 that the CFTC will conduct a series of hearings in July and August on various issues facing the agency. The first hearing, for which a date has not been set, will focus on speculative position limits, in particular whether the CFTC should set limits on all commodities of finite supply (including energy commodities). Currently, the CFTC sets position limits on agricultural commodities, while the several futures exchanges set limits or position accountability levels on all other commodities. This first hearing will also continue the CFTC's ongoing review of the potential elimination of the "bona fide hedge" exemption from speculative position limits for certain categories of non-commercial traders.

Chairman Gensler also announced certain changes to the CFTC's weekly "Commitments of Traders" reports. Positions held by swaps dealers and professionally managed positions (such as hedge funds) will be presented separately, and the reports will include data on (i) contracts listed on a foreign board of trade that settle to a U.S. contract, and (ii) significant price discovery contracts. The CFTC will also continue to release a report on the market activities of swap dealers and index traders, initially on a quarterly basis, based on data gathered through the CFTC's ongoing special call for information on these market participants.

Read more.

## BANKING

**FDIC Releases Proposed Policy Statement on Qualifications for Failed Bank Acquisitions**

On July 2, the Federal Deposit Insurance Corporation (FDIC) released for comment a Proposed Statement on Qualifications for Failed Bank Acquisitions (Proposed Statement). The Proposed Statement is intended to be guidance for capital investors interested in acquiring or investing in failed depository institutions and sets forth proposed terms and conditions for such investments or acquisitions.

Pursuant to the Proposed Statement, bidders who are eligible to make bids in connection with the resolution of a failed depository institution would have to meet the following standards: (i) capital support of the depository institution; (ii) agreement to cross-guarantee over substantially commonly owned depository institutions; (iii) limits on transactions with affiliates; (iv) maintenance of continuity of ownership; (v) clear limits on secrecy law jurisdiction vehicles as the channel for investments; (vi) limitations on whether existing investors in an institution could bid on it if it failed; and (vii) disclosure commitments.

In addition, the Proposed Statement sets forth a requirement that a depository institution acquired by a capital investor be very well capitalized at a Tier 1 leverage ratio of 15%, to be maintained for a period of at least three years, and thereafter at a well capitalized level.

In the release, the FDIC also issued a series of questions related to the Proposed Statement and seeks specific public input on certain aspects of the proposal.

Comments are due 30 days from the date of publication in the Federal Register.

For more information, click here.

## STRUCTURED FINANCE AND SECURITIZATION

**U.S. Treasury Names Asset Managers and Launches Legacy Securities Program**

On July 8, the heads of the U.S. Treasury Department (UST), Federal Reserve and Federal Deposit Insurance Corporation (FDIC) jointly announced the launch of the Legacy Securities Program and named the nine initial asset managers for the program. The Legacy Securities Program is one-half of the Public Private Investment Program (PPIP) meant to help U.S. financial institutions cleanse their balance sheets of troubled residential and commercial mortgage-related assets. Although the PPIP was originally meant to be a $500 billion to $1 trillion program targeting both loans and securities, the Legacy Loans Program to be run by the FDIC has been put on indefinite hold, and the UST will now initially only contribute $30 billion to the Legacy Securities Program.
The nine initial asset managers for the Public Private Investment Funds (PPIFs) to be formed with equity contributions and debt-financing from UST, will be, in alphabetical order, (i) AllianceBernstein, LP and its sub-advisors Greenfield Partners, LLC and Rialto Capital Management, LLC; (ii) Angelo, Gordon & Co., L.P. and GE Capital Real Estate; (iii) BlackRock, Inc.; (iv) Invesco Ltd.; (v) Marathon Asset Management, L.P.; (vi) Oaktree Capital Management, L.P.; (vii) RLJ Western Asset Management, LP.; (viii) The TCW Group, Inc.; and (ix) Wellington Management Company, LLP.

Katten is preparing a *Client Advisory*, to be published early next week, summarizing details of the terms of the Legacy Securities Program, including the provisions of the equity and debt term sheets published by UST on July 8.

For more information, click here.

**TALF Borrowers Request $5.4 Billion for ABS in July**

On July 7, the Federal Reserve Bank of New York (FRBNY) reported that borrowers requested $5.4 billion in Term Asset-Backed Securities Loan Facility (TALF) loans to finance purchases of asset-backed securities collateralized by auto loans, credit card receivables, servicing advances and small business loans. No loans were requested for equipment, floorplan or premium finance securitizations. The total amount of TALF loans requested is now approximately $33.9 billion.

Separately, the FRBNY announced that the next TALF loan subscription date, related solely to commercial mortgage-backed securities (CMBS), will be July 16. However, it is unclear whether any TALF-eligible CMBS will be available for purchase from potential issuers by that date.

Click here to read more about TALF operations.
Click here to read more about CMBS TALF operations.

**New York Fed Publishes Revised TALF Terms and Conditions, FAQs and Documents**

On July 2, the Federal Reserve Bank of New York (FRBNY) published revised terms and conditions and frequently answered questions for the Term Asset-Backed Securities Loan Facility (TALF). The FRBNY also posted a revised copy of the Master Loan and Security Agreement (MLSA) for the TALF program.

One of the more noteworthy changes is an increase, beginning in August, to the administrative fee rate from 5 basis points to 10 basis points for TALF loans related to non-mortgage asset-backed securities, and clarification that the administrative fee rate will be 20 basis points for TALF loans related to commercial mortgage-backed securities.

For blacklines of the revised terms and conditions, click here.
For the revised FAQs, click here.
For the revised MLSA, click here.

## ANTITRUST

**DOJ Antitrust Scrutiny Increasing**

In a series of recent actions, the Department of Justice (DOJ) has been ramping up antitrust enforcement, particularly in the technology sector:

- In May the DOJ withdrew a report concerning monopolization offenses issued under the previous administration. According to Christine Varney, Assistant Attorney General in charge of the Department's Antitrust Division, the enforcement approach set forth in that report raised too many hurdles to government antitrust enforcement.
- In early June it was reported that the DOJ is investigating the recruiting and hiring practices of some large U.S. tech companies, including Google and Apple. The government is reportedly investigating whether the companies entered into illegal agreements not to recruit each other's employees.
- On July 2, the DOJ officially announced an investigation into the settlement that Google reached with the Author's Guild and the Association of American Publishers over the Google Books search engine. One issue raising questions is whether provisions protecting Google against lawsuits over orphaned works (books that are under copyright but whose owners cannot be found) give Google an unfair advantage over competitors who lack special protections.
- Also this week, the DOJ filed a brief before the Second Circuit regarding an important issue at the intersection of patent and antitrust law. The government argued that so-called "reverse payments" from a branded drug manufacturer to a potential generic competitor, in order to delay entry by the generic, should be presumptively unlawful.

This activity represents a dramatic shift in the DOJ's enforcement approach. Under the Bush administration, the DOJ Antitrust Division focused nearly exclusively on prosecuting hard-core criminal cartel activity and on reviewing mergers. It is now clear that DOJ antitrust enforcement is becoming far more aggressive on the civil side, and conduct that businesses may not have paid great attention to during the last eight years now requires careful antitrust review.

Click here to read more about the withdrawal of the monopolization report.

# UK DEVELOPMENTS

**FSA Proposes Increased Fines**

On July 6, the UK Financial Services Authority (FSA) published its consultation paper CP09/19 *Enforcement Financial Penalties* outlining its proposals for a more consistent and transparent framework for financial penalties. The proposals could mean some fines will triple in size.

The FSA stated that the proposals reflect its determination to change behavior and address concerns about firms' repeated failure to improve standards. They will also ensure that fines better reflect the scale of the wrongdoing and that any profits made from behavior subject to penalty will be clawed back. The FSA emphasized the fact that its enforcement philosophy is "credible deterrence". It aims to achieve this by focusing on cases that can make a real difference to consumers and markets, and using enforcement strategically as a tool to change industry behavior.

The main proposal in CP09/19 is for a change in the FSA's policy on determining the level of financial penalties. The FSA intends to increase the level of penalties it imposes and also to be more transparent and consistent in the way that it sets penalties.

The proposed revised penalties framework will consist of the following steps: (i) removing any profits made from the breach; (ii) setting a figure to reflect the nature, impact and seriousness of the breach; (iii) considering any aggravating and mitigating factors; (iv) achieving the appropriate deterrent effect; and (v) applying any settlement discount.

The consultation will close on October 21, and any new policy is likely to apply to breaches committed after February 2010.

Read more.

**UK Government Issues Proposals for Reforming Financial Markets**

On July 8, the UK Chancellor of the Exchequer, Alistair Darling, presented to Parliament a White Paper entitled "Reforming Financial Markets." The White Paper sets out the UK Government's proposals for further reforms necessary to strengthen the financial system and its regulation as well as the Government's analysis of the causes of the current financial crisis and the actions already taken to restore financial stability.

The White Paper sets out a number of core issues to which the Government's strategy for regulatory reform must respond:

- strengthening the UK's regulatory institutional framework, so that it is better equipped to deal with all firms and, in particular, globally interconnected markets and firms;
- dealing with high impact firms that may be seen as being "too big to fail", through improved market discipline and improved supervisory focus on such firms;
- identifying and managing systemic risk as it arises across different financial markets and over time; and
- working closely with international partners to deliver the global action required to respond to the lessons of the financial crisis.

The Government proposes to increase the UK Financial Services Authority's (FSA's) powers by adding a statutory objective of financial stability and extending its rule-making powers. The Government also proposes to extend the FSA's powers to deal with individual firms on a case-by-case basis through firm-specific interventions and to enhance its enforcement powers in relation to market misconduct. In addition, the FSA will be empowered to constantly review the scope of regulation, gathering information from unregulated entities to determine whether they pose a threat to stability and should be brought within the FSA's regulatory regime.

The Government intends to strengthen the structure of the regulatory system by increasing the powers of both the FSA and the Bank of England and creating a Council for Financial Stability.

In order to ensure a competitive and fair market for consumers, the Government proposes a range of consumer protection measures. These include measures to raise financial capability; improve access to simple, transparent products; develop better and faster ways of dealing with widespread complaints; improve depositor protection arrangements; and strengthen competition and choice.

In a separate announcement, the FSA welcomed the Government's intention to legislate to give the FSA a statutory objective with respect to financial stability as well as new powers to act in pursuit of this objective.

Read more.

## EU DEVELOPMENTS

**Consultation on CESR's Proposal for a Pan-European Short Selling Disclosure Regime**

On July 8, the Committee of European Securities Regulators (CESR) published a consultation paper outlining its proposals for a pan-European harmonized and permanent short selling disclosure regime.

CESR proposes a two-tier disclosure system for the disclosure of significant net short positions held in shares admitted to trading on regulated markets or multi-lateral trading facilities (MTFs) in the European Economic Area. When a short position reaches a specified initial threshold (CESR's proposal is 0.10%), the short seller will be required to make a private disclosure to the regulator of the most liquid market for the share in which the position is held. Further disclosures will be required at increments of 0.10%. If the position reaches a second-tier threshold (CESR's proposal is 0.50%), the short seller will then also be required to make a public disclosure. Further disclosures will be required if the short position crosses subsequent incremental 0.10% thresholds. Disclosure will also be required when the positions which had previously been disclosed fall below any of the disclosure thresholds down to the initial disclosure threshold. Disclosure reports will be required to be made on the trading day after the day on which the relevant threshold is passed.

The proposed disclosure regime will apply to instruments with the economic effect of holding a short position and will include positions held in exchange-traded and over-the-counter derivatives. Long positions will be netted against short positions to calculate whether disclosure thresholds were met.

In the consultation, CESR explicitly acknowledged the fact that short selling plays an important role in financial markets, contributing to efficient price discovery, increasing market liquidity, facilitating hedging and other risk management and possibly helping to mitigate market bubbles. CESR also acknowledged that short selling could be used in an abusive fashion to distort the prices of financial instruments, thereby contributing to disorderly markets.

The consultation will close on September 30, and a final proposal will be made to the European Commission for its consideration by the end of 2009.

Read more.


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