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Corporate and Financial Weekly Digest

March 13, 2009

SEC/Corporate

New Corporation Finance Advisories Released

Within the last week, the Division of Corporation Finance of the Securities and Exchange Commission published two documents of note. The first is the staff's observations in connection with its review of smaller reporting companies' initial '33 Act registration statements. The staff points to common deficiencies in connection with such reviews including the need for companies to improve their Management Discussion and Analysis presentation by including an overview of key issues confronting management, to include all required undertakings relating to the offering, to provide accounting policies for revenue recognition as well as to expand disclosure with respect to recent sales of unregistered securities.

The Division also released Compliance and Disclosure Interpretations (C&DIs) with respect to Securities Act Forms. The C&DI compiles prior Division positions and also includes a number of new interpretations. A number of C&DIs relate to the permitted use of F-Series registrations, the updating of S-1 registration statements when used in a continuous offering, S-3 registration statement eligibility requirements (including for automatic shelf registration statements and for resales of convertible securities issued in PIPES transactions), a large number of C&DIs relating to the use of S-8 registration statements, as well as Q&As relating to Forms D and 144.

http://www.sec.gov/divisions/corpfin/guidance/cfsmallcompanyregistration.htm
http://www.sec.gov/divisions/corpfin/guidance/safinterp.htm

SEC Announces Fee Rate Increases for Corporate Transactions

On March 11, the Securities and Exchange Commission announced an increase of its fees under Section 6(b) of the Securities Act of 1933 applicable to the registration of securities, Section 13(e) of the Securities Exchange Act of 1934 applicable to the repurchase of securities and Section 14(g) of the Exchange Act applicable to proxy solicitations and statements in corporate control transactions from $39.30 per million dollars to $55.80 per million dollars. The foregoing fee increases will become effective on March 16.

http://sec.gov/news/press/2009/2009-56.htm

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Litigation

Plaintiffs Fail to Meet Heightened PSLRA Pleading Standard

Plaintiffs, purchasers of stock in defendant Orthoclear Holdings, Inc. (Orthoclear), a company that manufactured clear plastic devices to straighten teeth, brought an action arising out of Orthoclear's purported statements regarding the merits of a litigation in which it was involved. Specifically, Align Technology (Align) sued Orthoclear for infringement of intellectual property rights and violations of the Lanham Act. Plaintiffs alleged that during the course of that litigation, Orthoclear repeatedly told investors and its shareholders that Align's claims were meritless, and that it had a valid ownership interest in the intellectual property upon which its business was based. After Orthoclear settled with Align, agreeing to cease operations and transfer all existing rights to its intellectual property to Align in exchange for $20 million, plaintiffs brought an action against Orthoclear and certain of its offers and directors, asserting claims for alleged securities law violations including, *inter alia*, violations of Section 10(b) of the Securities Exchange Act of 1934.

Defendant Orthoclear moved to dismiss the complaint, arguing, *inter alia*, that plaintiffs failed to meet the heightened pleading requirements under the Private Securities Litigation Reform Act. In granting the motion to dismiss, the District Court rejected plaintiffs' argument that Orthoclear misrepresented the risks of the Align litigation. The Court held that because Orthoclear had disclosed the risks of the Align litigation in the share purchase agreements with the plaintiffs, plaintiffs, who were experienced investors, could not demonstrate that they were misled.

In addition, the Court ruled that the fact that defendants settled the Align litigation was not sufficient to raise a strong inference of scienter, that is, that defendants made misleading statements intentionally or with deliberate recklessness. The Court ruled that the decision to settle litigation does not indicate that defendants' statements concerning the merits of the litigation were false, as numerous factors other than the merits can contribute to the decision to settle a case. In addition, the Court noted that the fact that Orthoclear received $20 million for its intellectual property as part of the settlement further undercuts any claim that the settlement demonstrates that Orthoclear's statements about its intellectual property were false when made. (*Eshelman v. Orthoclear Holdings, Inc.*, No. C 07-1429 (JSW), 2009 WL 506864 (N.D.Cal. Feb. 27, 2009))

Court Refuses to Unfreeze Assets Obtained in Ponzi Scheme

The Securities and Exchange Commission and Commodity Futures Trading Commission brought related actions alleging that defendant Joseph Forte violated multiple securities laws through his operation of a Ponzi scheme wherein he fraudulently obtained approximately $50 million from at least 76 investors. In relation to these claims, and in an effort to preserve any remaining funds, the government sought, and Forte consented to, an order freezing all funds and assets held by Forte and his company. The next month, however, Forte petitioned the District Court for the Eastern District of Pennsylvania to release a portion of the frozen assets so that he could pay a variety of bills. In denying his request, the Court noted that when evaluating requests to release frozen assets, courts commonly look to several factors, all of which weighed strongly against granting Forte's request.

For example, the funds sought were to be used exclusively for Forte's personal use, and thus his request was not in the interest of the defrauded investors. In addition, Forte failed to present evidence that the assets he sought to have released were derived from sources other than the fraud. Moreover, Forte

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failed to establish that his interest in having access to the funds to pay ordinary and necessary living expenses outweighed the government's interest in preventing the depletion of potentially forfeitable assets.

The Court also noted that many of the expenses that Forte was seeking to pay, such as payments for mortgages on multiple properties and satellite television, could not be considered necessities, thus cutting against the release of the assets. Finally, the Court noted that even with respect to "necessities," Forte was seeking excessive amounts and had failed to submit documentation supporting the amounts requested. (*Securities and Exchange Commission v. Forte*, Civ. Nos. 09-63, 09-64, 2009 WL 465600 (E.D. Pa. Feb. 24, 2009))

Broker Dealer

CBOE Proposes Rule Amendment to Permit Tied Hedge Transactions

The Chicago Board Options Exchange (CBOE) filed a proposal with the Securities and Exchange Commission to allow "tied hedging" transactions to be represented in the options trading crowd. Under this proposal, a CBOE member would be permitted to hedge an option order with the underlying security, security future or futures contract, as applicable, before forwarding both the option order and the hedging position to a CBOE floor broker with instructions to represent both positions to the options trading crowd. In-crowd market participants choosing to participate in the option transaction would also be required to participate in the related hedging position.

http://edocket.access.gpo.gov/2009/pdf/E9-4287.pdf

FINRA Proposes Major Expansion of Trace Requirements

The Financial Industry Regulatory Authority (FINRA) issued a press release announcing its intention to propose a significant expansion of its Trade Compliance and Reporting Engine (TRACE) requirements. Currently, TRACE reports real-time pricing and trade volume information only on corporate bonds trading in the secondary market. The proposal would expand the categories of TRACE-reportable bonds to include debt issued by federal government agencies, government corporations and government-sponsored enterprises. In addition, the proposal would require the reporting of primary market transactions in new issues. FINRA stated that its TRACE expansion proposal is expected to be published in the near future.

http://www.finra.org/Newsroom/NewsReleases/2009/P118110

Private Investment Funds

Proposed Stop Tax Haven Abuse Act

On March 2, Senators Levin, Whitehouse, McCaskill and Nelson introduced the Stop Tax Haven Abuse Act bill, an earlier version of which was introduced by Senator Levin, then Senator Obama and others in February 2007. If enacted in the form proposed, the bill would treat offshore corporations with $50 million of gross assets that are primarily managed within the United States, including hedge funds and private equity funds, as domestic corporations for income tax purposes.

Other provisions in the bill that would directly affect certain hedge funds and private equity funds include (i) a proposal to treat "dividend equivalents" and "substitute dividends" as dividends for purposes of the 30% tax imposed on U.S.-sourced dividends received by non-U.S. persons; (ii) a proposal to require each person that is a shareholder of, forms, transfers assets to, has a beneficial interest in, or receives property from, a passive foreign investment

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company to file a report with the Internal Revenue Service; and (iii) a proposal (substantially similar to the proposal contained in the Hedge Fund Transparency Act bill introduced by Senators Levin and Grassley on January 29) to make certain anti-money laundering requirements applicable to hedge funds and private equity funds relying on the exemptions provided by sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940.

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s506is.txt.pdf

Please see **"SEC to Independently Confirm Advisor Assets with Third Parties Including Investors" in Investment Companies and Investment Advisors**.

Investment Companies and Investment Advisors

Supreme Court to Resolve Circuit Split Regarding Excessive Fund Advisor Fees

On March 9, the U.S. Supreme Court granted certiorari in *Jones v. Harris Associates L.P.*, 527 F.3d 627 (7th Cir. 2008). The Court, which will hear oral arguments in its October 2009 term, will resolve a circuit split regarding what constitutes a breach of fiduciary duty with respect to excessive investment company advisor fees under Section 36(b) of the Investment Company Act of 1940, as amended.

The Court of Appeals for the Second Circuit in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982) established a multiple-factor fairness test long used by fund directors in reviewing advisory agreements to avoid advisor and fund director liability for excessive fee payments under Section 36(b). In 2008, the Seventh Circuit's *Jones* decision sharply criticized the *Gartenberg* approach and adopted a much more relaxed standard based on whether the advisor had deceived the fund's board or the board acted in bad faith. The *Jones* court, showing an appreciation for how fund investors behave, stated that "[t]he trustees (and in the end the investors, who vote with their feet and dollars), rather than a judge or jury, determine how much advisory services are worth."

http://www.supremecourtus.gov/orders/courtorders/030909zor.pdf

SEC to Independently Confirm Advisor Assets with Third Parties Including Investors

The Securities and Exchange Commission's Office of Compliance Inspections and Examinations (OCIE) has announced that when performing examinations of the books and records of regulated persons and organizations such as registered investment advisors, the SEC may request independent confirmation of investor assets from various third parties, including bank and broker-dealer custodians, account administrators, investors in hedge funds managed by the advisor, advised clients, derivative counterparties, hedge fund administrators and/or managers that are invested in by advised clients, National Securities Clearing Corp., Depository Trust & Clearing Corp., and auditors for the advisory firm and/or investor accounts. In separate letters to the Managed Funds Association and the Investment Adviser Association, OCIE staff stated that the SEC's confirmation requests will make clear that the requests should not be construed as an indication by the SEC that any violations of law have occurred, nor should the confirmation requests be construed as an adverse reflection upon the advisor.

http://www.managedfunds.org/downloads/MFA%20Letter%203.9.2009.pdf
http://investmentadviser.org/eweb/docs/Public/IAA3.9.2008.PDF

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Banking

FDIC Extends Restoration Plan, Imposes Special Assessment

On February 27, the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) voted to amend the restoration plan for the Deposit Insurance Fund (DIF). The Board also took action to ensure the continued strength of the insurance fund by imposing a special assessment on insured institutions of 20 basis points, implementing changes to the risk-based assessment system, and setting rates beginning the second quarter of 2009.

Under the restoration plan approved last October, the Board set a rate schedule to raise the DIF reserve ratio to 1.15% within five years. Today's action extends the restoration plan horizon to seven years in recognition of the current significant strains on banks and the financial system and the likelihood of a severe recession.

The amended restoration plan was accompanied by a final rule that sets assessment rates and makes adjustments that improve how the assessment system differentiates for risk. Currently, most banks are in the best risk category and pay anywhere from 12 cents per $100 of deposits to 14 cents per $100 of deposits for insurance. Under the final rule, banks in this category will pay initial base rates ranging from 12 cents per $100 to 16 cents per $100 on an annual basis, beginning on April 1.

The Board adopted an interim rule imposing a 20 basis point emergency special assessment on the industry on June 30. The assessment is to be collected on September 30. The interim rule would also permit the Board to impose an emergency special assessment after June 30 of up to 10 basis points if necessary to maintain public confidence in federal deposit insurance. Comments on the interim rule on special assessments are due no later than 30 days after publication in the Federal Register.

Changes to the assessment system include higher rates for institutions that rely significantly on secured liabilities, which may increase the FDIC's loss in the event of failure without providing additional assessment revenue. Under the final rule, assessments will be higher for institutions that rely significantly on brokered deposits but, for well-managed and well-capitalized institutions, only when accompanied by rapid asset growth. The final rule also would provide incentives in the form of a reduction in assessment rates for institutions to hold long-term unsecured debt and, for smaller institutions, high levels of Tier 1 capital.

Finally, the Board voted to modify the debt guarantee component of the Temporary Liquidity Guarantee Program to allow participating entities, with the FDIC's permission, to issue mandatory convertible debt. This change would provide institutions additional options for raising capital and reducing the concentration of FDIC-guaranteed debt maturing in mid-2012.

http://www.fdic.gov/news/board/27Feb09_Final_Rule.pdf
http://www.fdic.gov/news/board/27Feb09_Interim_Rule.pdf

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Structured Finance and Securitization

FRBNY Releases Revised FAQs and MLSA for TALF

On March 11, the Federal Reserve Bank of New York (FRBNY) released new documents relating to the Term Asset-Backed Securities Lending Facility (TALF), including, among others, a revised set of Frequently Asked Questions (FAQs) and a revised Master Loan and Security Agreement (MLSA). The revised documents do not include any information about proposed new asset

STRUCTURED FINANCE AND SECURITIZATION

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classes, such as commercial mortgage-backed securities, but do provide information about certain changes to the program's terms, including:

- an explanation in the FAQs that "if an eligible borrower posts eligible collateral there should be every expectation of financing" although the FRBNY "reserves the right not to fund in exceptional cases, such as upon revelation of materially adverse information about the borrower prior to settlement" which cases are "expected to be isolated and rare";
- limitation of the FRBNY's right to audit and inspect TALF borrowers so that it applies only to the extent relevant to such borrower's TALF loans and collateral or its obligations under the MLSA;
- clarification that the non-recourse feature of a borrower's TALF loan will not become inapplicable because the collateral is found to have been ineligible, unless the borrower knowingly breached a representation related to the eligibility of the collateral (and allowing the borrower to base its knowledge on its review of the offering materials for the collateral);
- removal of the concept of substitution of eligible collateral for deficient collateral from the MLSA;
- clarification that when calculating the FICO scores of auto loan or lease receivables for purposes of determining whether an auto asset-backed securities (ABS) deal is considered prime or subprime, receivables without a FICO score will be assigned the minimum FICO score of 300, instead of zero, and that commercial receivables may be included in the calculation in certain circumstances as long as no more than 15% of the trust's receivables are commercial;
- clarification that eligible auto dealer floorplan ABS may also include ABS issued out of an existing or newly established floorplan master trust in which all or substantially all of the auto dealer floorplan lines of credit underlying the ABS were originated on or after January 1, 2009;
- clarification that none of the auditor's attestation, the issuer certification or the indemnity undertaking will be required for Small Business Administration (SBA) Pool Certificates or Development Company Participation Certificates, but that pool assemblers will be required to deliver to the FRBNY an undertaking in connection with SBA Pool Certificates in the form found at http://www.newyorkfed.org/markets/TALF_Undertaking_SBA_ABS.pdf; and
- statement that the regulatory capital treatment for TALF-financed ABS will be the same as that for ABS not financed by a TALF loan.

For more information about TALF, please see Katten's *Client Advisory* on the topic.

http://www.newyorkfed.org/markets/talf_docs.html

House Passes Legislation Allowing Residential Mortgage Cram-Downs

On March 5, the House of Representatives passed H.R. 1106, the Helping Families Save Their Homes Act of 2009. This legislation, as reported in the February 27, 2009, edition of *Corporate and Financial Weekly Digest*, allows bankruptcy judges to modify mortgages on primary residences and provides a servicer safe harbor, Hope for Homeowners improvements, Federal Housing Administration changes and reforms to the Federal Deposit Insurance Corporation insurance fund.

http://judiciary.house.gov/news/090305.html
http://www.govtrack.us/congress/billtext.xpd?bill=h111-1106

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NYFRB Extends March TALF Subscriptions Through March 19

On March 13, the New York Federal Reserve Bank (NYFRB) announced that it will extend the window for the first subscriptions for funding from the Term Asset-Backed Securities Loan Facility (TALF) by two days. The extension was requested by market participants in order to allow more time for borrowers to complete the documentation associated with the initiation of the program. The window for receipt of requests for TALF loans has been extended to last from 10 a.m. ET on March 17 through 5 p.m. ET on March 19. Lending rates on TALF loans will be set on March 19 at 8 a.m. ET. The settlement date will remain March 25, and the dates for the April subscription and settlement remain unchanged.

http://www.newyorkfed.org/newsevents/news/markets/2009/ma090313.html

UK Developments

FSA Signals Regulatory Sea Change

In a speech delivered on March 12, Hector Sants, Chairman of the UK Financial Services Authority (FSA), signaled a new era of intensive supervision.

Mr. Sants declared that the philosophy of principles-based regulation, generally characterized as “light touch” is to be replaced by a more "intrusive and direct style of supervision."

The reasons for the change are based on lessons learned from recent market events as well as a change in the regulator’s philosophy. Further, “to suggest that we can operate on principles alone is illusory, particularly because the policy-making framework does not allow it. Europe, in particular, has a particular penchant for rules and in any case in a number of key areas such as prudential they are indeed necessary."

Mr. Sants characterized the future direction of the FSA as “outcomes-focused.” He explained this to mean that they would “seek to make judgments on the judgments of senior management and take actions if in our view those actions will lead to risks to our statutory objectives. This is a fundamental change. It is moving from regulation based only on observable facts to regulation based on judgments about the future.”

He emphasized that this would be an 'intrusive' and 'direct' style of supervision (which he called 'the intensive supervisory model') and stated that this would be allied with a more proactive approach to enforcement termed “our credible deterrence philosophy.”

Finally, Mr. Sants issued a stark warning: “There is a view that people are not frightened of the FSA. I can assure you that this is a view I am determined to correct. People should be very frightened of the FSA.”

http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0312_hs.shtml

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EU Developments

European Commission Consults on Major Changes to Financial Services Regulation

On March 10, the European Commission launched a consultation *Driving European Recovery* on major structural changes to European financial services and markets regulation. The Commission intends by the end of May

EU DEVELOPMENTS

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to publish a communication setting out its proposals on the future of the EU supervisory architecture followed by numerous specific legislative measures before autumn 2009. At this stage, it is seeking the views of interested parties. The Commission requests the submission of comments by April 10.

The Commission endorses the key principles set out in the recent *de Larosière Report* and calls for a supervisory system combining stronger oversight at the EU level with maintaining a key role for national supervisors. Its proposals here contrast with the de Larosière recommendations, which focused on EU level supervision.

The Commission will propose an ambitious new reform program, designed to deliver "responsible and reliable financial markets for the future". The reform program will have five key objectives:

1. To provide the EU with a supervisory framework that detects potential risks early, deals with them effectively before they have an impact, and meets the challenge of complex international financial markets. The Commission will present a European financial supervision package before the end of May 2009.

2. To fill gaps where European or national regulation is insufficient or incomplete, based on a 'safety first' approach. In particular, the Commission will propose:
    - A comprehensive legislative instrument establishing regulatory and supervisory standards for hedge funds, private equity and other systemically important market players (April 2009)
    - A white paper on tools for early intervention to prevent a crisis (June 2009)
    - On the basis of a report on derivatives and other complex structured products (June 2009), appropriate initiatives to increase transparency and ensure financial stability
    - Legislative proposals to increase the quality and quantity of prudential capital for trading book activities and tackle complex securitization (June 2009) and to address liquidity risk and excessive leverage (Autumn 2009)

There will also be proposals:

3. To ensure that European investors, consumers and small and medium-sized enterprises can be confident about their savings, access to credit and their rights as concerns financial products.

4. To improve risk management in financial firms and align pay incentives with sustainable performance.

5. To ensure more effective sanctions against market wrongdoing.

The *de Larosière Report* can be found at:
http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf

Driving European Recovery can be found at:
http://ec.europa.eu/commission_barroso/president/pdf/press_20090304_en.pdf
http://ec.europa.eu/commission_barroso/president/pdf/press_20090304_annx_en.pdf

More information on the consultation is available at:
http://ec.europa.eu/internal_market/consultations/2009/fin_supervision_en.htm

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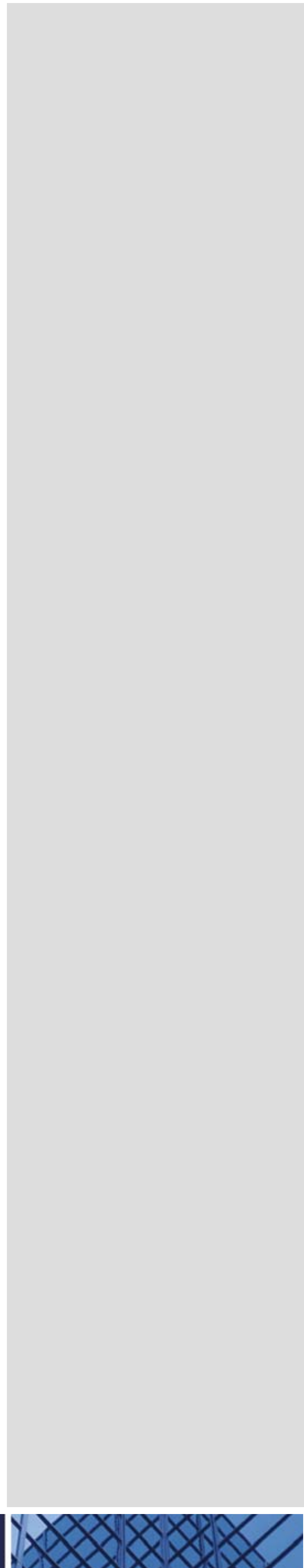

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