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Corporate and Financial Weekly Digest

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SEC/Corporate

SEC/CORPORATE

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SEC, Delaware Drafting New Shareholder Access Proposals

According to a Bureau of National Affairs interview with Securities and Exchange Commission spokesman John Nester, SEC Chairman Mary Schapiro has directed the SEC's staff to draft proposals permitting shareholder access to issuers' proxy statements for director nominees. The SEC's current rules, which permit issuers to exclude stockholder proposals relating to director nominations from their proxy materials, were adopted in November 2007 under then-Chairman Christopher Cox. Earlier, Chairman Cox developed two alternative proposals: one which would have permitted investors holding at least 5% of an issuer's stock to file proxy access by-law proposals; the other, which was subsequently adopted, is the SEC's current rule. The details of the new proposal, including whether the "intermediate" step of a by-law provision will be required, have not been revealed.

Proxy access is also being considered by Delaware's lawmakers. A Delaware corporate bar proposal would permit a Delaware corporation to adopt a by-law requiring any proxy solicitation materials circulated by the corporation regarding the election of directors to include nominees submitted by stockholders, in addition to those submitted by the corporation. The proposed legislation would permit the by-law to include minimum ownership requirements as well as a list of other qualifications that a stockholder must comply with in order to nominate a director. Whether the SEC's new rules will preempt Delaware's proposed corporate law amendments may depend upon whether the SEC's new proposals specifically allow for state law preemption, as was the case in the earlier SEC proposal.

BNA Securities Regulation & Law Report 3/16/09 (Vol. 41, No. 11)

Litigation

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Plaintiffs Adequately Allege Exchange Act Violations Against Ponzi Scheme Operators

The United States District Court for the Middle District of Florida has denied the defendants' motion to dismiss a complaint alleging violations of Section 10(b) of the 1934 Securities and Exchange Act and Securities and Exchange Commission Rule 10b-5. The plaintiffs alleged that the defendants exercised control over entities that defendants knew were making false statements of material fact to lure investors into a Ponzi scheme involving purchases of point-of-sale debit and credit card terminals. The defendants allegedly controlled and engaged in a fraudulent scheme that raised more than $20 million from approximately 300 investors. The individual defendants moved to dismiss the complaint, arguing that the plaintiffs had failed to adequately allege either control person liability or scienter.

The Court held that the plaintiffs had adequately alleged control person liability and scienter. In particular, one of the defendants argued that the complaint's specific allegations of wrongdoing related to actions taken by people other than the defendant. The Court found that defendant's argument was a fundamental misunderstanding of control person liability, which provides that a person with the power to control the primary violator's actions can be liable for that wrongdoing. In addition, the Court found that the complaint adequately alleged scienter by asserting that the companies operated at a deficit from the time of their inception, that the defendants knew they could not deliver on promises made to investors, and that two other companies owned by the defendants had violated securities laws in Pennsylvania and Maryland yet the defendant continued to operate an identical company in Florida. (*Gustin v. Hoffman*, No. 6:08-cv-57-Orl-31DAB, 2009 WL 604957 (M.D.Fla. Mar. 9, 2009))

Commingling of Identities Held Insufficient to Pierce Corporate Veil

The United States Bankruptcy Court for the Middle District of Pennsylvania recently found that a bankruptcy trustee could not either pierce the corporate veil of a limited liability company to reach the owners of the LLC, nor could the trustee "reverse-pierce" the corporate veil of the owners of the LLC to reach a separate restaurant business that they owned. The plaintiff, the Chapter 7 bankruptcy trustee for the LLC, had brought claims against both the owners and the restaurant alleging, among other things, that the owners were "alter egos" of the LLC and thus jointly liable for its debts. The trustee also claimed that the restaurant should also be liable for the debts of its owners, the alleged "alter egos" of the LLC.

The Bankruptcy Court found that in order to pierce the corporate veil, the trustee must show that the defendants disregarded the corporate form by a combination of four factors: (i) undercapitalizing the business; (ii) failing to adhere to corporate formalities; (iii) substantially intermingling corporate and personal affairs; and (iv) the use of the corporate form to perpetrate a fraud. The Court held that the plaintiff had failed to show any of these factors. In particular, the trustee argued that there was substantial intermingling of corporate and personal affairs because the defendants had used personal credit cards to make purchases for the LLC and both the owners and the restaurant had paid bills directly for the LLC. However, the Court found that this was not commingling of assets sufficient to trigger a piercing of the corporate veil, and it noted that the trustee had failed to cite a single example of funds from the LLC being deposited in a personal account for either the owners or the restaurant. Therefore, the Court found that while "there may have been an intermingling of identities, there appears to be no evidence of the commingling of assets, financial records, or employees." Finally, the Court held that since the owners were not personally liable for the debts of the LLC, liability could not be extended to the restaurant under the "reverse-piercing of the corporate veil" theory. (*In re LMcD*, Bankruptcy No. 5-05-bk-54237, 2009 WL 545746 (Bkrtcy.M.D.Pa. Mar. 4, 2009))

Broker Dealer

FINRA Proposes Rule Prohibiting Trading Ahead of Customer Orders

The Financial Industry Regulatory Authority (FINRA) is requesting comments on proposed FINRA Rule 5320 which will prohibit a member firm from trading for its own account ahead of customer limit and market orders. The proposal represents a cooperative effort between FINRA and NYSE Regulation to harmonize approaches and achieve greater consistency and simplified compliance obligations for dual members. The proposal would integrate NASD Interpretive Material 2110-2 and NASD Rule 2111 into a single rule governing member firms' treatment of customer orders and would apply the new rule

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uniformly to all equity securities with the following exceptions:

- Large Order and Institutional Account Exceptions: a member firm may negotiate specific terms and conditions regarding institutional account orders and orders of 10,000 shares or more (unless such orders are less than $100,000 in value) as long as the member firm discloses these terms and conditions to the customer placing such an order.

- No-Knowledge Exception: would expand FINRA's "no-knowledge" interpretation to include a member firm's market-making desks with respect to exchange-listed securities and would require a member firm to disclose to customers the extent it "walls off" customer order flow in exchange-listed securities from the market-making desks.

- Odd Lots and Bona Fide Errors: applies to all customer orders except for a member firm's proprietary trade that either offsets a customer odd lot order or corrects a bona fide error.

The proposed rule would apply at all times a customer order may be executed, even outside normal market hours and after hours.

Comments are due to FINRA by April 24.

http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p118127.pdf

FINRA Proposes Margin Requirements for Positions in Credit Default Swaps

The Financial Industry Regulatory Authority (FINRA) recently filed proposed FINRA Rule 4240 with the Securities and Exchange Commission to adopt margin requirements for broker-dealers that carry positions in credit default swaps (CDS) for the accounts of customers and other broker-dealers. Rule 4240 would apply both to cleared CDS and non-cleared CDS.

For Chicago Mercantile Exchange (CME) cleared CDS, Rule 4240 would require customers to deposit margin which is not less than the margin required to be deposited by the FINRA member at CME with respect to these positions. For other cleared CDS and over-the-counter CDS, sellers of protection would be required to post a percentage of the notional amount of the CDS, which percentage would vary depending on the size of the coupon payments required to be made under, and the maturity date of, the CDS. For buyers of protection, the margin required would be equal to 50% of the amount of margin that would be required from a seller of protection of the same CDS. Under the proposed Rule, the percentages of the notional amount required to be deposited as margin for CDS index transactions would be lower than the percentages required for single name CDS transactions.

The proposed Rule would require FINRA members to take a concentration haircut. First, the member would identify its most concentrated CDS position and calculate its current and potential exposure with respect to this position. If this amount exceeds the member's tentative net capital, the member would be required to take a capital charge equal to the margin required for this position under Rule 4240. The member could reduce the amount of this charge by the amount of any excess margin that it holds with respect to its customers.

http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p118120.pdf

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ISE Proposes to Redefine "Primary Market"

In an effort to allow Primary Market Makers more flexibility in opening trading in a particular class of options, the International Securities Exchange, LLC (ISE) has filed a proposal with the Securities and Exchange Commission to replace references to the "primary market" for an underlying security in ISE Rule 701 with references to the "market for the underlying security." ISE Rule 701(b)(2) currently requires Primary Market Makers to open each class of options promptly following the opening of the underlying security in the "primary market" where the underlying security is traded. The ISE believes that the term "primary market" has become increasingly difficult to define because underlying securities trade on multiple exchange platforms and other venues. Under the proposal, the term "market for the underlying security" would mean either the primary listing market, the primary volume market, or the first market to open the underlying security, as determined by the ISE on an issue-by-issue basis.

http://www.ise.com/assets//documents//OptionsExchange//legal/proposed_rule_changes/2009/SR-ISE-2009-13$Proposed_Rule_Change_to_Revise_the_Definition_of_Primary_Market$20090318.pdf

Proposed Reinstatement of the Uptick Rule

On March 13, the Securities and Exchange Commission announced that it will consider whether to propose short sale price test rules at its open meeting on April 8. Separately, on March 16, Senators Ted Kaufman (D-Delaware) and Johnny Isakson (R-Georgia) introduced a bill to require the SEC to reinstate the "uptick rule" prohibiting short sales not effected upon an increase in the stock price in an attempt to increase the pressure on the SEC to take action.

http://kaufman.senate.gov/press/in_the_news/news/?id=4375F5B0-6788-41CB-8EBE-76F441D66088

Private Investment Funds

Please see "SEC Director Advises as to Best Compliance Practices" in **Investment Advisors and Investment Companies** immediately below.

Investment Advisors and Investment Companies

SEC Director Advises as to Best Compliance Practices

On March 12, Lori Richards, the Director of the Securities and Exchange Commission's Office of Compliance Inspections and Examinations, addressed the IA Compliance Best Practices Summit 2009 and urged firms to review their compliance procedures and oversight to strengthen the "Culture of Compliance." She emphasized that compliance programs must be reviewed and refined continually to meet the changing environment, risks and business of an investment advisory firm. In particular she highlighted the following areas for review in the current environment: (i) disclosure, (ii) custody, (iii) performance claims, and (iv) resources supporting the compliance program. Ms. Richards particularly highlighted the need to review conflict of interest disclosures involving compensation arrangements with solicitors, finders, or other service providers, fees paid by clients to the firm or affiliates and the services provided for such fees, and the use of client commissions to pay for products and services (soft dollars), and the need to make accurate disclosures and claims of past performance. As to custody, she suggested that compliance personnel of hedge fund managers should review the independence of the fund's auditor and timely distribution of audited financials. She also advocated investments in technology to aid in front-end compliance

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and monitoring.

http://www.sec.gov/news/speech/2009/spch031209lar.htm

Banking

OTS Realigns Regional Structure and Enhances Large Bank Supervision

On March 16, the Office of Thrift Supervision (OTS) announced plans to realign its regional office structure in order to improve efficiency and support regulatory consistency. The OTS is reducing the number of regional offices from five to four: (i) Northeast region (Jersey City); (ii) Southeast region (Atlanta); (iii) Central region (Chicago); and (iv) Western region (Dallas). The Central region's oversight will expand to include thrifts in Minnesota, Iowa, Nebraska, South Dakota and North Dakota, and all of the former Western region and much of the former Midwest region will combine to form the new Western region. Any changes to caseload assignments will be communicated to affected institutions by the regional staff.

OTS is also creating a new executive-level position in Washington, D.C., responsible for executing the large bank oversight program announced on February 26 for institutions with greater than $10 billion in assets.

http://files.ots.treas.gov/25294.pdf

FDIC Extends the Debt Guarantee Component of Its Temporary Liquidity Guarantee Program

On March 17, The Board of Directors of the Federal Deposit Insurance Corporation (FDIC) voted to extend the debt guarantee portion of the Temporary Liquidity Guarantee Program (TLGP) from June 30 through October 31 and to impose a surcharge on debt issued with a maturity of one year or more, beginning in the second quarter, to gradually phase out the program. With the extension, all insured depository institutions and those additional participants, such as holding companies, that have actively participated in the debt guarantee portion of the TLGP (by issuing guaranteed debt before April 1) may continue to issue guaranteed debt through October 31 without application. The guarantee on debt issued before April 1 will expire no later than June 30, 2012. The guarantee on debt issued on or after April 1 will expire no later than December 31, 2012.

Participants that are not insured depository institutions and that have not issued FDIC-guaranteed debt before April 1 must apply by June 30 if they wish to issue guaranteed debt after that date. If the application is approved, the guarantee on debt issued on or after April 1 will expire no later than December 31, 2012.

The Board of Directors also voted to impose surcharges on guaranteed debt that has a maturity of one year or more and is issued on or after April 1. For guaranteed debt that is issued by June 30 and matures by June 30, 2012, the surcharge will be 10 basis points (on an annualized basis) for an insured depository institution and 20 basis points (on an annualized basis) for all others. For all other guaranteed debt that utilizes the extension (either through a maturity after June 30, 2012, or through issuance after June 30, 2009), the surcharge will be 25 basis points (annualized) for an insured depository institution and 50 basis points (annualized) for all others. Surcharges will be in addition to current fees for guaranteed debt and will be deposited into the Deposit Insurance Fund instead of being set aside to cover potential TLGP losses.

http://www.fdic.gov/news/news/press/2009/pr09041.html

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FASB Issues Proposed Guidance Regarding Fair Value Measurements and Impairments of Securities

On March 18, the Financial Accounting Standards Board issued two proposed staff positions (FSPs) on application guidance for fair value measurements and impairments of securities. Proposed FSP FAS 157-e, *Determining Whether a Market Is Not Active and a Transaction Is Not Distressed*, provides guidelines for making fair value measurements in light of the principles presented in FASB Statement No. 157, *Fair Value Measurements*. Statement 157 provides a framework for measuring fair value and a definition of fair value that contemplates an orderly transaction between market participants, not a forced or distressed sale. In the current economic crisis, many constituents have requested additional authoritative guidance to assist them in determining whether a market is active or inactive, and whether a transaction is distressed. Proposed FSP FAS 157-e would provide this application guidance.

Proposed FSP FAS 115-a, FAS 124-a, and EITF 99-20-b, *Recognition and Presentation of Other-Than-Temporary Impairments*, provides additional guidance on accounting for and presenting impairment losses on securities. Proposed FSP FAS 115-a, FAS 124-a, and EITF 99-20-b on other-than-temporary impairments (OTTI) is designed to provide clarity to investors about the credit and noncredit component of an OTTI event and to communicate when an OTTI event has occurred. As proposed, the FSP would apply to both debt and equity securities. The proposed FSP requires separate display of losses related to credit deterioration and losses related to other market factors on the income statement. Market-related losses would be recorded in other comprehensive income if it is not likely that the investor will have to sell the security prior to recovery.

If approved, both FSPs would be effective for interim and annual periods ending after March 15.

http://www.fasb.org/news/nr031709.shtml

Insurance Capital Markets

West Coast Life Adds Claims to Stranger-Owned Life Insurance Complaint

On March 12, West Coast Life Insurance Co. added civil conspiracy and several violations of Florida law to a complaint alleging that an investment company, several insurance brokers and individual policyholders engaged in an illegal stranger-owned life insurance (STOLI) scheme. The amended complaint alleges that Park Venture Advisors masterminded and implemented the plan, which involved the sale of individual life insurance policies to private investors, while Wells Fargo Delaware Trust Co. served as a trustee for an insurance trust where the disputed policies were collected and eventually sold.

In the complaint, which was originally filed in August 2008, West Coast Life alleges that over the course of 2007 and 2008, nine elderly individuals applied for life insurance policies ranging from $3 million up to $10 million, well beyond their means and what they would ordinarily have sought. West Coast Life alleges that Park Venture Advisors offered the policy applicants a cash incentive equal to an unspecified percentage of the policy and that both the policy applicants and brokers fraudulently stated in the policy applications that they had no intention of selling an interest in their policies to private investors. However, the life insurance policies were soon transferred to Park Venture Advisors' Granite Program, which established different trusts through which the policies' death benefits would pass, permitting the policies to be sold to investors with no relationship to the policyholders. West Coast Life is seeking

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declaratory judgment allowing it to invalidate the policies and retain the premiums it has collected. The insurance company has also requested the court to order the brokers to return at least $1 million in fees and to declare the individual trusts invalid. (*West Coast Life Insurance Co. v. Life Brokerage Partners LLC et al.*, 08-cv-80897 (U.S. District Court for the Southern District of Florida))

Fourth Circuit Affirms Decision in First Penn Case

On February 26, the U.S. 4th Circuit Court of Appeals in Richmond affirmed a lower court decision in the First-Penn Pacific Life Insurance Co. case holding, in effect, that insurable interest is not negated solely because the owner plans to sell a policy at the time of purchase. The carrier had appealed a 2007 decision by the U.S. District Court of Maryland denying it permission to rescind a $2 million policy it had issued to the late Stanley Moore of Arizona. The district court had held against First Penn on the grounds that the insurer had failed to take action within the two-year contestability period. The appellate court found that Moore had attempted to exploit the viatical settlement industry in 1997 when he obtained seven life insurance policies valued at a total of $8.5 million, based on its determination that Moore falsely claimed to be terminally ill when he discussed selling the policies with a broker and that he intended to sell all or most of the policies at the time he applied for them. The court stated, however, that "no third party participated in the procurement of Moore's policy and therefore no one was 'wagering' on Moore's life in violation of public policy." The court also agreed with the position reflected in an *amicus* brief filed by Katten Muchin Rosenman LLP on behalf of the Life Insurance Settlement Association that "evaluating insurable interest on the basis of the subjective intent of the insured at the time the policy issues... would be unworkable and would inject uncertainty into the secondary market for insurance." (*First Penn-Pacific Life Insurance Company v. William Evans* 2009 WL 497394)

Structured Finance and Securitization

FRBNY Releases Revised TALF FAQs and Expands Eligible Collateral for TALF's April Subscription

On March 17, the Federal Reserve Bank of New York (FRBNY) released a revised set of Frequently Asked Questions in connection with the Term Asset-Backed Securities Lending Facility (TALF), and on March 19, the FRBNY announced that the list of eligible collateral for TALF's April subscription will be expanded to include asset-backed securities (ABS) backed by residential mortgage servicing advances, business equipment loans or leases, auto fleet leases and floorplan loans. The changes detailed by the revised FAQs include: (i) primary dealers may submit names of prospective borrowers to the FRBNY for a pre-certification review in advance of the subscription date; (ii) if a borrower is deemed ineligible between the subscription date and the settlement date, the primary dealer may borrow from the Primary Dealer Credit Facility, or in certain cases, from the TALF facility; (iii) clarifications regarding variable funding notes; (iv) clarifications regarding primary dealers' responsibilities for the accuracy of offering materials and to their duty of "reasonable care" regarding collateral eligibility determinations; (v) ABS trusts may use interest rate swaps to create floating-rate securities based off of fixed-rate receivables provided the swap agreements are entered into at fair prices.

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

http://www.federalreserve.gov/newsevents/press/monetary/20090319a.htm
http://www.newyorkfed.org/markets/talf_faq.html

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FRBNY Releases Initial Results of March TALF Loan Requests

On March 19, the Federal Reserve Bank of New York (FRBNY) released the initial results for the first round of loan requests for funding from the Term Asset-Backed Securities Lending Facility (TALF). The amount of TALF loans requested at the March 17-19 operation was $4.7 billion, including $1.9 million of loan requests related to auto loans, and $2.8 billion of loan requests related to credit cards. No loan requests were made with respect to student loans or Small Business Administration guaranteed loans.

Additional details on the April funding will be released on March 24. Subscriptions for the April funding will be accepted on April 7, and those loans will settle on April 14.

http://www.newyorkfed.org/newsevents/news/markets/2009/ma090319.html

UK Developments

FSA Publishes Wide-Ranging Regulation Review

On March 18, the UK Financial Services Authority (FSA) published the *Turner Review*: *a regulatory response to the global banking crisis*, together with Discussion Paper 09/02, which sets out the FSA's specific proposals. Together they form an exceptionally important regulatory initiative. Clearly the timing is designed to influence the G-20 Summit scheduled to take place in London, chaired by the UK, in early April.

The *Review* considers the underlying causes of the current financial crisis and in recommending a regulatory response stresses the importance of future regulation and supervision being based on a different approach. Among its recommendations are:

- fundamental changes to bank capital and liquidity regulations and to bank published accounts, enhanced capital requirements to support risky trading activity, and counter-cyclical capital buffers;
- increased reporting requirements for unregulated financial institutions such as hedge funds;
- regulation of credit rating agencies;
- regulation of remuneration policies; and
- major changes in the FSA's approach to supervision and regulation (building on the new approach described in the speech of FSA Chief Executive Hector Sants, as reported in the March 13, 2009, edition of *Corporate and Financial Weekly Digest*).

http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/037.shtml

UK DEVELOPMENTS

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