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Corporate and Financial Weekly Digest

December 5, 2008

SEC/Corporate

SEC Staff Offers Guidance for Financial Institutions Filing Proxy Statements in Connection With the TARP Capital Purchase Program

The Securities and Exchange Commission's Division of Corporation Finance recently issued guidance for financial institutions which are required to file a proxy statement in connection with obtaining funds pursuant to the Capital Purchase Program (CPP) under the Troubled Asset Relief Program (TARP). Financial institutions participating in the CPP may be required to solicit and obtain shareholder approval for the authorization to issue securities by filing a proxy statement on Schedule 14A.

In response to the time constraints which financial institutions are subject to in obtaining shareholder approval and completing the funding transactions with the U.S. Department of the Treasury, the Staff of the Division of Corporation Finance has provided a compilation of actual comments it issued while reviewing the preliminary proxy statements of financial institutions which had earlier sought to obtain shareholder approval for a transaction pursuant to the CPP. Some of the sample comments include:

- Discuss why you plan to participate in the CPP or are considering participating.
- Disclose whether you have already applied to participate in the CPP and describe the status of your application.
- Disclose the material terms of your participation in the CPP. Describe the material terms of the securities and warrants you will issue to the Treasury.
- Disclose the estimated proceeds of your proposed sale of securities to the Treasury and disclose how you expect to use them.
- Discuss how your participation in the CPP may:
  - impact the holders of any outstanding senior classes of your securities,
  - impact the rights or dilute the interests of your existing common shareholders,
  - require you to expand your board of directors to accommodate Treasury appointments to it,
  - require you to register for resale securities you have issued to the Treasury, and
  - impact how you operate your company—for example, how the terms of participation will require you to restructure your executive compensation arrangements.

SEC/CORPORATE

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- Discuss any material effect on your liquidity, capital resources or results of operations if the proposal is approved and the Treasury denies your application.

- Disclose whether you will modify any plans or contracts to comply with limits on executive compensation established by Section 111 of the Emergency Economic Stabilization Act of 2008.

- Item 13 of Schedule 14A requires you to include financial information in your proxy statement if you are seeking authorization to issue common or preferred stock under certain circumstances. If you have not included financial information in your proxy statement, please explain to us why you believe financial statements are not material in connection with issuing the warrants to purchase common stock.

The Staff also offers guidance on issues for financial institutions to consider with regard to the inclusion of pro forma financial statements in the proxy statement. The Staff notes that if a financial institution expects the proceeds of the sale of securities to the Treasury to have a material impact on its balance sheet or income statement, it must provide pro forma financial statements that comply with Article 11 of Regulation S-X in its proxy statement or, in lieu of including pro forma financial statements, it must provide a textual discussion of the pro forma effect.

The Staff states that in evaluating the impact of the potential sale of securities to the Treasury, a financial institution must consider the material effect of the transaction, including:

- how the application of the proceeds of the transaction may potentially affect a financial institution's net interest margin;

- how the accretion and dividends on the preferred stock will impact the net income available to common shareholders; and

- how the transaction will impact a financial institution's basic earnings per share, diluted earnings per share and diluted shares outstanding.

The Staff further notes that if a financial institution does not believe the sale of the securities to the Treasury will have a material impact on its balance sheet or income statement, it must provide the SEC with its quantitative and qualitative analysis supporting its conclusion.

Financial institutions may direct any questions to the Staff at (202) 551-3770.

http://www.sec.gov/divisions/corpfin/cffilingguidance.htm

RiskMetrics Group Releases 2009 Proxy Voting Policies

On November 25, RiskMetrics Group (RiskMetrics) released the 2009 updates to its U.S. Corporate Governance Policy. The policy updates will apply to all shareholder meetings scheduled on or after February 1, 2009. RiskMetrics focused its 2009 U.S. policy updates mainly on issues involving executive compensation, board structure and accounting practices.

Executive Compensation. The following pay practices, each of which will prompt withhold votes for compensation committee members, have been added to RiskMetrics' U.S. Poor Pay Practices policy:

- adoption of change-in-control arrangements that include tax gross-ups on excise payments triggered by golden parachute payments,
- tax gross-ups on executive perks,

- modified “single-trigger” change-in-control provisions that allow a change-in-control payment upon voluntary resignation, and
- payment of dividends or dividend equivalents on unearned performance awards.

RiskMetrics will recommend shareholder proposals on “clawbacks” of incentive pay similar to policies required for financial institutions receiving U.S. Treasury TARP funds and proposals seeking holding requirements for executives receiving stock-based incentives. Moreover, the decline of stock price will not be an acceptable reason for repricing or resetting performance goals.

Board Structure. RiskMetrics will recommend support for shareholder proposals requiring independent chairs but will not recommend proposals requiring new standing board committees.

Accounting Practices. The Poor Accounting Practices policy, which prompts withhold votes for audit committee members or sometimes the full board, has been updated to include issuers who have received an adverse independent auditor opinion.

Other Updates. The 2009 policy updates also address director withhold recommendations for poor director attendance and company performance comparisons based on revised total shareholder return criteria; recommendations on proposals related to advance notice bylaw provisions, poison pills, Special Purpose Acquisition Corporation M&A and capital stock authorizations; and various corporate responsibility topics.

http://www.riskmetrics.com/sites/default/files/RMG2009PolicyUpdateUnitedStates.pdf

Litigation

FAA Does Not Authorize Arbitrators to Compel Pre-Hearing Discovery From Non-Parties

In reversing a district court’s order enforcing an arbitral subpoena under the Federal Arbitration Act (FAA), 9 U.S.C. Section 7, the Second Circuit Court of Appeals held that the FAA does not authorize arbitrators to issue pre-hearing document discovery subpoenas to entities that are not parties to such proceedings. Although this ruling aligns the Second Circuit with the Third Circuit, other circuits have enforced such subpoenas.

The arbitration giving rise to the discovery subpoena at issue concerned a trust’s claim against an insurer under a so-called “contingent cost” insurance policy that contained a broad arbitration clause. During the discovery phase of the arbitration, the insurer sought to compel production of documents from the entity responsible for purchasing the policy for the trust (Peachtree). Although Peachtree was a party to the same arbitration agreement as the trust and the insurer, it was not a party to the arbitration. After the arbitration panel issued a subpoena requiring Peachtree to produce documents in advance of the arbitration hearing, Peachtree moved unsuccessfully in the district court to quash.

On appeal, the Second Circuit, applying basic principles of statutory construction, examined the plain language of Section 7, which provides that “[t]he arbitrators… may summon in writing any person to attend before them… as a witness and in a proper case to **bring with him**… any book, record, document, or paper which may be deemed material as evidence in the case” (emphasis added). The Court held that this language “unambiguous[ly]” provides that “documents are only discoverable in arbitration when brought before arbitrators by a testifying witness.” Thus, the proper way for the insurer

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to have obtained access to the requested documents by subpoena would have been to subpoena Peachtree to appear as a witness at the arbitration hearing and produce the documents at that time. The Court rejected the insurer's argument that an exception should be applied because Peachtree and the trust were "intimately related." Even if this were true, the Court ruled that Section 7 does not contain a discovery exception for closely related entities. (*Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 2008 WL 4978550 (2d Cir. Nov. 25, 2008))

Court Dismisses Portion of Securities Fraud Claims

In a securities fraud class action brought against a publicly traded company and its officers, directors and major shareholders, a federal district court granted in part defendants' motion to dismiss claims asserted under Section 10(b) of the Securities and Exchange Act and Rule 10b-5.

Plaintiff alleged that defendants made false or misleading statements and omissions in the company's public filings, press releases and investor conference calls from February 2003 to May 2005. The court divided these allegations into two categories: (i) false statements regarding the future level of Microsoft's demand for the defendant company's products (Microsoft accounted for nearly 90% of the defendant company's business at the start of the class period) and (ii) omissions concerning price reductions in defendants' contract extension with AT&T (another of its major customers).

With respect to the Microsoft allegations, the court noted that the loss of Microsoft business and its impact on the company were "fully disclosed" in "unmistakable terms" in the company's February 2004 registration statement, which stated that "the revenue we receive from Microsoft Corporation has declined in recent periods and we believe will continue to decline throughout 2004. If we are unable to replace this revenue, our business and results will be harmed." Accordingly, the court held that plaintiff's allegation concerning Microsoft could not support its securities fraud claims.

Defendants did not fare as well with their effort to eliminate plaintiff's AT&T contract extension allegations. Defendants asserted that they had fully disclosed the extension in 2004 so that the stock declines that plaintiff attributed to disclosures made at the end of the class period in 2005 could not have been caused by alleged omissions relating to the AT&T contract. However, the court ruled that defendants' pre-2005 disclosures concerning the renegotiated AT&T contract were not "full" and, in fact, omitted material information about the dramatic price reduction defendants were required to accept in order to secure the contract extension. After noting that it could reasonably be inferred that defendants' 2004 disclosures downplayed the impact of the renegotiated contract, the court declined to dismiss the Section 10(b) and Rule 10b-5 claims to the extent that they were based on the alleged inadequacy of defendants' public disclosures of the AT&T contract. (*West Palm Beach Firefighters' Pension Fund v. Startek, Inc.*, 2008 WL 4838671 (D. Colo. Nov. 6, 2008))

Broker Dealer

FINRA Issues Alert Regarding FTC's FACT Regulations

On November 26, the Financial Industry Regulatory Authority (FINRA) issued a Regulatory Notice highlighting recent Federal Trade Commission regulations (issued jointly with a number of federal banking regulators) implementing provisions in the Fair Credit Transactions Act of 2003. The regulations impose new requirements on firms to develop and implement a written program to detect, prevent and mitigate identity theft in connection with the opening or maintenance of accounts (Red Flag Rules). The Red Flag Rules apply to every

BROKER DEALER

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"financial institution" or "creditor" offering or maintaining "covered accounts," as such terms are defined in the Red Flag Rules. In FINRA's view, the Red Flag Rules will apply to most member firms. The Red Flag Rules will take effect on May 1, 2009.

http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117448.pdf

FINRA Requests Comment on Proposed Changes to FINRA Reporting Requirements

On November 28, the Financial Industry Regulatory Authority (FINRA) requested comment on its proposal to adopt a new FINRA Rule 4530 to replace both NASD Rule 3070 and NYSE Rule 351, existing rules that generally require members to report adverse regulatory actions. FINRA highlighted key changes that would apply to the rule as proposed. For example, although the new rule continues to require reporting regarding findings of violations by external bodies, it would also now require reporting whenever a member firm has concluded on its own that an associated person of the firm or the firm itself has violated applicable financial or investment-related laws or rules (including foreign bodies), as is currently required under NYSE Rule 351. This broad reporting requirement would be balanced by commentary from FINRA that it would not expect firms to report isolated violations that could reasonably be viewed as ministerial, did not result in customer harm and were remedied promptly. FINRA's Regulatory Notice announcing the proposed rule describes all aspects of the proposed rule and also provides a summary in chart form of how its requirements relate to the existing requirements of NASD Rule 3070 and NYSE 351. The comment period expires on December 29.

http://www.finra.org/Industry/Regulation/Notices/2008/P117455

FINRA Provides Guidance Regarding Extraordinary Cooperation

The Financial Industry Regulatory Authority (FINRA) published a notice on November 28 outlining a number of factors that it claims it will consider when assessing whether a member firm's level of cooperation during the course of a regulatory investigation can be considered to be "extraordinary" and thus potentially influence a sanctioning determination. The factors include: self-reporting of violations, extraordinary steps to correct deficient procedures and systems, extraordinary remediation to customers and providing substantial assistance to FINRA investigations. The FINRA Notice provides additional detail on each of the factors listed above.

http://www.finra.org/Industry/Regulation/Notices/2008/P117453

NASDAQ Proposes Reduction of Exposure Time for Option Limit Orders

At present, NASDAQ OMX PHLX, Inc. (the Exchange) Rules 1080(c)(ii)(C)(1) and (2) provide that an Order Entry Firm may not execute as principal against orders on the limit order book they represent as agent unless: (i) agency orders are first exposed on the limit order book for at least 3 seconds, (ii) the Order Entry Firm has been bidding or offering on the Exchange for at least 3 seconds prior to receiving an agency order that is executable against such order, or (iii) the Order Entry Firm proceeds in accordance with the crossing rules. In addition, Order Entry Firms must expose orders they represent as agent for at least 3 seconds before such orders may be automatically executed, in whole or in part, against orders solicited from member and non-member broker-dealers to transact with such orders. On November 10, the Exchange filed with the Securities and Exchange Commission a proposed rule change whereby the above exposure periods would be reduced to one second. The SEC is considering granting accelerated approval of the proposed rule

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change at the end of a 15-day comment period.

http://www.sec.gov/rules/sro/phlx/2008/34-58949.pdf

NYSE Proposes Changes to Streamline Odd-Lot Order Handling Guidance

On November 6, New York Stock Exchange LLC (NYSE) filed a proposal with the Securities and Exchange Commission to update NYSE Rule 411(b) concerning odd-lot order handling requirements, particularly by adding a new subparagraph to explicitly address fraudulent or manipulative conduct, such as wash sales. As amended, Rule 411(b) would also require that odd-lot orders be aggregated only during regular trading hours and would clarify that a person, member or member organization is not permitted to enter or accept multiple odd-lot orders where such orders can be aggregated into round-lots.

Additionally, to provide a single, comprehensive source of interpretive guidance for odd-lot order system and trading practices, NYSE proposes to (i) rescind NYSE Information Memorandum 94-14 to the extent that it created a distinction in the regulatory treatment of odd-lot limit and odd-lot market orders, and (ii) issue a new Information Memorandum that would update and restate current interpretive guidance on these issues.

http://www.sec.gov/rules/sro/nyse/2008/34-58979.pdf
http://apps.nyse.com/commdata/pub19b4.nsf/docs/5388F885B786C86A852574FA00766E51/$FILE/NYSE-2008-118.pdf

Structured Finance and Securitization

SEC Issues Final and Proposed Rules on Credit Rating Agencies

On December 3, the Securities and Exchange Commission approved a number of final rule changes and issued new proposed rule changes based on their 10-month examination of three major credit rating agencies to increase transparency, disclosure and accountability at nationally recognized statistical rating organizations (NRSROs). The final amendments include the addition of three new record-keeping requirements and new conflicts prohibitions including rules that:

- require NRSROs to make and retain records of all rating actions related to a current rating from the initial rating to the current rating;
- require NRSROs to keep a record of the rationale for any material difference between the credit rating implied by a quantitative model and the final credit rating issued for a structured finance product if a quantitative model is a substantial component of the credit rating process for such product;
- require NRSROs to retain records of any complaints regarding the performance of a credit analyst in determining, maintaining, monitoring, changing or withdrawing a credit rating;
- prohibit an NRSRO from issuing a credit rating with respect to an obligor or security where the NRSRO or an affiliate made recommendations to the obligor or the issuer, underwriter or sponsor of the security about the corporate or legal structure, assets, liabilities or activities of the obligor or issuer of the security;
- prohibit a person within an NRSRO who has responsibility for participating in determining credit ratings or for developing or approving procedures or methodologies used for determining credit

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ratings from participating in any fee discussions, negotiations or arrangements.

The SEC's proposed rule changes include a rule that would prohibit an NRSRO from issuing a rating for a structured finance product paid for by the product's issuer, sponsor or underwriter unless the information about the product provided to the NRSRO to determine the rating and, thereafter, monitor the rating is made available to other NRSROs, and a rule that would that require even more stringent disclosure of historical ratings data.

http://www.sec.gov/news/press/2008/2008-284.htm
http://www.sec.gov/news/press/2008/nrsrofactsheet-120308.htm

GAO Issues Reports on TARP and Foreclosure Reduction Efforts

On December 2, the Government Accountability Office (GAO) issued a report on the status of the implementation of the Troubled Asset Relief Program titled "Additional Actions Needed to Better Ensure Integrity, Accountability and Transparency" and on December 4, the GAO released another report on TARP titled "Status of Efforts to Address Defaults and Foreclosures on Home Mortgages."

In its first report, the GAO reviewed the way in which the U.S. Department of the Treasury has utilized its authority under the Emergency Economic Stabilization Act of 2008 (EESA) to implement TARP. The GAO's report focuses primarily on the Treasury's efforts to stabilize the financial system by purchasing preferred shares in financial institutions through the Capital Purchase Program (CPP). The GAO makes a number of recommendations to improve accountability and transparency in the operation of the CPP and other TARP programs. The most notable recommendation is that the Treasury should do more to work with bank regulators to establish a systematic means of determining whether financial institutions receiving CPP funds are (i) acting consistently with EESA's objectives to expand the flow of capital to U.S. consumers and businesses through increased lending and to work to modify the terms of residential mortgages, and (ii) complying with key requirements of their agreements with the Treasury, including limitations on executive compensation, dividend payments and the repurchase of stock. The GAO report also addresses the Treasury's efforts to establish the Office of Financial Stability and the methods and metrics that can be used to measure TARP's impact on the financial system and overall economy.

In its second report, the GAO notes that default and foreclosure rates have reached historic highs and are expected to increase further, and that one of the stated purposes of the EESA is to preserve homeownership. The GAO observes that the Treasury originally planned to use its position as an owner of a large amount of troubled assets acquired through TARP purchases to influence servicers to modify mortgages. However, after deciding to focus on the CPP instead of large-scale purchases of troubled assets, the Treasury is now considering various ways to reduce foreclosures, including (i) encouraging financial institutions receiving CPP funds to modify loans, (ii) instituting a loan modification program similar to that proposed by the FDIC, which is modeled on the FDIC's Indymac program, (iii) attempting to increase participation in the Hope for Homeowners modification/refinance program or (iv) using its authorities in some other way to reduce foreclosures.

http://www.gao.gov/new.items/d09161.pdf
http://www.gao.gov/new.items/d09231t.pdf

Fed and Treasury Announce Agency-Debt/MBS Purchases and TALF Facility

On November 25, the Federal Reserve Board announced that in an attempt to reduce mortgage-interest rates it would begin purchasing up to $500 billion in mortgage-backed securities guaranteed by Fannie Mae, Freddie Mac and Ginnie Mae and up to $100 billion in direct debt obligations of Fannie Mae, Freddie Mac and the Federal Home Loan Banks. The purchases will take place over the next several quarters.

Additionally, the Federal Reserve Board and the U.S. Department of the Treasury announced the creation of the Term Asset-Backed Securities Loan Facility (TALF) which is intended to help consumers and small businesses obtain credit by promoting the issuance of asset-backed securities (ABS) backed by student loans, auto loans, credit card receivables and certain small business loans. The facility eventually may be expanded to include securities backed by commercial mortgage loans, non-agency residential mortgage loans or other assets, but at this time such assets are not covered. More information on the TALF is available in a Katten Client Advisory published December 1.

http://www.federalreserve.gov/newsevents/press/monetary/20081125b.htm
http://www.federalreserve.gov/newsevents/press/monetary/20081125a.htm
http://www.treas.gov/press/releases/hp1292.htm

CFTC

CFTC Proposes to Require Electronic Filing of CPO/CTA Disclosure Documents

In response to a petition for rulemaking by the National Futures Association (NFA), the Commodity Futures Trading Commission has proposed amendments to CFTC Regulations 4.26 and 4.36 that would require commodity pool operators (CPOs) and commodity trading advisors (CTAs) to file their disclosure documents electronically with the NFA using its new online disclosure document filing system. Currently, most CPOs and CTAs file their disclosure documents with the NFA via e-mail. Users will access the new filing system using the same login and password that they currently use for NFA's Online Registration System.

The comment period for the proposed amendments closes on December 26.

http://www.cftc.gov/stellent/groups/public/@lrfederalregister/documents/file/e8-28177a.pdf

NFA Rules to Specify Content of Forex Dealer Customer Statements

The National Futures Association (NFA) has filed for approval by the Commodity Futures Trading Commission a new Compliance Rule 2-44, as well as conforming amendments to NFA's Interpretive Notice Regarding Forex Transactions, that would set out in greater specificity the information that must be included in statements provided to the customers of Forex Dealer Members (FDMs). The new rule is modeled generally after CFTC 1.33, which governs futures transactions, and is intended to standardize the content of FDM customer statements by replacing the more general content requirements currently set forth in NFA's Interpretive Notice with a detailed list of required information. Among the specific items set forth in the new rule, FDMs would be required to prominently display the customer's account equity (including all realized and unrealized profits and losses) in each daily, monthly and/or quarterly statement. The new rule would permit FDMs to provide customers with daily statements electronically, and to provide confirmations and monthly/quarterly statements electronically with the customer's consent.

http://www.nfa.futures.org/news/PDF/CFTC/CR2-44_Forex_Interp_Notc_112408.pdf

CFTC

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CFTC Issues No-Action Letters to Korea Exchange and Thailand Futures Exchange Pcl

The Commodity Futures Trading Commission's Office of General Counsel issued a no-action letter to the Korea Exchange (KRX) on November 26 permitting the offer and sale in the United States of KRX's futures contract based on the KOSPI 200 Index. On the same day, the Office of General Counsel also issued a no-action letter to Thailand Futures Exchange Pcl (TFEX) permitting the offer and sale in the United States of TFEX's futures contract based on the SET50 Index.

http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5574-08.html
http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5575-08.html

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BANKING

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FDIC Streamlines Bidder Qualification Process for Troubled Institutions

On November 26, the FDIC announced the establishment of a modified bidder qualification process to expand the pool of qualified bidders interested in purchasing the deposits and assets of failing depository institutions. In recognition of the fact that potential investors not organized as FDIC insured institutions or bank holding companies might be interested in bidding to purchase a failing depository institution, the FDIC will consider abbreviated applications and may issue conditional approval for deposit insurance in order to qualify interested parties for the FDIC's failing institution bidders list. The program complements the Office of the Comptroller of the Currency's recently announced program to pre-qualify applicants who wish to receive a national bank charter.

Interested parties must have conditional approval for a bank charter from the responsible agency and meet certain bid criteria established by the FDIC, including (i) a business plan compliant with the Community Reinvestment Act, (ii) readily available capital, and (iii) an identified management team subject to financial and biographical review.

http://www.fdic.gov/news/news/press/2008/pr08127.html

Federal Reserve Extends Life of Liquidity Facilities

Citing "continuing strains in financial markets," the Federal Reserve on December 2 announced the extension through April 30, 2009, of three liquidity facilities: the Primary Dealer Credit Facility (PDCF), the Asset-Backed Commercial Paper Money Market Fund Liquidity Facility (AMLF) and the Term Securities Lending Facility (TSLF). These facilities had previously been authorized through January 30, 2009.

The extension through April 30 for these facilities is consistent with the term authorized for several other liquidity-related facilities: the Commercial Paper Funding Facility (CPFF), the Money Market Investor Funding Facility (MMIFF) and the temporary reciprocal currency arrangements (swap lines) with 14 other central banks. In contrast, the newly announced Term Asset-Backed Securities Loan Facility (TALF) is not scheduled to expire until December 31, 2009.

The PDCF provides discount window loans to primary dealers. The AMLF provides loans to depository institutions to purchase asset-backed commercial paper from money market mutual funds. Under the TSLF, the Federal Reserve Bank of New York auctions term loans of U.S. Treasury securities to primary dealers. The CPFF provides a liquidity backstop to U.S. issuers of commercial paper. The MMIFF supports a private-sector initiative to provide liquidity to U.S. money market investors. The TALF encourages issuance of asset-backed securities collateralized by auto loans, student loans, credit card receivables and certain small business loans.

http://www.federalreserve.gov/newsevents/press/monetary/20081202b.htm

Office of Comptroller of the Currency Releases New Fee Schedule

On December 1, the Office of the Comptroller of the Currency (OCC) released a bulletin describing its new fee schedule. The purpose of this issuance is to inform all national banks and federal branches and agencies of fees charged by the OCC for 2009. Changes are effective January 1, 2009. The issuance covers semi-annual assessments, examination fees and licensing fees, among others.

http://www.occ.treas.gov/ftp/bulletin/2008-34.html

FDIC Board Approves Final Version of Temporary Liquidity Guarantee Program

In response to public comments received on the proposed Temporary Liquidity Guarantee Program (TLGP) first announced by the Federal Deposit Insurance Corporation (FDIC) on October 13, the Board of Directors of the FDIC approved a final TLGP rule on November 21.

The TLGP has two components: a debt guarantee component, in which the FDIC guarantees newly issued senior unsecured debt of insured depository institutions and most U.S. holding companies; and a transaction account guarantee program, in which participating institutions can provide customers with full coverage on non-interest bearing transaction accounts held at insured depository institutions for an annual fee of 10 basis points.

In connection with the final adoption, the Board announced numerous changes to the TLGP in light of public comments. With respect to the debt guarantee component, the final version of the program provides that the FDIC's payment obligation is triggered by a payment default and also eliminates certain short-term debt from coverage. With respect to the transaction account guarantee program, coverage now includes lawyers' trust accounts and low-interest Negotiable Order of Withdrawal accounts.

Eligible institutions that do not wish to participate must opt out no later than December 5.

http://www.fdic.gov/news/news/press/2008/pr08122.html

OCC Conditionally Approves "Shelf Charter" to Expand Pool of Qualified Bidders for Troubled Institutions

On November 21, the Office of the Comptroller of the Currency (OCC) conditionally approved a national bank "shelf charter," designed to "facilitate new equity investments in troubled depository institutions."

According to the terms of the conditional approval, investors have preliminary approval to establish a national bank although the charter will remain "on the shelf," or inactive, until such time as the investor group attempts to acquire a troubled institution. The shelf charter concept permits investors to position themselves to acquire troubled institutions and clears such investors to view the list of failing or troubled institutions maintained by the Federal Deposit Insurance Corporation (FDIC) in order to submit bids. If a bid is accepted by the FDIC, final charter approval can be granted by the OCC together with final approval of deposit insurance by the FDIC.

The OCC believes that shelf charters will expand the "pool of potential buyers available to buy troubled institutions, and in particular the new equity capital available to bid on troubled institutions" through the FDIC's bid process.

The first shelf charter was granted to Ford Group Bank, National Association on November 17.

http://www.occ.treas.gov/ftp/release/2008-137.htm

UK Developments

FSA Updates Short Selling FAQs

On November 26, the UK Financial Services Authority published a further update to its short selling FAQs. The only substantive change is to the answer to question 42, which provides additional detail on the interaction of the short selling requirements related to companies in rights issue periods with the requirements related to UK financial sector companies (where such companies enter into a rights issue period).

www.fsa.gov.uk/pubs/other/Short_selling_FAQs_V5.pdf

FSA Proposes Further Amendments to UK Listing Rules

On December 1, the UK Financial Services Authority (FSA) published *CP08/21 Consultation on amendments to the Listing Rules and feedback on DP08/1*, a feedback statement following its review of the UK listing regime published in January 2008. The paper proposes further changes to the UK regime so that relevant listing rules are clearly marked as "Premium" or "Standard" in order to ensure that issuers understand their obligations under the regime.

The requirements for a Standard listing (currently called a Secondary listing) are derived from the EU Prospectus Directive, Disclosure and Transparency Rules and Consolidated Admissions and Reporting Directive. "Premium" listings will have to meet UK standards that are super-equivalent to the EU requirements.

The proposed "Standard" listing will cover issues of equities (excluding issues by investment entities), Global Depository Receipts and Debt and Securitized derivatives, as such issues are only required to comply with EU minimum standards.

The Premium segment will only be open to equity securities issued by commercial companies and closed and open-ended investment entities. Premium and Standard listings will be available to both UK and overseas companies.

The FSA expects to provide further feedback in the summer of 2009.

www.fsa.gov.uk/pubs/cp/cp08_21.pdf

UK Definition of "Financial Instrument" Harmonized

On December 2, the definition of "financial instrument" found in Part 6 of the Financial Services and Markets Act 2000 and in Article 5 of the Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Instruments) Order 2001 (SI 2001/996) was amended by the publication of the Definition of Financial Instrument Order 2008 (SI 2008/3053). The amendments ensure that the term "financial instrument" is understood by reference to its definition in the EU Market Abuse Directive and the EU Markets in Financial Instruments Directive (MiFID).

UK DEVELOPMENTS

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The definition is being amended to ensure that the UK remains fully compliant with its obligations under the EU Market Abuse Directive and MiFID. The provisions used to implement the UK's obligations under these Directives need to be updated to ensure continued compliance with respect to subsequent amendments. The changes mean that the UK Financial Services Authority's powers to make rules for the disclosure of information in relation to financial instruments will now extend to derivative instruments, which, although not giving a legal entitlement to acquire shares, in practice put their holders in an economically similar position. The most common example of this is a Contract for Difference (CfD), which currently falls outside the UK disclosure rules.

www.opsi.gov.uk/si/si2008/pdf/uksi_20083053_en.pdf

FSA Proposes New Liquidity Rules

On December 4, the UK Financial Services Authority (FSA) published consultation paper *CP08/22 Strengthening Liquidity Standards*, proposing significant changes to its liquidity requirements for banks, building societies and investment firms.

The proposed rules are based on the Basel Committee on Banking Supervision's (BCBS) Principles for Sound Liquidity Risk Management and Supervision and other international agreements to address liquidity issues as a result of recent market events. The FSA proposals include: (i) a new liquidity risk management framework with greater emphasis on liquidity risk assessment and mitigation; (ii) a qualitative framework for liquidity risk management with an increased focus on stress testing and contingency funding; (iii) new liquidity reporting requirements; and (iv) a new approach for corporate groups operating in the UK.

The consultation period closes on March 4, 2009, and new rules are expected in October 2009.

www.fsa.gov.uk/pubs/cp/cp08_22.pdf

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

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