

## Corporate and Financial Weekly Digest

Business/Financial News in Brief  
**June 30, 2006**

### SEC/Corporate

#### **ABA Committee Adopts Majority Voting Amendments to Model Business Corporation Act**

The American Bar Association Committee on Corporate Laws has adopted amendments to the Model Business Corporation Act providing an alternative voting procedure for the election of directors. Although the MBCA will continue to permit candidates receiving a plurality of votes to be elected, even if they receive fewer votes for their election than against their election, elected directors must receive a majority of votes cast in order to be elected for a full term. The amendments, set forth in Section 10.22 of the MBCA, provide that directors receiving less than a majority of votes cast can serve until replaced by a qualified candidate selected by the board, but in no event longer than 90 days. Shareholder or board action amending the corporate by-laws will be needed before these amended voting procedures can take effect. According to the committee, the amendments are a response to “the high level of public interest in the proper system relating to the process of voting by shareholders for the election of directors”. (*BNA Securities Regulation & Law Report*, 6/26/06, p.1125.

<http://www.abanet.org/buslaw/committees/CL270000pub/materials/20060621000000.pdf>

#### **Nasdaq Names Companies to New Listing Tier**

The Nasdaq Stock Market, Inc. has identified the companies to be included in its new listing tier, the NASDAQ Global Select Market, effective July 3. According to NASDAQ, this new tier for which approximately 1,200 companies qualify, has the highest listing standards in the world. In conjunction with the new tier, the NASDAQ National Market will be renamed the NASDAQ Global Market. The NASDAQ Capital Market will remain as is with approximately 550 companies. (*Securities Mosaic*, 6/26/06)

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## Broker Dealer

### **SEC Denies Request for Broker to Share Commissions with Foreign Affiliates**

The Staff of the Division of Market Regulation of the Securities and Exchange Commission has advised Dinosaur Securities, LLC, a registered broker-dealer and member of the NASD, that the Staff would not take a no action position if Dinosaur pays certain unregistered foreign companies transaction-based compensation in exchange for those companies referring non-U.S. nationals, non-U.S. citizens or non-U.S. entities to Dinosaur to trade in U.S. markets. NASD Rule 1060 allows NASD member firms to pay transaction-related compensation to unregistered foreign persons to trade in U.S. markets if, among other things, the member firm assures itself that the non-registered foreign person is not required to register in the U.S. as a broker-dealer. In its response, the Staff stated that it would not provide no-action relief to member firms attempting to satisfy their obligations under Rule 1060. The Staff recommended that, in analyzing whether the activities of the foreign companies, taken as a whole, would require broker-dealer registration, Dinosaur and its counsel review the adopting release for Exchange Act Rule 15a-6 (Release No. 34-27017 (July 11, 1989)) and, in particular, the discussion on general principles of U.S. registration for international broker-dealers.

<http://www.sec.gov/divisions/marketreg/mr-noaction/dinosaur062306.htm>

### **Notice of Proposed Rulemaking Lowers Threshold for Retaining Money Transmittal Records**

The Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury and the Board of Governors of the Federal Reserve System (Board) are reviewing and requesting comments on lowering the threshold in the rule requiring banks and nonbank financial institutions to collect and retain information on funds transfers and transmittals of funds. Currently, banks and nonbank financial institutions are required to collect, retain, and transmit information on funds transfers and transmittals of funds in amounts of \$3,000 or more. The Bank Secrecy Act authorizes the Treasury to require financial institutions to keep records and file reports that the Treasury determines have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in intelligence or counterintelligence matters to protect against terrorism. The Notice of Proposed Rulemaking requests comments on (i) the potential effect of lowering the threshold – or eliminating the threshold altogether – as a means of combating terrorism, money laundering, and other illicit activity and protecting the U.S. financial system from these threats; (ii) the benefit to law enforcement of reducing or eliminating the threshold for the requirement to collect, retain, and transmit information on funds transfers and transmittals of funds; (iii) the burden to the financial system, if any, that would result from lowering or eliminating the threshold for the requirement to collect, retain, and transmit information on funds transfers and transmittals of funds; and (iv) consumer practices and procedures to measure the effect of lowering the threshold. FinCEN and the Board believe that money launderers and terrorist financiers have become increasingly sophisticated in their use of funds transfer and transmittal of funds and now effect most money transfers in amounts of less than \$3,000.

<http://www.federalreserve.gov/boarddocs/press/bcreg/2006/20060616/attachment.pdf>

### **Money Market Shares Bought in Sweeps Exempt From Credit Prohibitions**

Under Section 11(d)(1) of the Securities Exchange Act of 1934, brokers participating in the distribution of new issues are prohibited from extending credit on those issues for at least 30 days from their sales to customers. Broker-dealers regularly offer to sweep the cash balances in their customers' accounts to a money market fund, usually one managed by an affiliate of the broker. In response to a request of the Securities Industry Association, the Securities and Exchange Commission issued an exemption from

Section 11(d)(1) to allow brokers to extend immediate margin or credit on shares of money market funds bought in a sweep arrangement within or after 30 days from the date of purchase.

<http://www.sec.gov/divisions/marketreg/mr-noaction/sia060806.htm>

### **No Action Relief Given to Real Estate Brokerage Firms Employing Dually Registered Persons**

A broker-dealer offering tenant in common interests in real estate properties as part of a tax deferred exchange pursuant to Section 1031 of the Internal Revenue Code of 1986, which treats those exchanges as securities transactions, has obtained no action relief from broker-dealer registration for the real estate firms with which its registered representatives are associated. A number of conditions must be met to obtain this relief: (i) dually registered persons must operate their "securities" businesses from their homes and not from offices in the real estate broker's office; (ii) there may be no signage relating to the securities business at the real estate broker's office; (iii) the registered persons must use business cards for their securities businesses separate from the cards used for their real estate businesses; and (iv) they cannot, in any way, compensate others in the real estate office for referrals of business. In addition, dually registered persons and their employing real estate firms must enter into agreements, approved by the broker-dealers, providing for payment of fixed fees for desks at the broker's office and possible payment of fees based upon a percentage of real estate commissions earned. These fees cannot be adjusted, on a backward or forward basis, to recognize income from the securities business for the requesting broker-dealer.

<http://www.sec.gov/divisions/marketreg/mr-noaction/weltonst062706.htm>

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## **Banking**

### **Sheila C. Bair Sworn in as 19th Chairman of the Federal Deposit Insurance Corporation**

Sheila C. Bair has been sworn in as the 19th Chairman of the Federal Deposit Insurance Corporation (FDIC). Martin J. Gruenberg, Vice Chairman of the FDIC, had served as Acting Chairman since Donald E. Powell resigned on November 15, 2005. Ms. Bair's experience includes serving as a Commissioner on the Commodity Futures Trading Commission, Senior Vice President for Government Relations of the New York Stock Exchange, Assistant Secretary for Financial Institutions at the U.S. Department of the Treasury, and most recently, as a Professor at the University of Massachusetts.

Chairman Bair's recent work focused heavily on the banking sector. As the Assistant Treasury Secretary for Financial Institutions, she was charged with helping to develop the Administration's positions on banking policy issues. She worked closely with Treasury's own banking regulatory bureaus, the Office of the Comptroller of the Currency and the Office of Thrift Supervision, as well as the Federal Reserve Board and the FDIC. Chairman Bair's research at the University of Massachusetts also dealt extensively with banking and related issues. In addition, as an academic, Ms. Bair served on the FDIC's Advisory Committee on Banking Policy.

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## Litigation

### **Allegations of Specific Conduct in Furtherance of Market Manipulation Scheme Avoid Dismissal**

Following dismissal of a complaint alleging violations of the federal securities laws arising from false representations that induced plaintiffs to buy stock in a company that was in fact an “empty shell” with no “employees, infrastructure, product or services,” plaintiffs filed an amended complaint. In denying defendants’ motion to dismiss, the Court held that plaintiffs’ expanded description of defendants’ fraudulent conduct sufficiently alleged market manipulation and that, in addition, plaintiffs had pointed to specific conduct in furtherance of defendants’ scheme, such as acts to “pump up” the value of the company’s stock, dumping of the company’s stock for a profit, and concealing information that would have exposed the scheme. (*Catton v. Defense Technology Systems, Inc.*, No. 05 Civ. 6954 (SAS), 2006 WL 1716862 (S.D.N.Y. June 20, 2006))

### **Failure to Allege Competition in Tied Market Leads to Affirmance of Dismissal of Tying Claim**

A real estate agent brought an action alleging that use of the multiple listings service (MLS) for homes and properties was “tied” to membership in a real estate trade association in violation of Section I of the Sherman Act. In affirming dismissal of the complaint, the Seventh Circuit held that while it adequately alleged that membership in the association was required to access the MLS and that the association had “sufficient market power to restrain free competition in the tied market product,” the complaint did not state a claim because it failed to allege that there was any competition in the allegedly tied market for realtor trade association memberships. As the Court pointed out, “[w]here there is no competition in the tied market, there can be no antitrust violation.” Thus, “[f]orcing a buyer to purchase a product he otherwise would not have purchased [in order to obtain the product he wants] is insufficient to establish the foreclosure of competition” required to state claim under the federal antitrust laws. (*Reifert v. South Central Wisconsin MLS Corp.*, No. 05:05-3601, 2006 WL 1585570 (7th Cir. June 12, 2006))

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