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Featured Article

New DOJ Cooperation Principles: Substituting the Culture of Avoidance for the Culture of Waiver

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Introduction

The Department of Justice (DOJ or Department) revised its charging and cooperation principles for business organizations by adding a new chapter to the U.S. Attorney's Manual on August 28, 2008.[1] These revisions, by Deputy Attorney General Mark R. Filip, are the latest effort by the Department to respond to critics who claim that its policies on cooperation have created a "culture of waiver" that strips business organizations of key rights, such as the attorney-client privilege and the work product doctrine.[2] The Department's prior attempt to quell its critics came in a November 2006 DOJ memorandum familiarly known as the McNulty memo, which placed procedural and substantive limitations on the circumstances under which prosecutors could request waivers of privilege from business organizations.[3] Many claim those restrictions were ineffective, if not ignored.[4]

Ironically, Mr. Filip's revisions were issued on the same day that the Second Circuit Court of Appeals affirmed *United States v. Stein*[5] and at a time when Congress is threatening to legislate limits on prosecutorial request for waivers.[6] In *Stein*, the district court dismissed indictments against 13 former KPMG partners based on violations of the individuals' Sixth Amendment right to counsel under the DOJ's Thompson memo, the predecessor to the McNulty memo and Filip revisions.[7]

The new revisions respond to the Department's critics by precluding prosecutors from asking for what it calls "core" attorney-client communications. This would cover conversations such as those by a director and his or her counsel not related to an internal investigation.[8]

The revisions are keyed to the notion of choice. Corporations can choose whether they want to cooperate. If they decline to cooperate, that, in and of itself, will not justify being charged. At the same time, cooperation credit can mitigate any potential charges. The key to earning that credit, according to the revisions, is the production of all the facts, regardless of whether they are privileged or not. Waiver by itself will not yield cooperation credit—only the production of all the facts.

To facilitate production of all the facts, the Filip revisions revert to the concept of choice: the company may choose to have significant portions of its internal investigation—typically the source for the company of most facts about an incident—done by non-lawyers. This eliminates the waiver question by avoiding the creation of privilege—the culture of waiver becomes the culture of avoidance. Unfortunately, this idea ignores the purpose of the attorney-client privilege and work product doctrine and the difficult problems any organization conducting a self-evaluative internal investigation in full public view would experience. Thus, while the revisions are a step in the right direction, it is doubtful that they will end the culture of waiver and its assault on the attorney-client privilege and the rights of corporate employees.

Filip Revisions: A Response to Each Key Point of Criticism

The Filip revisions substantially alter the Department's approach to cooperation and privilege waivers while preserving many of its basic organizational charging principles. This new approach responds directly to each of the "culture of waiver" critics while trying to redefine the debate from one that focuses on the conduct of the prosecutor under the McNulty memo, to the choices made by the company.

The new approach, consistent with past approaches, encourages self-reporting and cooperation,[9] but poses this as a choice for the organization, not a requirement. Cooperation may yield cooperation credit that can be beneficial in the charging process. Conversely, a failure to cooperate in and of itself is not a basis for being charged.[10] The revisions caution, however, that in view of the complexity of many business transactions and the difficulty of assessing precisely what occurred and who is responsible, it may well be in the interest of the organization to cooperate.[11] Stated differently, if the organization chooses not to cooperate that alone will not justify charging it. That choice, however, could result in a charging decision being made on incomplete facts or inappropriately enhance the prospect of being charged. Accordingly, the choice not to cooperate may not be beneficial to the company. This "organizational choice" approach threads through the revisions.

In the first of five key points clearly designed to assuage DOJ critics, the revisions define cooperation in terms of providing facts to the Department. Cooperation credit is a function of furnishing the DOJ all the facts, regardless of their source.[12] When read in conjunction with the discussion about the difficulty of ascertaining what happened and who is responsible in a corporate setting, it is clear that a full report of the facts includes identifying who is responsible for the actions. This point is consistent with earlier Department policy.[13] The corollary to this principle, however, reflects the new approach: the revisions state that privilege waivers in and of themselves will not result in cooperation credit. This contrasts with earlier policy which noted that waivers might be necessary.[14] Now, cooperation credit is a function of the organization's choice to either furnish all the facts or not. Waiver is no longer the issue under the revisions.

Second, the Filip revisions prohibit prosecutors from requesting "core" attorney-client privilege communications.[15] The example given in the revisions is of a corporate official seeking legal counsel outside of the fact gathering process of an internal investigation.[16] The new approach contrasts with that of the McNulty memo, which placed procedural and substantive limitations on the circumstances under which prosecutors could request waivers of attorney work-product (what the memo called Category I material) or attorney-client communications (essentially Category II material). By abolishing the McNulty categories and prohibiting requests by prosecutors for certain attorney-client communications, the new policy adopts, in part, the approach used in the pending Attorney-Client Privilege Protection Act, which essentially bans requests by prosecutors for privileged material.

Third, the revisions state that in "evaluating cooperativeness," prosecutors cannot consider whether a corporation has advanced attorneys' fees to its employees, officers or directors.[17] This point responds directly to *Stein* where the district court concluded that under the Thompson memo, prosecutors violated the defendants' Sixth Amendment right to counsel.[18]

Fourth, prosecutors are prohibited from considering the fact that a business organization has entered into a joint defense agreement with some or all of its current or former employees in evaluating the cooperation of the entity.[19] Using cooperation or joint defense agreements, an organization can share documents and information about an investigation with its employees under the protection of privilege. Many organizations are reluctant to enter into these agreements, or restrict their scope, out of fear that it may undermine their claims of cooperation, particularly if a number of employees decline to cooperate with the government. Yet without these agreements, employees would typically not have access to key materials from an organization's files, which are often necessary to prepare for an interview with internal investigators or prosecutors or which may be necessary to prepare a defense.[20]

Finally, the revisions indicate that prosecutors will not consider whether a business organization has disciplined or terminated employees in assessing corporate cooperation.[21] Like the other key points in the new policy, this prohibition speaks directly to Department critics who have repeatedly complained that prosecutors are interfering unnecessarily in personnel decisions by essentially demanding that anyone the government thought might be involved be fired.

Analysis: No Real Change

Mr. Filip's revisions take a good first step by addressing each of the key points raised by critics of the Department—and for that matter, those of the Securities and Exchange Commission

(SEC), which is a co-equal creator of the "culture of waiver."[22] At the same time, however, careful consideration of the revisions demonstrates that in fact they do little to end the culture of waiver.

The ban on requests for core attorney-client communications is a good beginning. Banning prosecutors from asking for waivers of this material aids in protecting the privilege and ensuring that business organizations and its employees seek and obtain legal advice that may be critical to resolving the situation without fear that their discussions will become subject to public scrutiny.

The protection offered by the directive is limited, however. Under the revisions, the only protected attorney-client communications are those where legal advice is sought *and* which are "[s]eparate from (and usually preceding) the fact-gathering process in an internal investigation . . . ."[23] As the McNulty memo made clear, it should be a rare circumstance in which prosecutors would have a need for this type of material.[24]

The key issue has never been the "core" communications but, rather, waiver as it relates to the internal investigation a business organization typically conducts following the discovery of possible malfeasance. The McNulty, Thompson, and Holder memos all suggested that cooperation may require a waiver of the privileges that protect an internal corporate investigation.[25] In practice, many believed waiver was mandatory.[26]

Corporate internal investigations are an important part of a critical corporate process of seeking legal advice and assuring future compliance with the law.[27] As the Filip revisions acknowledge, the company as an artificial construct does not have personal knowledge. To analyze possible malfeasance and evaluate what needs to be done, the first step is for the company to conduct an internal inquiry. During this inquiry, it is critical that investigators and witnesses feel free to fully explore all pertinent issues, theories and facts. It is also essential that investigators carefully document the course of the inquiry and make notes of key points that can later be used as the situation is analyzed. Privilege facilitates this process. As the Supreme Court made clear in its seminal decision in *Upjohn v. United States*, the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[28] Applying the protections of the privilege to the internal inquiry thus helps ensure a full and complete investigation and future compliance with the law.[29]

A key focus of the waiver question has been witness interviews conducted by internal investigators. Those witness interviews are often critical to the inquiry and the ability of a company to assess a situation. In many instances, an employee may want to cooperate with the organization but not the government. Conducting the inquiry in a privileged setting gives a company the opportunity to obtain information from the employee and complete its inquiry.[30] As the *Upjohn* court made clear: "While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege."[31]

The Filip revisions alter the Department's approach to the question of internal investigations by redefining the issue while leaving business organizations with the same dilemma. Rather than phrasing the question of producing information and materials from the inquiry as one of possible waiver, as in the past, the Filip revisions recast the issue as one of choice for the company:

> A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts . . . Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect — for example, having employee or other witness statements collected after interviews by non-attorney personnel.[32]

Accordingly, the company can choose to either use lawyers or not use lawyers. What was an issue of waiver by the company is now a question of choice—waiver is eliminated by redefining the question.

Redefining the issue as one of choice rather than waiver fails, however, to recognize the fundamental issues at stake. Protests regarding waiver and stripping corporations of fundamental rights are not about abstract theoretical rights but the ability of the company to assess what happened, take the necessary steps to correct the situation and ensure future compliance with the law. Stated differently, eliminating the culture of waiver is about ensuring that corporations can implement the key law enforcement goals of rooting out and correcting any malfeasance and ensuring that the organization will be a good corporate citizen in the future. The "culture of waiver" has undercut the ability of business organizations to meet this goal.

In the end, redefining the issue from one of waiver to choice leaves the company with the same dilemma it has always had under DOJ cooperation principles—produce the results of the internal investigation or fail to obtain cooperation credit. Since many would argue that the company has no choice except to try and obtain cooperation credit,[33] under the new policy the company still has no choice but to strip itself of key rights whether through waiver or simply forgoing the use of lawyers. Unfortunately, what is sacrificed are the rights of the organization and its employees and ultimately its ability to meet key law enforcement goals.[34]

The other points in the new policy suffer from similar flaws. At first glance, the passages that proscribe prosecutors from considering the payment of legal fees, entering into joint defense or cooperation agreements and personnel actions all seem to fully answer the critics. Each statement, however, has the same limitation: the point cannot be considered in assessing "cooperation." Each can be considered in other ways. Thus, while the payment of attorneys' fees cannot be considered in evaluating cooperation, prosecutors can inquire about indemnification agreements and payments. In *Stein*, prosecutors testified that the only thing they did was ask about the advancement of legal fees, not direct their curtailment.[35] That question, sanctioned by the Filip revisions, is as *Stein* demonstrates, frequently more than enough to cause any business organization to limit or terminate the payments, as KPMG did in a desperate attempt to compile enough cooperation credits to avoid being charged.

Similarly, while prosecutors may not consider joint defense agreements in evaluating cooperation, the revisions note that the company should be aware that these undertakings can preclude the production of certain facts. If the company cannot produce all the facts, it would not earn cooperation credit.[36] Given the prospect of this result, many companies in the crucible of a government charging decision will clearly avoid this potential difficulty—they will avoid entering into these agreements thereby depriving their employees of often critical information for their personal testimony and defense.

Finally, the limitations on considering corporate personnel actions are equally ineffective. While those actions may not be considered in evaluating cooperation, they can be fully assessed in determining whether the organization has remedied the situation and taken sufficient steps to ensure compliance with the law in the future.[37] Indeed, the DOJ has repeatedly stressed the importance of full remediation and assurances of future compliance. Yet following the non-lawyer suggestions of the Filip revisions will undercut the ability of the organization to comply with these goals. That, of course, would undercut the ability of the organization to obtain cooperation credit, the very point of the actions. Thus, like the other points in the new policy, it is a good first step, but it does not resolve the situation.

In sum, while the Filip revisions take a good first step, they do little to eliminate the culture of waiver the Department has created through its cooperation policies. Business organizations are still left with the same choices, whether it is called waiver or avoidance, and Department policies continue to undermine their ability to be good corporate citizens. Under the Filip revisions, the choice offered business organizations is the same as before: No choice at all.

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[1] Previously, cooperation principles were included as part of a memorandum by then Deputy Attorney General Paul J. McNulty. *See infra* note 3. The new revisions are a chapter in the U.S. Attorneys' Manual. *See Principles of Federal Prosecution of Business Organizations*, U.S. Department of Justice, Executive Office for U.S. Attorneys, U.S. Attorneys' Manual, Title 9, Chapter 28 (Aug. 28, 2008) [hereinafter Filip revisions].

[2] A diverse group of organizations and individuals have protested the Department's policies regarding cooperation by business organizations. Those policies have fostered what has come to be called the "culture of waiver," according to critics, because a waiver of the attorney-client privilege and work product protections is believed to be required to earn cooperation credit to try and avoid or mitigate liability. A survey by a group of business and bar organizations concluded that most practitioners believe that waiver of privilege is necessary to cooperate. *See The Decline Of the Attorney-Client Privilege in the Corporate Context—Survey Results* (2006). The groups include the American Bar Association, American Chemistry Council, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation. Congress has held hearings on this question, during which many former justice department officials and former attorneys general testified about the ill effects of DOJ cooperation policies. *See The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations; Hearing Before the Senate Committee on the Judiciary*, 109th Cong. (2006); *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers; Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 109th Cong. (2006).

[3] *See* Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components, United States Attorneys (Dec. 12, 2006) [hereinafter McNulty memo]. In 1999, the Department issued the first of a series of memoranda discussing organizational charging principles. *See* Memorandum from Eric Holder, Deputy Attorney General, to All Component Heads and United States Attorneys (June 16, 1999) [hereinafter Holder memo]; Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, United States Attorneys (Jan. 20, 2003) [hereinafter Thompson memo].

[4] *See* Letter, E. Norman Veasey, former Chief Justice, Delaware Supreme Court, to the Honorable Patrick Leahy and the Honorable Arlen Specter, Judiciary Committee Hearings on S. 186 (Sept. 13, 2007).

[5] No. 07-3042, 2008 BL 196269 (2d Cir. Aug. 28, 2008).

[6] *See* Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007). This bill passed the House of Representatives and is currently being considered by the Senate. On July 9, 2008, Attorney

General Michael Mukasey testified before the Senate Judiciary Committee, noting that the McNulty memo was being revised. *See Oversight of the U.S. Department of Justice; Hearing Before the Senate Committee on the Judiciary*, 110th Cong. (2008) (testimony of Michael Mukasey). A letter from Deputy Attorney General Filip to Senator Specter dated the same day outlined the proposed revisions [hereinafter Filip Letter]. The revisions were intended to forestall congressional action on the bill. The draft legislation would essentially prohibit prosecutors from requesting waivers of privilege.

[7] *See Stein*, 2008 BL 196269, at 5.

[8] *See* Filip revisions, *supra* note 1, at 9-§28.720 n.3.

[9] *See* Filip revisions, *supra* note 1, at § 9-28.750 (stating that "the Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities"); Thompson memo, *supra* note 3, at 2 ("In conducting an investigation . . . prosecutors should consider . . . the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including . . . the waiver of corporate attorney-client and work product protection."); *see also* Holder memo, *supra* note 3, at § VI (same); McNulty memo, *supra* note 3, at 6 (same).

[10] *See* Filip revisions, *supra* note 1, at § 9-28.700.

[11] *See id.* (Factors including "the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions" may create a situation where "cooperation can be a favorable course for both the government and the corporation.").

[12] *See id.* at § 9-28.720 ("Cooperation: Disclosing the Relevant Facts.").

[13] *See* McNulty memo, *supra* note 3, at 7; Thompson memo, *supra* note 3, at 4.

[14] *See* McNulty memo, *supra* note 3, at 8-10; Thompson memo, *supra* note 3, at 5.

[15] *See* Filip Revisions, *supra* note 1, at § 9-28.710 ("Attorney-Client and Work Product Protections.").

[16] *See id.* at § 9-28.720(b) ("Separate from (and usually preceding) the fact-gathering process in an internal investigation, a corporation, through its officers, employees, directors, or others, may have consulted with corporate counsel regarding or in a manner that concerns the legal implications of the putative misconduct at issue. Communications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege.").

[17] This provision essentially mirrors a provision in the McNulty memo. *Compare id.* at § 9-28.730 *with* McNulty memo, *supra* note 3, at 11. While both the Filip revisions and the McNulty memo suggest that there may be circumstances under which the DOJ needs to make these inquiries, it is difficult to understand the reason the government needs to know if the organization is honoring what is usually a state law obligation frequently covered by an insurance contract. The suggestion in the Filip revisions that the information may be necessary to evaluate conflicts is less than convincing and would clearly not justify routine questions on the point. *See* Filip revisions, *supra* note 1, at § 9-28.730, n. 6. In any event, the payment of legal fees is an issue for the employee, company and carrier, not the government. *But see, United States v. Bennett*, No. 05-1192 (S.D.N.Y. June 12, 2008) (in its sentencing memorandum, the DOJ argued that defendant Phillip Bennett, who pled guilty to charges based on the collapse of Refco, should not be given cooperation credit for working with plaintiffs in class actions based on the Refco debacle because his legal fees were being paid under an indemnification agreement with the company).

[18] *See United States v. Stein*, 435 F. Supp. 2d 330, 369 (S.D.N.Y. 2006), *reaff'd.*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007) (holding that "the fact that advancement of legal fees occasionally might be part of an obstruction scheme or indicate a lack of full cooperation by a prospective defendant is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves, regardless of the legal standard of scrutiny applied.").

[19] *See* Filip revisions, *supra* note 1, at § 9-28.730 ("[T]he mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements.").

[20] *See Stein*, 435 F. Supp. 2d at 337 ("'Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents . . . a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.'") (quoting Holder memo, *supra* note 3, at § VI, ¶ 4); *Cf. United States v. Weissman* (S.D.N.Y. Apr. 26, 1995) (granting defendant's motion to compel two law firms to produce documents for his defense of the government's charges of obstruction and perjury, where defendant argued that he had made statements to the law firms while they were acting as outside counsel for a corporation in a joint defense effort; the court held that defendant's demonstrated need to determine whether statements revealed facts concerning the existence of any joint defense agreement overruled the law firms' assertion of privilege).

[21] *See* Filip revisions, *supra* note 1, at § 9-28.720 ("Cooperation: Disclosing the Relevant Facts."); Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines (Aug. 28, 2008); Filip Letter, *supra* note 6, at 3. On this issue, the McNulty memo contained a specific directive, absent from the Filip revisions, that in assessing the extent and value of a corporation's cooperation, "[a]nother factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents . . . [for example,] through retaining the employees without sanction for their misconduct . . . ." *See* McNulty memo, *supra* note 3, at 11.

[22] The SEC's organizational charging and cooperation principles are contained in a Report of Investigation and Commission Statement, commonly known as the Seaboard Report, issued in 2001. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release No. 34-44969 (Oct. 23, 2001). While the Seaboard Report also stresses self-reporting, the production of all facts, and suggests that a waiver of privilege may be required in some instances, in practice, waiver is routine for corporations trying to maximize cooperation credit. *See* Speech by SEC Staff: Remarks Before the Mutual Fund Directors Forum 7th Annual Policy Conference (Apr. 12, 2007) (Linda Chatman Thomsen, Director, SEC Division of Enforcement, citing two examples where cooperation credit was given—the company that waived privilege was not prosecuted; the company that did not waive privilege got cooperation credit but was prosecuted).

[23] Filip revisions, *supra* note 1, at § 9-28.720(b).
[24] *See* McNulty memo, *supra* note 3, at 10.
[25] *See* Thompson memo, *supra* note 3, at 9 ("This [attorney-client] waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation."); *see also* Holder memo, *supra* note 3 ("The Department does not, however, consider waiver of a corporation's privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation's cooperation."); McNulty memo, *supra* note 3, at 12 ("Waiver of attorney-client-and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.").
[26] Since business organizations cannot assert the Fifth Amendment, the privileges are their only effective protection from disclosure. *See* Julie R. O'Sullivan, *The Last Straw: The Department of Justice Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigation of Corporations*, 57 DePaul L. Rev. 29, 340 (2008).
[27] *See Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, American College of Trial Lawyers, at 5 (Feb. 2008) ("Internal investigations, conducted by and at the direction of legal counsel, are a critical tool by which companies and their boards learn about violations of law, breaches of duty and other misconduct that may expose the company to liability and damages.").
[28] 449 U.S. 383, 389 (1981).
[29] *Supra* note 27, at 14.
[30] In *Stein*, prosecutors pressured witnesses, through KPMG, to waive their Fifth Amendment rights. This led to the ruling that the Thompson memo was in part unconstitutional. 495 F. Supp. 2d at 390. Under current practice, the company as the holder of the privilege can waive privilege after the conclusion of the investigation. Witnesses in an investigation should be advised of this fact. This possibility can of course result in some witnesses deciding not to cooperate. The situation becomes even more difficult if a company decides to waive privilege at the outset. Under those circumstances, it may have difficulty fully assessing the situation. This is part of the difficulty created by the culture of waiver. Decisions such as *United States v. Stringer*, 521 F.3d 1189 (9th Cir. 2008), which permit agencies such as the SEC to essentially "front" for criminal investigators, aggravate this situation as does the trend toward deputization. *See* N. Richard Jannis, *Taking the Stand: Deputizing Corporate Counsel As Agents of the Federal Government*, Washington Lawyer n.19 (March 2005) (discussing criminally charging witnesses for obstruction of justice for not telling the truth to internal investigators where the witness knew the information would be transmitted to the government). This is particularly true when the organization limits its cooperation with its employees.
[31] 449 U.S. at 396.
[32] Filip revisions, *supra* note 1, at §9-28.720(a).
[33] *See* Thomas O. Gorman and Heather Stewart, *Is There a New Sheriff in Corporateville? The Obligations of Directors, Officer, Accountants, and Lawyers after Sarbanes-Oxley 2002*, 45 Admin. L. Rev. 135 (2004); Frank C. Razzano, *To Cooperate With the Securities Exchange Commission or Not to Cooperate – That's the Question – Part II*, 31 Sec. Reg. L.J. 410 (2003).
[34] *See United States v. Zolin*, 491 U.S. 554 (1989), *Upjohn*, 449 U.S. at 383; *Commodity Futures Trading Com. v. Weintraub*, 471 U.S. 343 (1985); *Hickman v. Taylor*, 329 U.S. 495 (1947).
[35] *See Stein*, 435 F. Supp. 2d at 342–43.
[36] *See* Filip revisions, *supra* note 1, at § 9-28.720 ("Cooperation: Disclosing the Relevant Facts.").
[37] *See id.* at § 9-28.900 ("In determining whether or not to prosecute a corporation, the government may consider whether the corporation has taken meaningful remedial measures. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel . . . changes necessary to establish an awareness among employees that criminal conduct will not be tolerated."); Thompson memo, *supra* note 3, at 7 ("In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline . . . In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed."); *McNulty* memo, *supra* note 3, at 16 (same).

Broker-Dealer Regulation

Short Sales

SEC Issues Emergency Order Halting Short Sales in Hundreds of Financial Companies

SEC Press Release No. PR-2008-211 (Sept. 19, 2008); SEC Release No. 34-58592 (Sept. 18, 2008); SEC Press Release No. PR-2008-218 (Sept. 21, 2008); SEC Release No. 34-58611 (Sept. 21, 2008)

On September 18, 2008, the Securities and Exchange Commission (SEC) issued an emergency order (Initial Order) designed to "protect the integrity and quality of the securities market and strengthen investor confidence" in light of recent turmoil in the credit and equity markets. The Initial Order, which took immediate effect on September 18, 2008, banned short selling in the securities of 799 listed financial services firms. The SEC amended the Initial Order on September 21, 2008 to add additional financial firms that were omitted from the original list of companies in the Initial Order. (The Initial Order and the amended Initial Order are referred to below as the "Emergency Order.") Calling its action "decisive," the SEC stated that the Emergency Order "calls a time-out to aggressive short selling in financial institution stocks, because of the essential link between their stock price and confidence in the institution." The Emergency Order will terminate at 11:59 p.m. on October 2, 2008, but may be extended by the SEC if it determines an extension is necessary in the public interest and for the protection of investors.

Background

Section 12(k)(2) of the Securities Exchange Act of 1934 (Exchange Act) gives the SEC authority to issue emergency orders to alter, supplement, suspend or impose requirements or restrictions with respect to any matter or action subject to the regulation of the SEC or a self-regulatory organization under the securities laws. The SEC may issue an emergency order if it determines that it is necessary in the public interest and for the protection of investors to, among other things, "maintain or restore fair and orderly securities markets" or "reduce, eliminate, or prevent the substantial disruption" of the securities markets.

July 2008 Emergency Order

On July 15, 2008, the SEC issued an emergency order (July Order) to take temporary action in response to "naked" short selling in the securities of Fannie Mae, Freddie Mac and other primary dealers at commercial and investment banks. *See* Bloomberg Law Reports® — Securities Law, *SEC Issues Emergency Order to Prohibit "Naked" Short Selling of Certain Securities* (July 21, 2008). The SEC amended the July Order on July 18, 2008 to clarify its application and, simultaneously, issued non-binding guidance in response to questions about the order. *See* Bloomberg Law Reports® — Securities Law, *SEC Amends "Naked" Short Selling Emergency Order and Issues Related Guidance* (July 28, 2008). The July Order expired on August 12, 2008.

New Short Selling Rules

Responding to recent events in the financial markets, on September 17, 2008, the SEC issued another emergency order (September 17 Order) aimed at deterring abusive naked short selling practices. That order adopted two new rules under the Exchange Act: (1) new Rule 10b-21, which prohibits short sellers from deceiving broker-dealers and other market participants about their intention or ability to actually deliver securities within the three-day settlement period; and (2) new temporary Regulation SHO Rule 204T, which penalizes market participants who fail to deliver securities by the settlement date. In the September 17 Order, the SEC also amended Regulation SHO Rule 203(b)(3) to eliminate the "options market maker" exception to the rule's close out requirements, allowing the SEC to treat options market makers the same way as other market participants by requiring them to immediately close out persistent "fails to deliver" in certain threshold securities with a substantial number of fails to deliver. *See* Bloomberg Law Reports® — *SEC Issues Emergency Order Creating Temporary Rules to Deter "Naked" Short Selling Abuses* (Sept. 22, 2008).

Emergency Order

The SEC opened the Emergency Order with a discussion of the July Order, noting that the earlier order applied to a much smaller number of financial institutions. The SEC cited concerns that excessive short selling in a wider range of financial institutions was causing "sudden and excessive fluctuations of the prices of" those financial institutions' securities and was threatening the fair and orderly operation of the markets and undermining investor confidence in the financial markets. "This crisis of confidence can impair the liquidity and ultimate viability of an issuer, with potentially broad market consequences," said the SEC. Based on these concerns, the SEC stated that it was necessary to temporarily suspend short selling in 799 financial institutions. The list of firms included banks, insurance companies and securities firms, which were identified using Standard Industry Classification, or "SIC," codes. The SEC concluded that the Emergency Order "should prevent short selling from being used to drive down the share prices of issuers even where there is no fundamental basis for a price decline other than general market conditions."

Exceptions

The SEC provided a limited exception from the suspension for certain bona fide market makers, stating that those market makers may find it necessary to execute customer orders more quickly than would be possible under the Emergency Order. Specifically, the SEC exempted registered market makers, block positioners, and other market makers obligated to quote in the over-the-counter market who are engaging in short selling of a publicly traded security subject to the Emergency Order as part of bona fide market making in that security. The exception for bona fide market makers was to expire at 11:59 p.m. on September 19, 2008.

The SEC also included an exception to allow for short sales occurring as a result of an automatic exercise or assignment of an equity option held prior to the effective date of the Initial Order, due to the expiration of that option.

Amendments to Emergency Order

On September 21, 2008, the SEC amended the Emergency Order to include certain financial firms that were omitted from its original list of firms subject to the order. Citing classification problems, the SEC amended the order to provide that national securities exchanges listing financial firms will select the individual financial institutions whose securities will be covered by the Emergency Order. Accordingly, each national securities exchange will publish immediately a list on its website of the companies to be covered by the Emergency Order. The SEC said that it expects that these lists will include banks, savings associations, broker-dealers, investment advisers and insurance companies. Recognizing that an issuer may choose not to be subject to the Emergency Order, the SEC authorized the applicable exchange(s) listing that issuer to exclude it from the list of firms subject to the Emergency Order.

New Exceptions

The SEC also amended the Emergency Order to provide exceptions for futures contracts, options assignments, market makers and sales of restricted securities. First, the SEC included an exception to allow for short sales occurring as a result of the expiration of futures contracts held before the Emergency Order became effective, similar to the exception for options provided in the Initial Order. With respect to options assignments, the SEC stated that the Emergency Order will not apply to the writer of a call option that effects a short sale in a company subject to the Emergency Order as a result of assignment following exercise by the holder of the call.

The SEC modified the exception for bona fide market makers to extend it for the duration of the Emergency Order and to clarify that it applies to all market makers and to bona fide market making and hedging activity directly related to bona fide market making in exchange traded funds and exchange traded notes of which a security subject to the Emergency Order is a component. The SEC stated that the purpose of this exception "is to permit market makers to continue to provide liquidity to the markets." The SEC also limited the market maker exception by providing that "if a customer or counterparty position in a derivative security based on a [security subject to the Emergency Order] is established after 12:01 a.m. E.D.T. on September 22, 2008, a market maker may not effect a short sale in [that security] if the market maker knows that the customer's or counterparty's transaction will result in the customer or counterparty establishing or increasing an economic net short position (i.e., through actual positions, derivatives, or otherwise) in the issued share capital of a firm covered by this Order." Market makers relying on the exception to the Emergency Order must publish a notice on their website to this effect.

Finally, the SEC amended the Emergency Order to clarify that it does not apply to persons effecting sales of securities covered by the order pursuant to Rule 144 of the Securities Act of 1933.

Related Actions

The Emergency Order is one of three emergency orders the SEC issued on September 18. Of the other two orders, the first imposes new temporary reporting requirements on institutional money managers (see infra for more information), and the second temporarily eases restrictions on the ability of securities issuers to repurchase their securities.

Additionally, in the press release announcing the Initial Order, the SEC noted that the United Kingdom's Financial Services Authority (FSA) took similar action on September 18, 2008, and that the two regulators are cooperating with each other on short selling issues.

Commodity Derivatives

Commodity Futures Trading Commission

CFTC Undertakes Special Efforts to Oversee Futures Markets in Response to Financial Market Stresses

CFTC Press Release No. 5551-08, *CFTC Update on Efforts Underway to Oversee Markets* (Sept. 19, 2008); CFTC Press Release No. 5553-08, *CFTC Statement Regarding Today's Trading in Crude Oil* (Sept. 22, 2008); CFTC Press Release No. 5552-08, *CFTC Statement Regarding Barclays Purchase of Lehman Futures Business* (Sept. 20, 2008); CFTC Press Release No. 5547-08, *Updated Statement Regarding Lehman Brothers* (Sept. 17, 2008); CFTC Press Release No. 5543-08, *Statement of CFTC Acting Chairman Walter Lukken Regarding Recent Market Developments* (Sept. 14, 2008)

The Commodity Futures Trading Commission (CFTC) issued a statement on September 19, 2008 highlighting four actions it has taken to oversee commodity futures markets in response to the latest stresses to the financial markets. Specifically, the CFTC described its most recent enhanced monitoring and enforcement activities, including (1) participating in proceedings related to Lehman Brothers Holdings Inc.'s (Lehman) bankruptcy to protect customers of Lehman's futures commission merchant (FCM) subsidiary, (2) heightened monitoring of single-stock and oil futures trading for evidence of potential manipulation, (3) working with futures exchange self-regulatory organizations to promote stability in the futures markets, and (4) preparing targeted regulatory relief for firms taking on trading positions from distressed companies. In addition, the CFTC recently released four other statements further detailing its efforts to monitor Lehman's bankruptcy proceedings for developments impacting customers of its FCM subsidiary and to scrutinize crude oil futures trading as part of its national crude oil investigation.

Protecting Futures Trading Customers of Lehman Brothers Inc.

The Commodity Exchange Act and CFTC regulations protect customers of registered FCMs by requiring the FCMs to segregate their customers' funds. In response to Lehman's Chapter 11 bankruptcy filing on September 14, 2008, acting CFTC Chairman Walter Lukken issued a statement that the CFTC "has been coordinating closely with other Federal and international regulators and self-regulatory organizations to ensure the customers of Lehman's CFTC-regulated futures commission merchant are protected." Lehman Brothers Inc. (LBI) is the regulated FCM and broker-dealer subsidiary of Lehman.

In a September 17, 2008 statement regarding Lehman, the CFTC noted that it was continuing to monitor the commodity futures markets following the announcement that Barclays Capital Inc. (Barclays) had made an offer to purchase substantially all of the North American business and operating assets of LBI, including LBI's FCM business. Lukken welcomed the Barclays development and commented that the CFTC has been "facilitating all efforts that promote the orderly unwinding and transfer of positions and uphold the safeguarding of customer assets." In a September 17 statement, the CFTC also stressed that senior members of its staff were working on-site at the Federal Reserve Bank of New York and at Lehman to ensure LBI's customers were protected to the fullest extent of the law.

Finally, when the United States Bankruptcy Court for the Southern District of New York approved Barclays' purchase of LBI, including its business as a registered FCM, Lukken made a statement on September 20, 2008, that the "purchase by Barclays provides for an orderly transfer of customer accounts [and] is a strong and positive development for the customers of Lehman's futures business . . . the [CFTC] worked to ensure these laws and regulations were upheld and customers at Lehman's regulated FCM were protected."

Heightened Monitoring of Futures Trading

In coordination with the Securities and Exchange Commission's (SEC) emergency action on short selling, the CFTC announced in a September 19 statement that it has been conducting heightened monitoring and surveillance of exchange-traded futures contracts that are based on single financial company stocks. The values of these futures contracts rise or fall depending on the movement of the referenced financial company's stock price in the market. The CFTC expressed concern about potential manipulation of these futures contract values due to any manipulation of underlying stock prices.

In addition, the CFTC issued a statement on September 22 regarding what appeared to be unusual activity in the crude oil futures market. On that day, the New York Mercantile Exchange (NYMEX) crude oil futures contract for October expiration settled at $120.92 per barrel, up approximately 17 percent in one day, after reaching $130 per barrel in intraday trading. In response, Lukken said that "CFTC surveillance and enforcement staff are closely monitoring today's large movement in the price of crude oil [and] are working with NYMEX compliance staff to ensure that no one is taking advantage of the current stresses facing our financial marketplace for their own manipulative gain." The September 22 statement also notes that the CFTC's enforcement staff can compel testimony and the production of information as part of its continuing national crude oil investigation. As part of that investigation, the CFTC issued an Interim Report on Crude Oil in July 2008 and the final report is expected to be released shortly.

Working with Exchange Self-Regulatory Organizations

In its September 19 statement, the CFTC explained that it is monitoring and working with exchange self-regulatory organizations (SROs) to ensure that futures trading firms continue to meet their customer segregation and capital market requirements. Furthermore, the CFTC is coordinating with relevant futures exchanges to help facilitate the orderly transfer and clearing of large trading positions (*i.e.*, block trading). In this regard, the CFTC noted that it is working with the SROs and exchanges to promote the orderly functioning and stability of the markets.

Targeted Regulatory Relief

Finally, in its September 19 statement, the CFTC declared that it is prepared to provide temporary and conditioned hedge exemption relief for firms taking on swap positions from distressed companies. The CFTC noted that this relief "will allow for continued risk management and orderly functioning of the markets." The hedge exemption relief would (1) be limited to existing positions only, (2) require weekly reporting by firms utilizing the exemption, and (3) expire after 90 days.

Additional Steps

The CFTC concluded in its September 19 statement that it is continuing to work "in close coordination with the comprehensive steps being taken by the Treasury, Federal Reserve, SEC and Congress" and may consider additional steps to protect market integrity.

Exchange & SRO Regulation

Membership

NYSE Temporarily Suspends Certain Rules to Permit Provisional Approval of Barclays Capital Inc. as a Member Organization and Specialist

SEC Release No. 34-58607 (Sept. 19, 2008); NYSE Form 19b-4 (Sept. 19, 2008), File No. SR-NYSE-2008-86

The Securities and Exchange Commission (SEC) noticed as immediately effective a proposed rule change (Proposal) by the New York Stock Exchange (NYSE) to suspend temporarily certain NYSE rules so that Barclays Capital Inc. (BCI) could be provisionally approved as an NYSE member organization and specialist, following the acquisition of Lehman Brothers Inc. (LBI) assets by Barclays Bank PLC (Barclays).

NYSE Rules Concerning Approval of New Member Organizations

In its Proposal, the NYSE explained that an applicant proposing to form an NYSE member organization must notify the NYSE in writing and submit information required by various NYSE rules. Specifically, among other things, an applicant must:

- provide its name and address as well as a list of all proposed parties that must be approved under NYSE Rules 304 (Allied Members and Approved Persons) and NYSE Rule 311 (Formation and Approval of Member Organizations);
- ensure, pursuant to Rule 311(b), that (1) the applicant's associated persons, (2) persons in control of the applicant, and (3) any person who satisfies the requirements of an approved person under Rule 304, are approved as a member or approved person;
- submit, as applicable, partnership or corporate documents, such as a certificate of incorporation and by-laws, pursuant to NYSE Rule 313 (Submission of Partnership Articles; Submission of Corporate Documents); and
- furnish, under Rule 313.20, an "opinion of counsel that, among other things, the corporation is duly organized and existing, its stock is validly issued and outstanding, and that the restrictions and provisions required by the Exchange on the transfer, issuance, conversion, and redemption of its stock have been made legally effective."

The NYSE also explained that if an applicant seeks to operate a specialist business pursuant to NYSE Rule 103 (Registration of Specialists), it must demonstrate that it has policies and procedures that comply with NYSE rules governing trading by specialists. In addition, the applicant must demonstrate that it has been approved to operate a specialist unit under NYSE Rule 98 (Operation of a Specialist Unit), or, if applicable, has been approved for an exemption for associated persons under former NYSE Rule 98 (Restrictions on Approved Person Associated with a Specialist's Member Organization).

Suspension of Rule Requirements

On September 17, 2008, Barclays announced that it agreed to acquire the assets of LBI. Thereafter, Barclays announced that certain LBI assets, including its employees and businesses, would be transferred to Barclay's wholly-owned subsidiary BCI. As the Proposal notes, BCI is not currently approved as an NYSE member organization, and the member organization approval process generally takes several months to complete.

Accordingly, to "ensure that BCI can continue the LBI operations without unnecessary interruption, including all operations that required LBI to be a member organization of the NYSE," the NYSE filed the Proposal to suspend temporarily the new member requirements of Rules 304, 311, 312, and 313, and authorize the provisional approval of BCI as a member organization. According to the Proposal, such approval is conditioned on (1) BCI providing information sufficient for the NYSE to confirm that BCI will meet its capital requirements as a member organization; and (2) BCI and its approved persons applying for and complying with the new member organization requirements, as set forth in Rules 304 and Rules 311–13, within 60 days of the date BCI is provisionally approved as a member organization pursuant to the Proposal.

To allow BCI to continue the business operations of Lehman Brothers MarketMakers (LBMM)—LBI's NYSE-approved specialist operation—the Proposal also provides for approval of BCI as a specialist under NYSE Rule 103, subject to certain conditions. Specifically, BCI must certify in writing that, until the time that it is "independently" approved as an NYSE member organization, it will (1) maintain existing LBMM technologies, staffing, supervisory structure, and written supervisory procedures concerning specialist operations, and (2) maintain the minimum capital for specialists, as required by NYSE Rule 104 (Dealing by Specialists) and federal law. BCI must also certify that it, along with its approved persons, will comply with existing LBI written supervisory procedures and information barriers between LBMM specialist operations and the rest of LBI.

Citing the need to ensure a "smooth transition of the LBI businesses to another entity," the SEC noticed the Proposal as immediately effective.

Federal Securities Law

Disclosure & Reporting

SEC Staff Testify before Senate Subcommittee on FASB's Proposed Off-Balance Sheet Accounting Improvements

SEC Congressional Testimony: *Testimony Concerning Transparency in Accounting, Proposed Changes to Accounting for Off-Balance Sheet Entities* (Sept. 18, 2008)

John White, Director of the Division of Corporation Finance of the Securities and Exchange Commission (SEC), and James Kroeker, SEC Deputy Chief Accountant (together, Staff), testified before the Senate Subcommittee on Securities, Insurance, and Investment concerning changes proposed by the Financial Accounting Standards Board (FASB) on September 15, 2008, to rules governing accounting for off-balance sheet entities. The proposed changes would eliminate the "scope exception" that allows companies to keep assets held by certain special purpose entities (SPEs) off their balance sheets. The Staff expressed their strong support for FASB's objective of improving disclosure concerning off-balance sheet transactions, but stressed the importance of public input on FASB's proposals. The Staff noted that comments received during the 60-day public comment period following release of FASB's proposals would be critical to any assessment of those proposals.

Background

As the Staff explained, FASB's Statement of Financial Accounting Standards (FAS) No. 140, *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities*, and FASB Interpretation No. 46R, *Consolidation of Variable Interest Entities*, are currently the primary sources of guidance on accounting for off-balance sheet transactions under U.S. generally accepted accounting principles (GAAP). Companies rely on this guidance in determining whether they should account for cash received in exchange for financial assets, such as mortgage loans, as sales or as secured loans. If the transactions are considered sales, companies can remove the assets sold from their balance sheets, but if the transactions are considered secured loans, companies must keep the assets on their balance sheets.

The Staff further explained that, under existing FASB guidance, companies must consolidate assets held in SPEs onto their balance sheets if the companies retain the majority of risks or rewards associated with those assets. FAS No. 140, however, provides an exception to this rule for assets held by certain types of trust entities called qualified special purpose entities (QSPEs). This exception is commonly known as the "QSPE scope exception." The Staff argued, however, that scope exceptions "should be used sparingly since economically similar transactions will result in different accounting outcomes." They noted that in January 2008, SEC staff asked FASB to consider improvements to accounting rules for off-balance sheet transactions, and that the SEC Advisory Committee on Improvements to Financial Reporting recently recommended that FASB reduce or eliminate the use of scope exceptions. They added that the President's Working Group on Financial Markets made similar recommendations in March 2008.

Proposed Changes

In response to these recommendations, FASB proposed to eliminate the QSPE scope exception and, as the Staff explained, "introduce a new accounting model that will focus consolidation analysis on qualitative indicators of control and reduce the reliance on mathematical calculations." The Staff noted that such a model would more closely align U.S. GAAP with international accounting standards. FASB also proposed to require companies to reconsider consolidating SPEs based on financial conditions at each reporting date. The current FASB guidance, in contrast, only requires companies to reconsider consolidating an SPE if there is a change in the SPE's structure or the company purchases an additional interest in the SPE.

The Staff noted that if these proposed changes are adopted, companies sponsoring SPEs will probably consolidate onto their balance sheets a "significant portion" of the existing off-balance sheet arrangements, including some existing QSPEs, structured finance vehicles and commercial-paper conduits. However, the Staff cautioned that an accurate assessment of the full impact of the proposed rule changes will not be possible before companies have had a chance to assess them in practice. Nevertheless, the Staff expressed their strong belief that the proposed changes "hold promise in enhancing financial reporting transparency," and noted that the SEC would monitor their effectiveness and mandate changes as necessary.

The Staff also stated that public input should be an important part of FASB's consideration of rule changes, noting that such input is "critical to the development of high quality accounting standards." Accordingly, the Staff stated that the SEC will review public comments on the proposed rule changes and work closely with FASB during the comment process.

Offerings & Registration

SEC Amends Cross-Border Exemptions for Foreign Private Issuers

SEC Release Nos. 33-8957 and 34-58597 (Sept. 19, 2008); File No. S7-10-08

The Securities and Exchange Commission (SEC) issued a final rule release amending its cross-border exemptions to expand and enhance the utility of the exemptions for cross-border tender offers, exchange offerings, rights offerings and other business combinations and to make it easier for U.S. investors to participate in these transactions on the same terms as other security holders. The amendments include codifications of existing SEC staff interpretations and exemptive orders, and amendments that will permit foreign institutional investors to report beneficial ownership on Schedule 13G to the same extent as their U.S. institutional counterparts. The amended rules, which will become effective 60 days after their publication in the Federal Register, are part of a series of disclosure "modernizations" recently announced by the SEC for foreign companies offering securities in U.S. markets. *See* Bloomberg Law Reports®– Securities Law, *SEC Votes to Modernize Foreign Company Disclosure Requirements* (Sept. 8, 2008); Bloomberg Law Reports®– Securities Law, *SEC Amends Rule 12g3-2(b) Registration Exemption for Foreign Private Issuers* (Sept. 15, 2008).

Revised Exemption Eligibility Test

Offerors are eligible for a "Tier I" exemption from most U.S. tender offer rules under the Securities Exchange Act of 1934 as well as from the registration requirements of Section 5 of the Securities Act of 1933 in cross-border transactions where U.S. holders own no more than 10 percent of the target company's securities. If U.S. holders own more than 10 percent, but no more than 40 percent of the target company's securities, an offeror is eligible for a "Tier II" exemption from some, but not all, U.S. tender offer rules, but remains subject to Section 5 registration requirements. Offerors seeking a Tier I or Tier II exemption must "look through" the record ownership of certain brokers, dealers, banks or nominees holding securities of the target company for the accounts of their customers to calculate the percentage of U.S. ownership of such securities.

The amendments revise this "look-through" test for identifying beneficial owners by modifying the timing of, and reference date for, the calculation of U.S. ownership. The existing rules require offerors to calculate U.S. ownership on the 30th day before the commencement of a tender offer or the solicitation for a business combination other than a tender offer. The revisions allow offerors to calculate U.S. ownership on any date that is no more than 60 days before, and no more than 30 days after, the public announcement of the transaction or, in the case of rights offerings, the record date. Where an offeror has made a good faith effort to ascertain the level of U.S. ownership and is unable to do so within the 90-day period, it may use a date within 120 days before public announcement. The SEC said that it expanded the time frame to help parties determine exemption eligibility at an earlier stage in the business combination planning process and maintain greater confidentiality in the context of hostile takeovers.

Alternate Daily Trading Volume Test

In some cases, an offeror may be unable to conduct the look-through analysis. Such cases include transactions involving target companies with securities in bearer form or instances where a foreign jurisdiction generates security holder lists only at fixed intervals. In these situations, the rule revisions allow offerors to use an alternate eligibility test based on a comparison of the average daily trading volume (ADTV) of the subject securities. Under the alternate test, an offeror may rely on the cross-border exemptions if the ADTV for the subject securities in the United States over a 12-month period ending no more than 60 days before the announcement of the transaction is not more than 10 percent of the ADTV on a worldwide basis for offerors seeking a Tier I exemption or 40 percent of the ADTV on a worldwide basis for offerors seeking a Tier II exemption. In cases of non-negotiated, hostile transactions, offerors need not conduct a look-through analysis and may rely on this alternate test as well because, as the SEC noted, calculation of U.S. beneficial ownership may be a challenge without the cooperation of the target company. However, the alternate test will not be available to offerors who, despite being unable to conduct the look-through analysis, know or have reason to know that U.S. ownership exceeds the limits for the applicable exemption.

Exclusion of Large Target Security Holders

The rule revisions also eliminate the current requirement that offerors exclude from the U.S. ownership calculation securities held by persons who own more than 10 percent of the subject securities. The existing rules require securities held by such greater-than-10 percent holders to be excluded from both the numerator and the denominator in calculating total U.S. ownership. The exclusion was originally designed to treat greater-than-10 percent holders as non-market participants for purposes of the U.S. ownership calculation. In practice, however, it often has the effect of disproportionately inflating U.S. holdings because holders of large blocks of foreign stock are often non-U.S. persons. The SEC said that it believes that eliminating the exclusion will significantly expand the number of business combinations eligible for the cross-border exemptions, while still providing appropriate investor protections.

Codification of Staff Interpretations

The amendments also include codifications of existing SEC staff interpretations and exemptive orders with respect to the Tier I and Tier II cross-border exemptions. For example, under existing rules, an offeror may conduct two concurrent offers: one made only to U.S. holders and another only to foreign holders. The new rules allow such offerors to conduct more than one foreign offer in addition to the U.S. offer. The SEC said that the multiple offer structure will minimize the difficulties in complying with two or more foreign regulatory regimes. Also, in the case of multiple offers, the U.S. offer may now include non-U.S. holders of American depositary receipts. In addition, the foreign offer or offers may include U.S. target security holders if (1) the laws of the foreign company's home jurisdiction expressly prohibit the exclusion of any target security holders, including U.S. holders, and (2) the offer materials distributed to U.S. persons fully describe the risks associated with participating in the offer.

Additional codifications of staff interpretations expand the cross-border exemptions to allow offerors to:

- suspend back-end withdrawal rights while tendered securities are counted;
- extend subsequent offering periods in both cross-border and domestic offers beyond 20 business days;
- purchase securities tendered during a subsequent offering period within 20 business days of the date of tender;
- pay interest on securities tendered during a subsequent offering period where required under foreign law;

- maintain separate offset and proration pools for securities tendered during the initial and subsequent offering periods for certain kinds of tender offers; and

- terminate an initial offering period or any voluntary extension of that period before a scheduled expiration date.

Schedule 13G Reporting

The rule revisions also permit foreign institutional investors to report beneficial ownership on Schedule 13G to the same extent as their U.S. institutional counterparts. Under existing rules, foreign institutions that acquire more than 5 percent of specified equity securities must report such acquisition on Schedule 13D within ten days. The rule revisions permit foreign institutions that obtain a greater than 5 percent stake to file a short-form Schedule 13G in lieu of a Schedule 13D so long as the holder certifies that (1) it is subject to a regulatory scheme substantially comparable to the regulatory scheme applicable to its U.S. counterparts, and (2) it will undertake to furnish to the SEC, upon request, the information it otherwise would be required to provide on Schedule 13D. The SEC stated that this revision codifies no-action relief it has granted to certain foreign institutions.

Investment Advisers

Disclosure & Reporting

SEC Issues Emergency Order Imposing Temporary Reporting Requirements on Short Sellers

SEC Release No. 34-58591A (Sept. 21, 2008); SEC Release No. 34-58591 (Sept. 18, 2008)

The Securities and Exchange Commission (SEC) issued an emergency order, as amended (Order), requiring institutional investment managers (Managers) to report short sales of certain publicly traded equity securities on a new Form SH. The first Form SH must be electronically filed on the SEC's EDGAR system on September 29, 2008 by 5:30 p.m. Eastern Time. The Order terminates on October 2, 2008, unless extended by the SEC.

Managers Covered by Order

The Order applies to any Manager, SEC-registered or unregistered, that has filed or was required to file a Form 13F for the calendar quarter ended June 30, 2008. In general, Managers exercising investment discretion over accounts holding Securities Exchange Act of 1934 (Exchange Act) Section 13(f) securities (Section 13(f) Securities), as defined in Exchange Act Rule 13f-1(c), with an aggregate fair market value of at least $100 million are subject to the Order. The SEC publishes a quarterly List of Section 13(f) Securities that generally includes equity securities traded on an exchange or quoted on an automated quotation system.

Short Sales and Short Positions Subject to Order

The Order uses the definition of "short sale" found in Rule 200(a) of Regulation SHO: "any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller." The Order defines "short position" to mean a position resulting from a short sale. Short sales in Section 13(f) Securities effected on or after September 22, 2008 are subject to Form SH's reporting requirements. However, a Manager is not required to report any short sale or position for any option on the SEC's List of Section 13(f) Securities.

Reporting on Form SH

A Manager's obligation to report short sales on Form SH is triggered if a Manager entered into a new short position between September 22, 2008 and September 27, 2008. If the SEC extends the Order's effective period, a Manager must make subsequent Form SH filings if it (1) enters into new short positions during a given week (*i.e.*, Sunday through Saturday) or (2) closes part or all of any short position that it effected on or after September 22, 2008. The filing deadline for subsequent Forms SH would be the first business day of a calendar week.

Among other things, the Order requires a Manager to disclose the following for each calendar day of the prior week: (1) the number and value of securities sold short for each Section 13(f) Security, and (2) the opening short position, closing short position, largest intraday short position, and the time of the largest intraday short position for each Section 13(f) Security sold short.

A Manager need not report the number of short sales in a particular Section 13(f) Security if (1) the Manager's short position in the Section 13(f) Security constitutes less than 0.25 percent of that class of the issuer's Section 13(f) Securities issued and outstanding, and (2) the fair market value of the Manager's short position in the Section 13(f) Security is less than $1,000,000.

The Order permits Forms SH to be filed on a non-public basis. However, the SEC stated that it will make filed Forms SH public two weeks after their due date.

Additional Guidance

On September 24, 2008, the SEC's Division of Corporation Finance, Division of Investment Management and Division of Trading and Markets issued guidance (Guidance) on Form SH's reporting requirements. Among other things, the Guidance answers questions regarding (1) short positions entered into prior to the Order's September 22, 2008 effective date and subsequent transactions effected to close out such short positions, (2) aggregating short sales across client accounts, (3) netting long positions against short positions, (4) valuing short sales, (5) reporting obligations of broker-dealers effecting short sales on a "riskless principal" basis, and (6) the effect of the Order's de minimis exclusion on reporting short positions on Form SH.

Extension of Order

The SEC may extend the Order beyond its current October 2, 2008 termination date, though the SEC stated in a press release that the Order's total duration may not exceed 30 calendar days.

Securities Litigation

Scienter

Fifth Circuit Reverses Jury Verdict in SEC Enforcement Action against Former Chief Accounting Officer of Waste Management

SEC v. Snyder, No. 07-CV-20455, 2008 BL 208224 (5th Cir. Sept. 16, 2008)

The U.S. Court of Appeals for the Fifth Circuit granted a new trial to Bruce Snyder, the former chief accounting officer of Waste Management, Inc. (Waste Management), whom a jury found liable of securities fraud and insider trading in a civil enforcement action brought by the Securities and Exchange Commission (SEC). Although the Court found that the SEC presented sufficient evidence to support the jury's findings, it granted a new trial because one of the district court's jury instructions did not accurately reflect the law and could have affected the outcome of the case.

Background

The SEC charged Snyder with filing a materially false and misleading Form 10-Q for the first quarter of 1999. The SEC claimed that the Form 10-Q overstated income and included undisclosed non-recurring accounting adjustments without the proper disclosure. These purported misrepresentations were allegedly intended to "close the gap between investor expectations and Waste Management's true financial performance." The SEC asserted that Snyder violated (1) Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 thereunder, and (2) Section 20(e) of the Exchange Act for aiding and abetting Waste Management's filing of a materially false and misleading Form 10-Q. Snyder was also charged with insider trading, under Section 10(b) of the Exchange Act and Section 17(a) of the Securities Act of 1933, for his sales of Waste Management stock shortly after filing the Form 10-Q.

At trial, Snyder argued that he did not act with scienter because he relied on the advice of Arthur Andersen, Waste Management's outside auditor, that the disclosures in the Form 10-Q were adequate. Nonetheless, the jury found Snyder liable on all counts, and the district court denied Snyder's motion for judgment as a matter of law.

Sufficiency of the Evidence

On appeal, the Fifth Circuit rejected Snyder's argument that there was insufficient evidence to support the jury's finding that he acted with scienter. As a preliminary matter, the Court noted that scienter can be satisfied by a showing of "severe recklessness." It declined to adopt the "no reasonable accountant" formulation of severe recklessness, which Snyder advocated.

The Court then found that the SEC offered "abundant evidence" at trial that Snyder acted with severe recklessness in not disclosing the allegedly non-recurring accounting adjustments. This evidence consisted primarily of expert testimony from Sally L. Hoffman, a Certified Public Accountant and Certified Fraud Examiner. Hoffman testified that it would have been obvious to someone with Snyder's training, education, information and experience with Waste Management that "not disclosing these adjustments in the Form 10-Q rendered it materially misleading." Snyder challenged assumptions implicit in Hoffman's testimony, but the Court noted his arguments went to the credibility and weight to be accorded to her testimony and thus, did not warrant a reversal.

As for Snyder's argument that he could not have acted with severe recklessness because Arthur Andersen approved the Form 10-Q, the Court explained that Arthur Andersen's review of the Form 10-Q was limited. Moreover, the jury could have found that Arthur Andersen was itself severely reckless or that the SEC's evidence was more credible than the testimony by Arthur Andersen accountants that the Form 10-Q was not materially false or misleading.

The Court also addressed whether the SEC presented sufficient evidence of insider trading. With respect to the scienter element, the Court found that, in addition to evidence that Snyder knew the Form 10-Q was misleading, there was sufficient evidence that Snyder knew before he traded that Waste Management was unlikely to meet its earnings targets for the second quarter of 1999. As an aside, the Court noted that financial forecasts may be material under Fifth Circuit law, and "the jury was entitled to find that the predictions of significant shortfalls in the second quarter was information that a reasonable investor would have found important."

Jury Instructions

Despite finding that there was sufficient evidence of scienter, the Court agreed with Snyder that the district court's jury instructions contained an incorrect statement of Fifth Circuit law that could have affected the case's outcome. Specifically, the Court held that the district court erred in instructing the jury that it was Snyder's burden to prove certain "elements" of his reliance-on-accountants defense before the jury could consider whether such reliance negated scienter. The Fifth Circuit explained that "the jury is free to decide for itself whether the facts demonstrate that the defendant acted with scienter in light of the advice he received from his attorneys or accountants. The defendant does not have the burden of proving any 'elements' of the defense before the jury can weigh the defendant's theory of reliance." Accordingly, the Court reversed and remanded for a new trial.

Other Noteworthy Developments*

Regulatory

- The Financial Industry Regulatory Authority (FINRA) announced that it will permit member firms to exchange customer assets invested in the Reserve Primary Fund, the Reserve Yield Plus Fund and the Reserve International Liquidity Fund (collectively, the Funds) in bulk for shares of another money market mutual fund or for deposits in a federally-insured bank without complying with all of the requirements of NASD Rule 2510(d). FINRA will permit such bulk transfers if member firms meet two conditions. First, if customer assets are transferred into another money market mutual fund, that fund must have a net asset value of $1.00 per share and be required to comply with Rule 2a-7 under the Investment Company Act of 1940. Second, the firm must notify its customers of the bulk exchange in writing "promptly after the exchange." The notice follows announcements on September 16 and 17, 2008 that the net asset values of the Funds had fallen below $1.00 per share. FINRA explained that it decided to permit bulk exchanges so member firms could protect the assets of their customers who invested in the Funds. FINRA Regulatory Notice No. 08-48 (Sept. 2008).

- The Financial Industry Regulatory Authority (FINRA) announced that, effective November 11, 2008, (1) the requirements outlined in NASD IM-2110-2 (Trading Ahead of Customer Limit Order) will apply to over-the-counter (OTC) equity securities, as defined in NASD Rule 6610(d) and (2) the minimum level of price improvement that firms must provide to trade ahead of an unexecuted customer limit order under IM-2110-2 will be based on tiered standards that vary according to the type of security and the price of the customer limit order. The revised standards will apply to OTC equity securities and NMS stocks. FINRA Regulatory Notice 08-49 (Sept. 2008).

- The Financial Industry Regulatory Authority (FINRA) issued guidance to member firms regarding the process for bona fide market makers to submit the written attestation required by new temporary Rule 204T under Regulation SHO. New Rule 204T provides that participants in registered clearing agencies must deliver securities in long and short sales of equity securities by the settlement date and close out any fail-to-deliver positions by the beginning of trading on the trading day immediately following the settlement date by borrowing or purchasing securities of like kind and quantity. The Securities and Exchange Commission (SEC) issued guidance on September 24, 2008, extending this close-out requirement to bona fide market makers but allowing qualifying market makers to close-out the fail-to-deliver positions by no later than the beginning of regular trading hours on the morning of the third settlement day after the settlement date for the transaction with the fail-to-deliver. Market makers who wish to take advantage of the extension in time must attest in writing to the markets on which they are registered that they only established the fail-to-deliver position for the purpose of meeting bona fide market making obligations. Market makers must also list and describe the steps they took to deliver the securities. FINRA clarified that Alternative Display Facility market makers and market makers in over-the-counter equity securities who wish to qualify for this extension must submit their written attestations to FINRA in a specified form, which is attached to FINRA's guidance. The attestations must be faxed to FINRA Operations by the close of business on the settlement day following the original settlement date of the transaction(s) at issue. FINRA Regulatory Notice 08-50 (Sept. 2008).

- The Securities and Exchange Commission approved (1) the Public Company Accounting Oversight Board's (PCAOB) proposed Auditing Standard No. 6, governing auditor evaluations of the consistency of financial statements, and (2) an amendment to PCAOB interim auditing standard AU Section 411. Both proposals take effect on November 15, 2008. Auditing Standard No. 6 replaces AU Section 420, the PCAOB's interim standard on evaluating consistency in financial statements, and conforms the PCAOB's rules on evaluating consistency to the Financial Accounting Standards Board's (FASB) Statement of Financial Accounting Standards (FAS) No. 154, *Accounting Changes and Error Corrections*. The amendment to AU Section 411 relocates the hierarchy of U.S. generally accepted accounting principles (GAAP) from the PCAOB's auditing standards to FASB's accounting standards. Specifically, the U.S. GAAP hierarchy will be set forth in FAS No. 162, *The Hierarchy of Generally Accepted Accounting Principles*. SEC Release No. 34-58555 (Sept. 16, 2008); File No. PCAOB-2008-01.

- The Securities and Exchange Commission (SEC) issued a final rule release adopting an updated version of the Electronic Data Gathering, Analysis and Retrieval System (EDGAR) Filer Manual, which contains the technical specifications for the preparation and submission of electronic filings to the SEC. The SEC revised the manual primarily to support electronic filing of Form D. Under recent rule amendments, starting on March 16, 2009, the SEC will only accept electronic Form D filings. The revisions to the manual also include updates to (1) forms PREM14A, DEFM14A, PREM14C and DEFM14C; (2) EDGAR company name conformance rules; (3) EDGARLite Form TA-2; and (4) EDGAR processing of series and classes co-registrant filings. Additionally, the revised manual incorporates the final US GAAP Taxonomies 1.0 into EDGAR. SEC Release Nos. 33-8956, 34-58584 and 39-2458 (Sept. 18, 2008).

- Treasury Secretary Henry M. Paulson, Jr. announced that a comprehensive approach to market developments is needed to address the root causes of stresses to the U.S. financial system, which he identified as illiquid mortgage assets. According to Paulson, the "federal government must implement a program to remove these illiquid assets that are weighing down our financial institutions and threatening our economy." Paulson stated that he, along with Federal Reserve Chairman Ben Bernanke and Securities and Exchange Commission Chairman Christopher Cox, would work with members of Congress to pass legislation that would help alleviate the pressure of illiquid mortgage assets on the U.S. financial system. In the interim, Secretary Paulson announced that (1) Fannie Mae and Freddie Mac will increase their purchases of mortgage-backed securities (MBS), and (2) the Department of the Treasury will expand its MBS purchase program. Statement by Secretary Henry M. Paulson, Jr. on Comprehensive Approach to Market Developments (Sept. 19, 2008).

- The Department of the Treasury (Treasury) announced the establishment of a temporary guaranty program (Program) for U.S. money market mutual funds that pay a fee to participate in the Program (Eligible Funds). According to the Treasury's press release, "President George W. Bush approved the use of existing authorities by Secretary Henry M. Paulson, Jr. to make available as necessary the assets of the Exchange Stabilization Fund for up to $50 billion" to support investors in Eligible Funds for the next year. If the net asset value of an Eligible Fund falls below $1.00 resulting in losses to Eligible Fund investors, the Program's insurance provisions would be triggered. According to the press release, the Program "should enhance market confidence and alleviate investors' concerns about the ability for money market mutual funds to absorb a loss." Treasury Announces Guaranty Program for Money Market Funds (Sept. 19, 2008).

- The Securities and Exchange Commission announced that it issued three emergency orders, pursuant to Section 12(k) of the Securities Exchange Act of 1934 (Exchange Act), to "protect the integrity and quality of the securities market and strengthen investor confidence" in light of recent turmoil in the credit and equity markets. The first order, which took immediate effect on September 18, 2008, bans short selling in the securities of 799 listed financial services firms. The second order, which is effective as of 12:01 a.m. on September 22, 2008, requires institutional investment managers who exercise discretion over accounts holding Exchange Act Section 13(f) securities to file a new form with the SEC disclosing all short sales in Section 13(f) securities. The SEC is requiring investment mangers to file this form, called Form SH, on the first business day following each week in which they make such short sales. Accordingly, the first Form SH filings must be filed on September 29, 2008. Short sales will be exempt from this requirement if (1) they represent less than 0.25 percent of the issuer's outstanding Section 13(f) securities, and (2) the fair market value of the short position is less than $1 million. The third order, which took effect at 12:01 a.m. on September 19, 2008, eases restrictions on issuer share repurchases by altering the timing and volume conditions set forth in Exchange Act Rule 10b-18's safe harbor for issuer repurchases. Specifically, the order temporarily suspends the time of purchases condition in Rule 10b-18, and modifies the volume of purchases condition to permit repurchases not exceeding 100 percent of the average daily trading volume of the security in question. All three orders will terminate at 11:59 p.m. on October 2, 2008, unless the SEC further extends them. SEC Press Release No. PR-2008-211 (Sept. 19, 2008).

- NYSE Regulation, Inc., the regulatory arm of the New York Stock Exchange (NYSE), issued an information memo to advise members of the American Stock Exchange (Amex) of certain regulatory requirements to which they will be subject if they relocate their equities operations to the NYSE Alertnext Trading Systems following the completion of the acquisition of Amex by NYSE Euronext, the parent company of the NYSE. The NYSE explained that, following the merger, Amex will be renamed NYSE Alertnext US LLC (NYSE Alertnext), and equities trading currently conducted on Amex trading systems will be relocated to the NYSE Alertnext Trading Systems. The NYSE further noted that although the NYSE and NYSE Alertnext will share certain facilities, they will act as two separate exchanges with separate self-regulatory organizations. NYSE Information Memo No. 08-44 (Sept. 19, 2008).

- The staff (Staff) of the Division of Investment Management of the Securities and Exchange Commission (SEC) granted no-action relief to Barclays Capital Inc. (Barclays Capital) in connection with its purchase of the assets and liabilities (Acquisition) of Lehman Brothers Inc. (Lehman). Specifically, the Staff stated that it would not recommend enforcement action if Barclays Capital (1) treats the Acquisition as an acquisition or assumption of substantially all of the assets and liabilities of Lehman's advisory business for purposes of Section 203(g) of the Investment Advisers Act of 1940 (Advisers Act), Rule 203-1 thereunder and Instruction 4.a(1) for Part 1A of Form ADV, and (2) engages in certain principal transactions with Lehman's former advisory clients for a period up to 15 business days after the Acquisition without complying with Advisers Act Section 206(3), provided certain conditions are met. SEC No-Action Letter to Barclays Capital Inc. (Sept. 19, 2008).

- The Securities and Exchange Commission's (SEC) Division of Trading and Markets (Division) issued a statement regarding the protection of customer assets held by broker-dealers in the wake of the recent market upheavals. Noting that the SEC's staff has received questions from investors regarding the safety of their assets held by broker-dealers, the Division stated that customers of U.S. broker-dealers "benefit" from the protections provided by (1) Securities Exchange Act of 1934 Rule 15c3-3 (Customer Protection Rule), and (2) the Securities Investor Protection Corporation (SIPC). As the Division recounted, the Customer Protection Rule requires a broker-dealer to keep customer assets, including cash and fully paid securities, in a secure location, free of liens and separate from the broker-dealer's proprietary cash and securities. The Division explained that "[a]ny person who has deposited funds or securities in a securities account at a broker-dealer is a 'customer' under the Customer Protection Rule," and customers cannot opt out of this protection. The Division stated that SIPC also protects customers up to $500,000 per customer, including a maximum of $100,000 for cash claims. SEC Press Release No. PR-2008-216 (Sept. 20, 2008).

- The Securities and Exchange Commission (SEC) granted registered broker-dealer Barclays Capital Inc. (Barclays Capital) temporary, conditional relief from Rule 15c3-1 under the Securities Exchange Act of 1934, allowing it to continue using the alternative method of computing net capital that was used by Lehman Brothers Inc. (Lehman). Barclays Capital may only use the alternative method when computing capital charges for the positions it will acquire from Lehman pursuant to its agreement to purchase Lehman's assets, business and personnel. The SEC conditioned its exemptive relief on Barclays Capital (1) maintaining at least $6 billion in Tentative Net Capital, (2) using Lehman's modeling infrastructure to do the "basic market risk and credit risk computations for the positions Barclays Capital acquires from Lehman," and (3) ensuring that the basic market risk and credit risk computations are supervised by "individuals who fully understand the operations of Lehman's models (including the inputs and techniques unique to Lehman's models) and the securities that Lehman has been permitted to model, and that have at least one year of experience working with Lehman's models." The three conditions will remain in place "until such time as the [SEC] determines otherwise." SEC Release No. 34-58612 (Sept. 22, 2008).

- The Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority and the North American Securities Administrators Association released a combined report outlining practices that financial services firms may implement to better serve senior investors. The report provides practical examples of policies and procedures for (1) conducting senior-focused supervision, surveillance and compliance reviews; (2) effectively communicating with senior investors; (3) training employees on senior-specific issues; (4) establishing an internal process for escalating issues; (5) encouraging investors to prepare for the future; (6) advertising and marketing to senior investors; and (7) ensuring the appropriateness of investments for seniors. The report, titled "Protecting Senior Investors: Compliance, Supervisory and Other Practices Used By Financial Services Firms in Serving Investors," was released in connection with the SEC's third annual Seniors Summit, which took place on September 22, 2008. SEC Press Release No. PR-2008-220 (Sept. 22, 2008).

- The NASDAQ OMX Group, Inc. (NASDAQ OMX) announced that it signed a Memorandum of Understanding (MOU) with Vietnam's largest securities market, the Ho Chi Minh Stock Exchange (HOSE). The MOU is intended to "support development of the Vietnamese securities market" and gives HOSE access to NASDAQ OMX's technology and services. As NASDAQ OMX explained, "[t]he objective of the agreement is to leverage NASDAQ OMX's technology and market expertise in order to strengthen infrastructure, efficiency and liquidity at HOSE and the Vietnamese capital market as a whole." NASDAQ OMX Press Release (Sept. 23, 2008).

- The Securities and Exchange Commission (SEC) announced that chief compliance officers (CCOs) for mutual funds and investment advisers may begin registering for the SEC's annual *CCOutreach* National Seminar (Seminar) to be held on November 13, 2008, at the SEC's Washington D.C. headquarters. The SEC stated that the Seminar will cover topics such as "sound practices with respect to valuation, prevention of insider trading, ensuring best execution, and making disclosures that are understandable and meaningful to investors." The SEC noted that attendance is limited to 500 people and adviser and mutual fund CCOs will be given priority on a first-come, first-served basis. SEC Press Release No. PR-2008-221 (Sept. 23, 2008).

- The Securities and Exchange Commission (SEC) issued a final rule release amending Securities Exchange Act of 1934 (Exchange Act) rules and forms to enhance disclosure by foreign private issuers (Foreign Issuer Reporting Enhancements). Following a three-year transition period, the Foreign Issuer Reporting Enhancements will require foreign reporting companies to file their annual reports with the SEC two months earlier. The Foreign Issuer Reporting Enhancements also amend Form 20-F to require foreign private issuers to provide certain new disclosures in their annual reports, including disclosures of any change in, or disagreement with, their certifying accountant. The amendments also eliminate an instruction to Form 20-F that permits certain issuers to omit segment data from their U.S. GAAP financial statements, and to have a qualified U.S. GAAP audit report. Additionally, the rule revisions amend Exchange Act Rule 13e-3, regarding going private transactions, to reflect recent regulatory changes applicable to foreign private issuers. Finally, foreign private issuers will now need to test only once a year their eligibility to use the special forms and rules available to them—on the last business day of their second fiscal quarter, rather than on a continuous basis. SEC Release Nos. 33-8959 and 34-58620 (Sept. 23, 2008); File No. S7-10-08.

- The Securities and Exchange Commission's (SEC) Division of Corporation Finance, Division of Investment Management and Division of Trading and Markets issued guidance (Guidance) providing questions and answers concerning the SEC's September 18, 2008 emergency order, as amended on September 21, 2008 (Order). The Order requires institutional investment managers to report short sales of certain publicly traded securities on a new Form SH. Among other things, the Guidance answers questions regarding (1) short positions entered into prior to the Order's September 22, 2008 effective date and subsequent transactions effected to close out such short positions, (2) aggregating short sales across client accounts, (3) netting long positions against short positions, and (4) the effect of the Order's *de minimis* exclusion on reporting short positions on Form SH. SEC Frequently Asked Questions, Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets Guidance Regarding the Commission's Emergency Order Concerning Disclosure of Short Selling (Sept. 24, 2008).

- The Division of Trading and Markets (Division) of the Securities and Exchange Commission issued a notice regarding EDGAR filers in certain areas of Texas experiencing ongoing power outages in the wake of Hurricane Ike. The Division advised companies in the affected areas to submit their EDGAR filings "as promptly as possible" after power is restored. The Division noted that while it does not automatically grant filing date adjustments, it would give "priority consideration" to filing date adjustment requests by companies in areas affected by Hurricane Ike, and would attempt to respond to telephone requests within two business days. SEC Notice, Notice for EDGAR Filers re: Hurricane Ike and Houston Power Outage Filing Problems (Sept. 24, 2008).

- The Division of Trading and Markets (Division) of the Securities and Exchange Commission (SEC) issued guidance providing questions and answers concerning the SEC's September 17, 2008, emergency order to protect investors against "naked" short selling abuses. In the guidance, the Division answered questions concerning the application of temporary Rule 204T under

Regulation SHO, particularly application of the "pre-borrow penalty" the rule imposes on participants in registered clearing agencies who do not remedy "fails to deliver" in connection with short sales. The Division also provided guidance concerning the application of Rule 204T to market makers. SEC Frequently Asked Questions, Division of Trading and Markets: Guidance Regarding the Commission's Emergency Order Concerning Rules to Protect Investors against "Naked" Short Selling Abuses (Sept. 24, 2008).

Courts

- The U.S. District Court for the Northern District of Illinois entered a default judgment and permanent injunction against Phillip Baker, who controlled Lake Shore Asset Management Limited, a registered commodity trading advisor and commodity pool operator, and related entities. According to the Court, Baker defrauded investors by failing to disclose trading losses and other material facts relating to his operation of commodity pools and misappropriated pool participant funds in violation of Sections 4b(a)(2)(i) and (iii) of the Commodity Exchange Act (CEA). In addition, the Court concluded that Baker willfully made false reports to pool participants in violation of Section 4b(a)(2)(ii) of the CEA. The Court permanently enjoined Baker from committing future violations of the CEA and from engaging in activity related to trading in any commodity interest, as that term is defined in Section 1a(4) of the CEA. Finally, the Court ordered Baker to immediately repatriate and transfer all funds, documents and assets outside of the United States to the Court-established receivership. *Commodity Futures Trading Commission v. Lake Shore Asset Management Limited*, No. 07-CV-3598, 2008 BL 208513 (N.D. Ill. Sept. 17, 2008).

- Jay Pomeranz filed a securities class action complaint against money market mutual fund the Primary Fund (Fund), its investment adviser Reserve Management Company, Inc. and the Fund's principal underwriter Resrv Partners, Inc. (collectively, Defendants) in the U.S. District Court for the Southern District of New York. According to the complaint, the Fund "deviated from its stated investment objective by sacrificing preservation of capital and liquidity in pursuit of higher yields." The complaint alleges that this "strategy was exemplified by the Fund's disastrous and unreasonable concentration of $785 million (face value) in commercial paper issued by Lehman Brothers Holdings, Inc." (Lehman), which filed for bankruptcy protection on September 15, 2008. According to the complaint, Lehman's bankruptcy wiped out the value of the Fund's entire investment in Lehman commercial paper, resulting in the Fund "breaking the buck" on September 16, 2008 when its net asset value fell below $1.00 to $0.97. The complaint alleges that Defendants violated Section 13(a) of the Investment Company Act of 1940 and caused significant losses to the Fund's shareholders. Among other things, the complaint seeks certification as a class action and unspecified damages. *Pomeranz v. The Primary Fund*, No. 08-CV-8060 (S.D.N.Y. filed Sept. 17, 2008).

- The U.S. District Court for the Southern District of New York transferred a securities class action involving Global Cash Access Holdings, Inc. (GCAH) to the U.S District Court for the District of Nevada (Nevada Court), concluding that the Nevada Court is a better forum for the litigation. The Court explained that GCAH's headquarters are located in Nevada, where a substantial number of potential material witnesses reside. In addition, according to the Court, the "locus of operative facts" favors transfer to the Nevada Court. For example, the Court noted that GCAH's allegedly misleading registration statements "emanated" from its Nevada headquarters. Accordingly, the Court concluded that transfer to the Nevada Court is in the "best interests of the litigation." *In re Global Cash Access Holdings, Inc. Sec. Litig.*, No. 08-CV-3516, 2008 BL 209130 (S.D.N.Y. Sept. 18, 2008).

- The Commodity Futures Trading Commission (CFTC) announced that the U.S. District Court for the Western District of Washington entered an order of permanent injunction and other equitable relief against Joseph Lavin (a/k/a Joseph Ivcevic) and his companies Global Asset Partners, LTD., Global Currency Trading Group, LLC, and Global Currency Trading Fund, LLC (collectively, Defendants) for defrauding customers through a foreign currency options scheme. According to the Court, Lavin defrauded customers of $11.5 million by soliciting customers to purchase foreign currency options contracts and misappropriating one percent of customer funds monthly as commissions, in violation of Section 4c(b) of the Commodity Exchange Act (CEA) and Rules 1.1 and 32.9(a), (b) and (c) thereunder. The Court also found that Defendants issued false reports to customers representing "profits" that concealed the misappropriated commissions. The Court ordered Defendants to pay over $11.6 million in restitution and over $11.6 million in civil monetary penalties and permanently enjoined Defendants from engaging in any business activities related to commodity futures and options trading. CFTC Press Release No. 5548-08 (Sept. 18, 2008); *Commodity Futures Trading Commission v. Lavin*, No. 07-CV-1185 (W.D. Wash. filed Aug. 1, 2007).

- The Commodity Futures Trading Commission (CFTC) announced that the U.S. District Court for the District of Vermont entered an amended order assessing a $1 million civil monetary penalty against defendant Gary Scholze for fraudulent solicitation and misappropriating customer funds, in violation of the antifraud provisions of the Commodity Exchange Act. According to the Court, beginning in August 2001, Scholze solicited approximately $2.1 million from 30 individuals to trade commodity futures and options and misappropriated approximately $1.5 million in customer funds for his personal expenses. The Court also found that Scholze issued false account statements to conceal his misappropriation and trading losses. The Court's order acknowledges that Scholze has already been ordered to pay $2.1 million in restitution to defrauded customers in a related criminal action. Thus, the Court declined to order additional restitution. The Court did, however, impose a civil penalty of $1 million, to be paid only after Scholze provides full restitution as ordered in the criminal action. The Court also permanently barred Scholze from trading, soliciting funds, and seeking registration with the CFTC. CFTC Press Release No. 5550-08 (Sept. 18, 2008); *Commodity Futures Trading Commission v. Scholze*, No. 06-CV-00114 (D. Vt. filed June 9, 2006).

- Broker-dealer Ameriprise Financial Services, Inc. and its broker-dealer affiliate Securities America, Inc. (together, Ameriprise) sued mutual fund The Reserve Fund (Trust), its investment adviser Reserve Management Company, Inc. and the Trust's Chairman and President Bruce R. Bent (collectively, Defendants) in the U.S. District Court for the District of Minnesota. In its complaint, Ameriprise alleges that the Trust and its agents "tipped" a number of major institutional investors (Institutional Investors) that the Trust's money market fund the Primary Fund (Fund) was "at serious risk of 'breaking the buck' (*i.e.*, its net asset value falling below $1 per share) because of its exposure to [securities issued by Lehman Brothers Holdings, Inc.]," which had declared its intention to file for bankruptcy protection earlier in the morning. According to the complaint, the Institutional Investors immediately submitted redemption requests to redeem approximately $41 billion of Fund shares at the then-prevailing net asset value of $1 per share. Ameriprise alleges that it subsequently submitted approximately $3.2 billion of Fund redemption requests on behalf of client accounts and about $53 million of Fund redemption requests for Ameriprise's own accounts, but only after the Fund's net asset value had fallen to approximately $0.95 per share. Ameriprise alleges that Defendants filed an inaccurate and misleading registration statement, violated the antifraud provisions of the federal securities laws and breached their fiduciary duties as a result of disclosing material non-public information to the Institutional Investors. Among other things, Ameriprise sought a temporary restraining order enjoining Defendants from processing Fund redemption requests, including the Institutional Investors' redemption requests which had not yet been paid according to the complaint. On September 19, 2008, Judge Paul A. Magnuson issued a temporary restraining order restraining Defendants from paying out Fund redemption requests except for certain requests that do not exceed $10,000. *Ameriprise Financial Services, Inc. v. The Reserve Fund*, No. 08-CV-5219 (D. Minn. filed Sept. 19, 2008).

- The U.S. District Court for the Southern District of New York dismissed a consolidated shareholder derivative action against several officers and directors of JPMorgan Chase & Co., alleging violations of the Securities Exchange Act of 1934, breach of fiduciary duties, waste of corporate assets, and unjust enrichment. Although noting that the Private Securities Litigation Reform Act of 1995 (PSLRA) does not apply to derivative actions, the Court considered "instructive" the provisions of the PSLRA addressing the problem of "professional plaintiffs." The Court concluded that dismissal was warranted because the plaintiff is a professional plaintiff who "cannot be trusted to represent the interests of the shareholders in this litigation fairly and adequately." The Court further found that "[f]rom the start, this litigation has been controlled by counsel with absentee plaintiffs." *In re JPMorgan Chase & Co. Shareholder Derivative Litig.*, No. 08-CV-974, 2008 BL 210840 (S.D.N.Y. Sept. 19, 2008).

- The Securities and Exchange Commission (SEC) announced that hedge fund manager Azure Bay Management, LLC and its owner Daniel N. Jones (together, Defendants) consented to the entry of a final judgment against them in the U.S. District Court for the Western District of Michigan in connection with their management of The Addington Fund LP (Fund), a hedge fund. In its amended complaint, the SEC alleged that Jones concealed substantial Fund losses from investors by, among other things, preparing and disseminating false account statements. The SEC also alleged that Defendants continued to collect excessive fees based on false performance figures for the Fund. Among other things, the final judgment permanently enjoins Defendants from violating the antifraud provisions of the federal securities laws and finds them liable for disgorgement and prejudgment interest totaling $2,943,958. Based on Defendants' financial condition, the SEC waived its right to pursue payment of all but $467,702. Defendants did not admit or deny the SEC's allegations. SEC Litigation Release No. LR-20727 (Sept. 19, 2008); *SEC v. Jones*, No. 07-CV-1198 (W.D. Mich. filed Nov. 29, 2007).

- The Securities and Exchange Commission (SEC) filed a complaint against Gary J. Gross, a former registered representative of broker-dealer Axiom Capital Management, Inc., alleging that, over a two and a half year period, he "defrauded several of his customers by making material misrepresentations and omissions about the risks and suitability of securities he bought for them, churning customer accounts, and fabricating customer account values." *SEC v. Gross*, No. 08-CV-80139 (S.D. Fla. filed Sept. 22, 2008). According to the SEC, most of the allegedly defrauded customers were elderly. The SEC claims that Gross earned more than $700,000 in commissions and fees through these transactions and caused more than $2.7 million in investor losses. The SEC charges Gross with violating Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The SEC seeks a permanent injunction, disgorgement, a civil monetary penalty and a penny stock bar against Gross. SEC Litigation Release No. LR-20732 (Sept. 22, 2008).

- In an action brought by customers of bankrupt broker-dealer A.R. Baron & Co. (Baron) against various defendants who allegedly assisted Baron in its various stock manipulation schemes, the U.S. District Court for the Southern District of New York granted nearly all motions to dismiss filed by defendants. The Court described Baron as a "boiler room," "which bilked its customers out of millions of dollars during the four-year period from May 1992, when it opened for business, until it went bankrupt in 1996." It then held that despite being a "novelette, 113 pages long with 357 separately numbered paragraphs," the Amended Complaint failed to adequately plead federal claims of securities fraud and state claims of common law fraud, conspiracy, and aiding and abetting, against Bear, Stearns & Co. (Baron's clearing broker), various brokerage firms and many individuals, including Baron employees and investors in Baron securities. However, the Court denied the motion to dismiss filed by Apollo Equities (Apollo) and two affiliated individuals, who allegedly paid bribes to Baron in exchange for Baron recommending that investors purchase securities owned by Apollo. *Fezzani v. Bear, Stearns & Co. Inc.*, No. 99-CV-793 (S.D.N.Y. Sept. 22, 2008).

- A purchaser of Federal Home Loan Mortgage Corporation (Freddie Mac) 8.375% Fixed to Floating Rate Non-Cumulative Perpetual Preferred Stock (Z Preferred Stock) filed a securities class action complaint against Goldman Sachs & Co., JPMorgan Chase & Co., and Citigroup Global Markets Inc. (collectively, Defendants), underwriters for Freddie Mac's initial public offering in the fall of 2007, of 240,000,000 shares of Z Preferred Stock. Plaintiff alleges that the offering materials for the Z Preferred Stock failed to warn investors that Freddie Mac "(1) was exposed to massive mortgage-related losses; (2) had debilitating deficiencies in its underwriting and risk-management procedures; (3) was and would remain after the Offering woefully undercapitalized; and most importantly, (4) faced imminent insolvency." Plaintiff claims Defendants violated Section 12(a)(2) of the Securities Act of 1933. *Mark v. Goldman Sachs & Co.*, No. 08-CV-8181 (S.D.N.Y. filed Sept. 23, 2008).

- The Commodity Futures Trading Commission (CFTC) filed a complaint in the U.S. District Court for the Southern District of Florida alleging that operators of an unregistered commodity pool, Michael Meisner and Phoenix Diversified Investment Corporation (Phoenix) (together, Defendants), fraudulently solicited money from pool participants and misappropriated pool participants' funds, in violation of the anti-fraud and other provisions of the Commodity Exchange Act (CEA). According to the complaint, Phoenix acted as a commodity pool operator without registering with the CFTC, and Defendants (1) solicited and accepted over $8 million from at least 26 pool participants between May 2003 and April 2008 (Relevant Time) to trade commodity futures contracts, (2) lost at least $5.8 million of pool participants' funds during the Relevant Time, (3) misappropriated a portion of pool participants' funds for their personal use, (4) made material misrepresentations and failed to disclose material facts about the profitability and risk of their futures trading, and (5) distributed false account statements and concealed losses by using monies received from new pool participants to repay earlier pool participants. The complaint alleges violations of Sections 4b(a)(2)(i), (ii) and (iii), 4o(1), and 4m(1) of the CEA and Rules 4.21 and 4.22 thereunder, and requests injunctive relief, civil penalties, restitution to defrauded pool participants, disgorgement of ill-gotten gains, and a permanent trading ban. *Commodity Futures Trading Commission v. Meisner*, No. 08-CV-81044 (S.D. Fla. filed Sept. 23, 2008).'

- The U.S. District Court for the Northern District of Illinois denied motions to dismiss a securities fraud class action against Northfield Laboratories, Inc. (Northfield), its Chairman and CEO Steven A. Gould, M.D. and former Chairman and CEO Richard E. DeWoskin (collectively, Defendants). Plaintiffs allege that Defendants made misleading statements about Northfield's efforts to develop a blood substitute for treating life-threatening blood loss. The Court held that plaintiffs adequately alleged (1) several material misrepresentations, (2) loss causation with respect to each of these alleged misrepresentations, and (3) scienter. *In re Northfield Laboratories, Inc. Sec. Litig.*, No. 06-CV-1493, 2008 BL 213327 (N.D. Ill. Sept. 23, 2008).

- The Securities and Exchange Commission (SEC) announced that Judge Kenneth A. Marra of the U.S. District Court for the Southern District of Florida granted the SEC's motion for summary judgment against Michael Lauer in a civil action involving a "massive billion-dollar hedge fund fraud." Judge Marra found that Lauer orchestrated an elaborate scheme involving hedge fund managers Lancer Management Group, LLC and Lancer Management Group II, LLC and hedge funds (1) Lancer Offshore, Inc., (2) Omnifund, Ltd., (3) Lancer Partners, LP, (4) LSPV, Inc., and (5) LSPV, LLC (collectively, Funds), each of which Lauer controlled. Specifically, Judge Marra found that Lauer violated the antifraud provisions of the federal securities laws by artificially inflating the Funds' net asset values, preparing false and misleading offering documents and investor newsletters, and providing sham "model" portfolios that falsified the Funds' investment positions. Finding Lauer's conduct to be "egregious, pervasive, [and] premeditated," Judge Marra issued a permanent injunction prohibiting Lauer from committing future violations of the antifraud provisions of the federal securities laws. Judge Marra reserved judgment on the SEC's claim for disgorgement and prejudgment interest and the imposition of a civil penalty. SEC Press Release No. PR-2008-225 (Sept. 24, 2008); *SEC v. Lauer*, No. 03-CV-80612 (S.D. Fla. Sept. 24, 2008).

- The Securities and Exchange Commission (SEC) announced that it sued investment adviser WealthWise, LLC (WealthWise) and its principal Jeffrey A. Forrest (together, Defendants) in the U.S. District Court for the Central District of California. In its complaint, the SEC alleges that Defendants failed to disclose a material conflict of interest to more than 60 WealthWise advisory clients who invested approximately $40 million in hedge fund Apex Equity Options Fund, LP (Apex). According to the complaint, Forrest recommended that WealthWise clients invest in Apex because of an innovative options trading strategy it used that would not only protect principal but also generate a three percent monthly return. However, the SEC alleges that Defendants failed to disclose a side agreement with Apex's manager, Thompson Consulting, Inc. (TCI), pursuant to which WealthWise received a portion of TCI's performance fee for all WealthWise client assets invested in Apex. According to the complaint, WealthWise clients lost nearly their entire investments in Apex when it suffered massive losses as a result of TCI's options trading strategy, while WealthWise received an estimated $388,401.80 in performance fees from TCI. Among other things, the SEC seeks a permanent injunction against Defendants barring future violations of the antifraud provisions of the federal securities laws, disgorgement of unlawful profits and imposition of civil penalties. SEC Press Release No. PR-2008-224 (Sept. 24, 2008); SEC Litigation Release No. LR-20737 (Sept. 24, 2008); *SEC v. WealthWise, LLC*, No. 08-CV-6278 (C.D. Cal. filed Sept. 24, 2008).

Administrative

- The Commodity Futures Trading Commission (CFTC) revoked hedge fund Beacon Rock Capital, LLC's (Beacon Rock) registrations as a Commodity Pool Operator and Commodity Trading Advisor based on a prior criminal conviction. Specifically, on April 4, 2008, Beacon Rock pled guilty in the U.S. District Court for the Eastern District of Pennsylvania to charges that it made illegal market timing trades that defrauded mutual funds and their shareholders. In its Opinion and Order, the CFTC concluded that this criminal conviction justifies revocation of Beacon Rock's registrations. Beacon Rock did not admit or deny the CFTC's findings. CFTC Press Release No. 5549-08 (Sept. 18, 2008).

- The Securities and Exchange Commission (SEC) announced that it was significantly expanding its ongoing investigations into market manipulation of financial stocks by obtaining statements under oath from hedge fund managers, broker-dealers and institutional investors with significant trading activity in financial stocks or significant positions in credit default swaps. The SEC also stated that it "approved a formal order of investigation that will allow SEC enforcement staff to obtain additional documents and testimony by subpoena." According to the SEC, it is coordinating its investigations with parallel inquiries by NYSE Regulation and the Financial Industry Regulatory Authority involving on-site visits to various broker-dealers. SEC Press Release No. PR-2008-214 (Sept. 19, 2008).

- The Securities and Exchange Commission (SEC) instituted settled administrative proceedings against Evan K. Andersen, a former partner and principal of SEC-registered investment adviser Lydia Capital, LLC (Lydia Capital). Among other things, the SEC alleged that Andersen (1) defrauded investors in Lydia Capital's hedge fund client Lydia Capital Alternative Investment Fund LP (Fund) through a series of material misrepresentations and omissions, and (2) misappropriated approximately $2.35 million of Fund assets. Without admitting or denying the SEC's allegations, Andersen agreed to be barred from association with any investment adviser. In a related SEC civil action filed in the U.S. District Court for the District of Massachusetts, a final judgment was entered by consent against Andersen permanently enjoining him from violating the antifraud provisions of the federal securities laws. SEC Release No. IA-2783 (Sept. 22, 2008); Administrative Proceeding File No. 3-13228.

- The Securities and Exchange Commission (SEC) issued an order instituting settled administrative proceedings against AmSouth Bank, N.A. (n/k/a Regions Bank) and AmSouth Asset Management, Inc. (n/k/a Morgan Asset Management) (together, AmSouth) in connection with their management of the AmSouth Funds, a mutual fund complex later merged into the Pioneer Group fund complex. According to the order, AmSouth entered into certain undisclosed agreements with AmSouth Funds' former administrator and securities lending agent, BISYS Fund Services, Inc. (BISYS). Pursuant to those agreements, BISYS allegedly rebated approximately $17 million in administrative and securities lending fees to AmSouth to pay for unauthorized marketing expenses and "expenses entirely unrelated to marketing, including the salary, bonus, benefits, and country club membership of the president of the AmSouth Funds." In exchange, AmSouth allegedly agreed to recommend to its board of trustees BISYS's administrative and securities lending services for the AmSouth Funds. Without admitting or denying the SEC's allegations, AmSouth agreed to cease and desist from committing future violations of the federal securities laws and pay a total of $11.4 million in disgorgement, prejudgment interest and civil penalties. SEC Press Release No. PR-2008-222 (Sept. 23, 2008); SEC Release Nos. IA-2784 and IC-28387 (Sept. 23, 2008); Administrative Proceeding File No. 3-13230.

- The Commodity Futures Trading Commission (CFTC) filed a notice of its intent to revoke Philadelphia Alternative Asset Management Company, LLC's (PAAM) registration as a Commodity Pool Operator (CPO). In its notice, the CFTC alleges that PAAM is subject to statutory disqualification of its CPO registration under Sections 8a(2)(C) and (E) of the Commodity Exchange Act (CEA) based on a default judgment entered against it in the U.S. District Court for the Eastern District of Pennsylvania on August 13, 2008. *See* CFTC Press Release No. 5531-08 (Aug. 19, 2008). In the default judgment, the Court found that PAAM fraudulently solicited over $280 million from individuals to participate in a commodity pool and misappropriated pool funds. The Court ordered PAAM to pay approximately $276 million as restitution and an $8.8 million civil monetary penalty. According to the CFTC, it will conduct a public proceeding pursuant to Rule 3.60 under the CEA to determine whether PAAM is subject to statutory disqualification and whether its CPO registration should be suspended, restricted, or revoked. CFTC Press Release No. 5554-08 (Sept. 24, 2008).

- The Commodity Futures Trading Commission (CFTC) announced that it filed and simultaneously settled charges against four registered commodity pool operators (CPOs)-Mansur Capital Corporation (Mansur), Persistent Edge Management LLC (Persistent), and Stillwater Capital Partners, Inc. and Stillwater Capital Partners, LLC (together, Stillwater)-for failing to file with the National Futures Association (NFA) and distribute to investors commodity pool annual reports in a timely manner. Subject to certain exemptions and extensions, Commodity Exchange Act (CEA) Rule 4.22 requires CPOs to file with the NFA and distribute to pool participants annual reports within 90 days of the end of the commodity pools' fiscal years. In orders instituting proceedings, making findings and imposing remedial sanctions (Orders), the

CFTC found that each of the CPOs operated one or more commodity pools and failed to timely comply with annual reporting obligations in violation of CEA Rule 4.7(b)(3)(i). The Orders require Mansur to pay $75,000, Persistent to pay $120,000, and Stillwater to jointly and severally pay $135,000 in civil monetary penalties. Mansur, Persistent, and Stillwater did not admit or deny the CFTC's findings. CFTC Press Release No. 5555-08 (Sept. 24, 2008); CFTC Order In the Matter of Mansur Capital Corporation, CFTC Docket No. 08-15 (Sept. 23, 2008); CFTC Order In the Matter of Persistent Edge Management LLC, CFTC Docket No. 08-16 (Sept. 23, 2008); CFTC Order In the Matter of Stillwater Capital Partners, Inc. and Stillwater Capital Partners, LLC, CFTC Docket No. 08-17 (Sept. 23, 2008).

Legislative

- Securities and Exchange Commission (SEC) Chairman Christopher Cox testified before the Senate Committee on Banking, Housing, and Urban Affairs concerning the recent turmoil in the U.S. credit markets a nd possible regulatory and legislative responses. Cox described the failure of the Gramm-Leach Bliley Act to give regulatory authority over investment bank holding companies to any government agency as a "costly mistake." He noted that the SEC has supervised investment bank holding companies on a voluntary basis since 2004, under its Consolidated Supervised Entities program, but argued that the events of the last six months "have made abundantly clear that voluntary regulation doesn't work." Accordingly, Cox called on Congress to codify or amend a Memorandum of Understanding between the SEC and the Federal Reserve on supervision of financial services firms. Cox also explained that Congress left a similar "regulatory hole" concerning the market for credit default swaps (CDS). According to Cox, "[n]either the SEC nor any regulator has authority over the CDS market, even to provide minimal disclosure to the market." Cox described a CDS purchaser as "tantamount to a short seller of the bond underlying the CDS," and analogized CDS holders who do not also hold the underlying bonds to "naked" short sellers. He stated that the "potential for unfettered naked shorting" and lack of regulation of the CDS market are "cause for great concern," and he urged Congress to give the SEC authority immediately to regulate the CDS market. SEC Congressional Testimony: *Testimony Concerning Turmoil in U.S. Credit Markets: Recent Actions Regarding Government Sponsored Entities, Investment Banks and Other Financial Institutions* (Sept. 23, 2008).

[*] Compiled from Bloomberg Daily Law Reports® on SCLR <GO>.

SEC Calendar

Rules Approved Sept. 19 – 25, 2008	
Sept. 19	Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions, SEC Release No. 34-58597, File No. S7-10-08 **Applies to:** Securities Act Rules 162, 800 and 802; Regulation S-T Rule 101; Exchange Act Rules 13d-1, 13e-3, 13e-4, 14d-1, 14d-11, 14e-5 and 16a-1; Forms S-4, F-4, F-X, and CB; Schedules 13G and TO
Sept. 23	Foreign Issuer Reporting Enhancements, SEC Release Nos. 33-8959, 34-58620 and IS-1310, File No. S7-05-08 **Applies to:** Securities Act Forms F-1, F-3 and F-4; Regulation C Rule 405; Exchange Act Form 20-F, and Rules 3b-4, 13a-10, 13e-2, 15d-2 and 15d-10
Rules Proposed Sept. 19 – 25, 2008	
	None
Rules Effective Sept. 19 – 25, 2008	
Sept. 24	Adoption of Updated EDGAR Filer Manual, SEC Release Nos. 33-8956, 34-58584, 39-2458 and IC-28381 **Applies to:** EDGAR Filer Manual Volume I and Volume II
Rules to Become Effective Sept. 26 – Oct. 3, 2008	
	None

Exchange & SRO Rulemaking

Rules Approved Sept. 18 – Sept. 24, 2008	
CHX	
Sept. 17*	Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Consolidating into a Single Rule Certain Requirements for Securities Traded on the Exchange Pursuant to Unlisted Trading Privileges, SEC Release No. 34-58568, File No. SR-CHX-2008-12
NASDAQ	
Sept. 17*	Order Approving Proposed Rule Change as Modified by Amendment Nos. 1 and 2 Related to Submission of Non-Tape Reports, SEC Release No. 34-58569, File No. SR-NASDAQ-2008-33
NYSE	
Sept. 19	Order Approving Proposed Rule Change to Amend Section 902.09 of the Listed Company Manual to Establish Fees for Securities Listed under Sections 703.21 and 703.22 of the Listed Company Manual and Traded on NYSE Bonds and to Waive Fees for Structured Products Transferred from the Amex to the NYSE, SEC Release No. 34-58599, File No. SR-NYSE-2008-56
Sept. 19	Order Approving Proposed Rule Change To Enable the Exchange To Waive Annual Listing Fees for Securities Transferring From the Amex or NYSE Arca, Inc., SEC Release No. 34-58601, File No. SR-NYSE-2008-74
NYSE Arca	
Sept. 17*	Order Granting Accelerated Approval of Proposed Rule Change to List and Trade the WisdomTree Dreyfus Emerging Markets Fund, SEC Release No. 34-58564, File No. SR-NYSEArca-2008-86
Sept. 19	Order Approving Proposed Rule Change To Waive Annual Fees for Securities Transferring to NYSE Arca from NYSE Alternext US, SEC Release No. 34-58598, File No. SR-NYSEArca-2008-78
OCC	
Sept. 18	Order Granting Approval of a Proposed Rule Change Relating to the Cash Dividend Threshold, SEC Release No. 34-58586, File No. SR-OCC-2008-16
Sept. 18	Order Granting Approval of Accelerated Delivery of Supplement to the Options Disclosure Document Reflecting Changes to Disclosure Regarding Certain Variability Index Options, Strategy-Based Index Options, and Adjustments of Stock Option Contracts, SEC Release No. 34-58604, File No. SR-ODD-2008-04
Rules Proposed Sept. 18 – Sept. 24, 2008	
AMEX	
Sept. 17*	Proposed Rule Change by the American Stock Exchange LLC Relating to the Removal of Certain Membership Committees, File No. SR-AMEX-2008-71
Sept. 17*	Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, to Revise its Initial Listing Process to Eliminate the Current Appeal Process for Initial Listing Decisions, Add a New Confidential Pre-application Eligibility Review Process, and Upgrade its Listing Requirements by Eliminating the Alternative Listing Standards, SEC Release No. 34-58570, File No. SR-AMEX-2008-70
BATS	
Sept. 19	Proposed Rule Change to Amend BATS Rulebook Chapter XI to Add Four New Rules Regarding the Registration and Obligations of Market Makers and Amend Rule 1.5 to Add Definitions of "Market Maker" and "Market Maker Authorized Trader," File No. SR-BATS-2008-05
CBOE	
Sept. 19	Notice of Filing of a Proposed Rule to Establish a CBSX-Only Order Type, SEC Release No. 34-58603, File No. SR-CBOE-2008-97
Sept. 19	Proposed Rule Change by Chicago Board Options Exchange, Incorporated Relating to Transfer of Interim Trading Permits, File No. SR-CBOE-2008-99
Sept. 22	Proposed Rule Change to Amend Fees Schedule, File No. SR-CBOE-2008-100

Exchange & SRO Rulemaking (cont'd)

Rules Proposed Sept. 18 – Sept. 24, 2008 (cont'd)	
ISE	
Sept. 22	Proposed Rule Change by International Securities Exchange Relating to Amending the Fee Schedule, File No. SR-ISE-2008-69
Sept. 23	Proposed Rule Change by International Securities Exchange, LLC Relating to Cancellation Fees, File No. SR-ISE-2008-70
Sept. 23	Proposed Rule Change by International Securities Exchange Relating to Option Fee Changes, File No. SR-ISE-2008-71
Sept. 23	Proposed Rule Change Relating to Foreign Currency Options Closing Settlement Value, File No. SR-ISE-2008-72
Sept. 24	Proposed Rule Change to Expand the Trading Hours of the ISE Stock Exchange, File No. SR-ISE-2008-73
FINRA	
Sept. 18	Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure to Raise the Amount in Controversy Heard by a Single Chair-Qualified Arbitrator to $100,000, File No. SR-FINRA-2008-47
Sept. 23	Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, to Amend the By-Laws of FINRA Regulation to Realign the Representation of Industry Members on the National Adjudicatory Council to Follow More Closely the Categories of Industry Representation on the FINRA Board, SEC Release No. 34-58626, File No. SR-FINRA-2008-46
NSX	
Sept. 19	Proposed Rule Change to Amend NSX Rules to Provide for a Minimum Execution Quantity Instruction on Certain Pegged Zero Display Reserve Orders, File No. SR-NSX-2008-16
Sept. 22	Proposed Rule Change to Amend Exchange Rule 16 and NSX Fee Schedule to Liquidity Adding Rebates and Market Data Credits for Order Delivery Transactions, File No. SR-NSX-2008-17
NASDAQ	
Sept. 19	Proposed Rule Change Relating to Trading the Two-Character Ticker Symbol "TO," File No. SR-NASDAQ-2008-75
Sept. 19	Proposed Rule Change Relating to Nasdaq's PORTAL Market, File No. SR-NASDAQ-2008-76
Sept. 22	Proposed Rule Change Regarding Fees for the Nasdaq Options Maintenance Tool, File No. SR-NASDAQ-2008-77
Sept. 22	Proposed Rule Change Regarding Fees for Enhancements to the Nasdaq Regulation Reconnaissance Service, File No. SR-NASDAQ-2008-78
Sept. 23	Notice of Filing of Proposed Rule Change to Establish a PORTAL Reference Database and Related Fees, SEC Release No. 34-58622, File No. SR-NASDAQ-2008-72
NYSE Arca	
Sept. 18	Proposed Rule Change by NYSE Arca, Inc. Relating to ProShares Trust II, File No. SR-NYSEArca-2008-99
Sept. 19	Proposed Rule Change by NYSE Arca, Inc., Relating to Rules 6.100 and 6.82, File No. SR-NYSEArca-2008-100
Rules Effective Sept. 18 – Sept. 24, 2008	
AMEX	
Sept. 19	Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the American Stock Exchange LLC Temporarily Suspending The Requirements of Its Rules Concerning the Approval of New Member Organizations in Order to Approve Barclays Capital Inc. Immediately and Provisionally as a New Member Organization, SEC Release No. 34-58606, File No. SR-AMEX-2008-72

Exchange & SRO Rulemaking (cont'd)

Rules Effective Sept. 18 – Sept. 24, 2008 (cont'd)

CBOE	
Sept. 22	Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend CBOE Rules Relating to Appointment Costs, SEC Release No. 34-58615, File No. SR-CBOE-2008-95
Sept. 22	Notice of Filing and Immediate Effectiveness of Proposed Rule Change by Chicago Board Options Exchange, Incorporated Relating to Transfer of Interim Trading Permits, SEC Release No. 34-58616, File No. SR-CBOE-2008-99
NYSE	
Sept. 19	Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Proposing to Temporarily Suspend the Requirements of NYSE Rule 311 and Related NYSE Rules Concerning the Approval of New Member Organizations in Order to Approve Barclays Capital Inc. as an NYSE Member Organization, SEC Release No. 34-58607, File No. SR-NYSE-2008-86
Sept. 24	Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Proposing to Suspend the Operation of certain NYSE rules to Respond to the Impact to the Marketplace of the Events of September 15, 2008, Including the Bankruptcy Filing by Lehman Brothers Holding Inc., SEC Release No. 34-58631, File No. SR-NYSE-2008-84
Sept. 24	Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Amending NYSE Rule 1000 ("Automatic Execution of Limit Orders Against Orders Reflected in NYSE Published Quotation"), SEC Release No. 34-58629, File No. SR-NYSE-2008-85
NYSE Arca	
Sept. 19	Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. to Temporarily Suspend the Requirements of NYSE Arca Rule 2.4 and Related NYSE Arca Rules Concerning Options Trading Permit Holder Applications and Approvals In Order to Immediately Approve Barclays Capital Inc. as an NYSE Arca OTP Holder, SEC Release No. 34-58608, File No. SR-NYSEArca-2008-101
Sept. 19	Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc., Amending NYSE Arca Equities Rule 7.35 Governing Auctions, SEC Release No. 34-58596, File No. SR-NYSEArca-2008-98
PHLX	
Sept. 17*	Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the NASDAQ OMX PHLX, Inc. to Enable the Listing and Trading of Options on Index-Linked Securities, SEC Release No. 34-58571, File No. SR-Phlx-2008-60
Sept. 18	Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Quotation Size Decrementation, SEC Release No. 34-58582, File No. SR-Phlx-2008-66

National Market System Plans

Plans Approved Sept. 18 – Sept. 24, 2008

Sept. 18	Order Approving the Twelfth Substantive Amendment to the Second Restatement of the Consolidated Tape Association Plan and the Eighth Substantive Amendment to the Restated Consolidated Quotation Plan, SEC Release No. 34-58585, File No. SR-CTA/CQ-2008-02

* Publicly available after last week's issue of Bloomberg Law Reports® — Securities Law.

Legislative Activity Table

Track Legislation	Short Title	Purpose
Broker-Dealer Regulation		
H.R. 6517 Rep. Ackerman (D-NY)	(No short title)	To require the Securities and Exchange Commission to reinstate the uptick rule on short sales of securities.
H.R. 1289 Rep. Johnson (D-TX)	Community Reinvestment Modernization Act of 2007	To enhance the availability of capital and credit for all citizens and communities, to ensure that community reinvestment keeps pace as banks, securities firms, and other financial service providers become affiliates as a result of the enactment of the Gramm-Leach-Bliley Act, and for other purposes.
H.R. 1171 Rep. Meeks (D-NY)	Money Market Fund Parity Act of 2007	To direct the Securities and Exchange Commission to revise rules to provide for the comparable treatment and expanded use of qualified money market funds for broker-dealer financing.
S. 601 Sen. Bayh (D-IN)	Simplification Through Additional Reporting Tax Act of 2007	To amend the Internal Revenue Code of 1986 to require broker reporting of customer's basis in securities transactions, and for other purposes.
H.R. 878 Rep. Emanuel (D-IL)	Simplification Through Additional Reporting Tax Act of 2007	To amend the Internal Revenue Code of 1986 to require broker reporting of customer's basis in securities transactions, and for other purposes.
Commodity Derivatives		
H.R. 6604 Rep. Peterson (D-MN)	Commodity Markets Transparency and Accountability Act of 2008	To amend the Commodity Exchange Act to bring greater transparency and accountability to commodity markets, and for other purposes.
S. 3268 Sen. Reid (D-NV)	Stop Excessive Energy Speculation Act of 2008	To amend the Commodity Exchange Act to prevent excessive price speculation with respect to energy commodities, and for other purposes.
H.R. 6377 Rep. Peterson (D-MN)	Energy Markets Emergency Act of 2008	To direct the Commodity Futures Trading Commission to utilize all its authority, including its emergency powers, to curb immediately the role of excessive speculation in any contract market within the jurisdiction and control of the Commodity Futures Trading Commission, on or through which energy futures or swaps are traded, and to eliminate excessive speculation, price distortion, sudden or unreasonable fluctuations or unwarranted changes in prices, or other unlawful activity that is causing major market disturbances that prevent the market from accurately reflecting the forces of supply and demand for energy commodities.
H.R. 2419 Rep. Peterson (D-MN)	Food, Conservation and Energy Act of 2008	Title XIII of the Act, the "CFTC Reauthorization Act of 2008," would reauthorize the CFTC for another five years (through 2013), and expand CFTC oversight and antifraud authority in several areas.
S. 2058 Sen. Levin (D-MI)	Close the Enron Loophole Act	To amend the Commodity Exchange Act to close the Enron loophole, prevent price manipulation and excessive speculation in the trading of energy commodities, and for other purposes.
H.R. 3009 Rep. Barrow (D-GA)	Market Transparency Reporting of United States Transactions Act of 2007	To enhance transparency of trading in over-the-counter derivatives in natural gas.
S. 577 Sen. Feinstein (D-CA)	Oil and Gas Traders Oversight Act of 2007	To amend the Commodity Exchange Act to add a provision relating to reporting and recordkeeping for positions involving energy commodities.
H.R. 594 Rep. Stupack (D-MI)	Prevent Unfair Manipulation of Prices Act of 2007	To regulate over-the-counter trading of energy derivatives.

Legislative Activity Table (cont'd)

Track Legislation	Short Title	Purpose
Corporate Governance		
S. 2956 Sen. Levin (D-MI)	Incorporation Transparency and Law Enforcement Assistance Act	To ensure that persons who form corporations in the United States disclose the beneficial owners of those corporations, in order to prevent wrongdoers from exploiting United States corporations for criminal gain, to assist law enforcement in detecting, preventing, and punishing terrorism, money laundering, and other misconduct involving United States corporations, and for other purposes.
S. 2866 Sen. Clinton (D-NY)	Corporate Executive Compensation Accountability and Transparency Act	To require greater disclosure of senior corporate officer compensation, to empower shareholders and investors to protect themselves from fraud, to limit conflicts of interest in determining senior corporate officer compensation, to ensure integrity in Federal contracting, to close corporate tax loopholes utilized to subsidize senior corporate officer compensation, and for other purposes.
H.R. 2829 Rep. Serrano (D-NY)	Financial Services and General Government Appropriations Act, 2008	Section 905 of bill states: "None of the funds made available by this Act may be used by the Securities and Exchange Commission to enforce the requirements of section 404 of the Sarbanes-Oxley Act with respect to non-accelerated filers under section 210.2-02R of title 17, Code of Federal Regulations."
H.R. 2727 Rep. Garrett (R-NJ)	Small Business SOX Compliance Extension Act	To extend the current moratorium for small businesses complying with section 404 of the Sarbanes-Oxley Act of 2002 by one year.
S. 2703 Sen. Dole (R-NC)	Regulatory Relief and Fairness Act	To reduce the reporting and certification burdens for certain financial institutions of sections 302 and 404 of the Sarbanes-Oxley Act of 2002.
S. 1153 Sen. Snowe (R-ME)	Small Business Regulatory Review Act of 2007	To require assessment of the impact on small business concerns of rules relating to internal controls, and for other purposes.
H.R. 1780 Rep. Kirk (R-IL)	Small Business Securities Protection Act	To improve the implementation of Section 404 of Sarbanes-Oxley.
S. 869 Sen. DeMint (R-SC)	Compete Act of 2007	To reform certain provisions of Section 404 of the Sarbanes-Oxley Act of 2002 to make compliance with that section more efficient, with the goal of maintaining United States capital market global competitiveness.
H.R. 1508 Rep. Meeks (D-NY)	Compete Act of 2007	To reform certain provisions of Section 404 of the Sarbanes-Oxley Act of 2002 to make compliance with that section more efficient, with the goal of maintaining United States capital market global competitiveness.
H.R. 1049 Rep. Garrett (R-NJ)	Amend Misinterpreted Excessive Regulation in Corporate America Act	To reduce the unintended costs and burdens that the Sarbanes-Oxley Act of 2002 imposes on U.S. businesses, while maintaining that Act's goals of bolstering confidence.
Federal Securities Laws		
H.R. 6513 Rep. Kanjorski (D-PA)	Securities Act of 2008	To amend the Federal securities laws to enhance the effectiveness of the Securities and Exchange Commission's enforcement, corporation finance, trading and markets, investment management, and examination programs, and for other purposes.
H.R. 6482 Rep. Ackerman (D-NY)	(No short title)	To direct the Securities and Exchange Commission to establish both a process by which asset-backed instruments can be deemed eligible for NRSRO ratings and an initial list of such eligible asset-backed instruments.
S. 3219 Sen. Casey (D-PA)	Senior Investor Protections Enhancement Act of 2008	A bill to enhance penalties for violations of securities protections that involve targeting seniors.

Legislative Activity Table (cont'd)

Track Legislation	Short Title	Purpose
Federal Securities Laws (cont'd)		
H.R. 6308 Rep. Frank (D-MA)	Municipal Bond Fairness Act	To ensure uniform and accurate credit rating of municipal bonds and provide for a review of the municipal bond insurance industry.
H.R. 6230 Rep. McHenry (R-NC)	Credit Rating Agency Transparency and Disclosure Act	To amend the Securities Exchange Act of 1934 to require nationally registered statistical rating organizations to provide additional disclosures with respect to the rating of certain structured securities, and for other purposes.
H.R. 6069 Rep. Campbell (R-CA)	Enhanced Emergency and Enforcement Authority Act	To provide additional emergency and enhanced enforcement authority to the Securities and Exchange Commission.
H.R. 6066 Rep. Frank (D-MA)	Extractive Industries Transparency Disclosure Act	To require, for the benefit of shareholders, the disclosure of payments to foreign governments for the extraction of natural resources, to allow such shareholders more appropriately to determine associated risks.
S. 2191 Sen. Lieberman (I-CT)	America's Climate Security Act of 2007	Section 9002 of the bill would require the Securities and Exchange Commission to direct securities issuers to inform investors of material risks related to climate change.
H.R. 3505 Rep. Roskam (R-IL)	Securities Law Technical Corrections Act of 2007	To make various technical and clerical amendments to the federal securities laws.
H.R. 3504 Re. Roskam (R-IL)	Transparency in Corporate Filings Act	To authorize the Securities and Exchange Commission to permit or require persons filing or furnishing information under the securities laws to make such information available on internet websites, in addition to or instead of including such information in filings with or submissions to the Commission, under such conditions as the Commission may specify by rule.
H.R. 2868 Rep. Meeks (D-NY)	(No short title)	To eliminate the exemption from State regulation for certain securities designated by national securities exchanges.
H.R. 2595 Rep. Mahoney (D-FL)	(No short title)	To amend the Securities Exchange Act of 1934 to require the disclosure of proxy votes relating to executive and director compensation by beneficial owners of more than five percent of a company's shares.
H.R. 2341 Rep. Baird (D-WA)	Stop Trading on Congressional Knowledge Act	To prohibit securities and commodities trading based on nonpublic information relating to Congress, and to require additional reporting by Members and employees of Congress of securities transactions, and for other purposes.
S. 1181 Sen. Obama (D-IL)	Shareholder Vote on Executive Compensation Act	To amend the Securities Exchange Act of 1934 to provide shareholders with an advisory vote on executive compensation.
S. 834 Sen. Hatch (R-UT)	Promoting Transparency in Financial Reporting Act of 2007	A bill to require annual testimony before Congress by the Securities and Exchange Commission, the Financial Accounting Standards Board, and the Public Company Accounting Oversight Board, relating to efforts to promote transparency in financial reporting.
H.R. 1341 Rep. Gillmor (R-OH)	Honest Income Disclosure Act	To require corporate income reported to the Internal Revenue Service to be included in annual reports to the Securities and Exchange Commission.
H.R. 1257 Rep. Frank (D-MA)	Shareholder Vote on Executive Compensation Act	To amend the Securities Exchange Act of 1934 to provide shareholders with an advisory vote on executive compensation.
H.R. 1208 Rep. Gillmor (R-OH)	Corporate Charitable Disclosure Act of 2007	To amend the Securities Exchange Act of 1934 to require improved disclosure of corporate charitable contributions, and for other purposes.
H.R. 755 Rep. Davis (R-KY)	Promoting Transparency in Financial Reporting Act of 2007	To require annual oral testimony before the Financial Services Committee of the Chairperson or a designee of the Chairperson of the Securities and Exchange Commission, the Financial Accounting Standards Board, and the Public Company Accounting Oversight Board, relating to their efforts to promote transparency in financial reporting.

Legislative Activity Table (cont'd)

Track Legislation	Short Title	Purpose
Hedge Funds		
H.R. 3417 Rep. Larson (D-CT)	Commission on the Tax Treatment of Hedge Funds and Private Equity Act of 2007	To establish the Commission on the Tax Treatment of Hedge Funds and Private Equity.
H.R. 2834 Rep. Levin (D-MI)	(No short title)	To amend the Internal Revenue Code of 1986 to treat income received by partners for performing investment management services as ordinary income received for the performance of services.
H.R. 2586 Rep. Capuano (D-MA)	Securities and Exchange Commission Authority Restoration Act of 2007	To amend the Investment Advisers Act of 1940 to authorize the Commission to require the registration of hedge fund advisers under that Act.
S. 1402 Sen. Grassley (R-IA)	Hedge Fund Registration Act of 2007	A bill to amend the Investment Advisers Act of 1940, with respect to the exemption to registration requirements.
Investment Advisers and Companies		
H.R.3225 Rep. Castle (R-DE)	Mutual Fund Fee Reform Act	To require the Securities and Exchange Commission to improve the disclosure of fees and expenses of open-end investment companies registered under the Investment Company Act of 1940.
H.R. 1357 Rep. Ros-Lehtinen (R-FL)	(No short title)	To require divestiture of current investments in Iran, to prohibit future investments in Iran, and to require disclosure to investors of information relating to such investments.
H.R. 397 Rep. Saxton (R-NJ)	(No short title)	To amend the Internal Revenue Code of 1986 to allow individuals to defer recognition of reinvested capital gains distributions from regulated investment companies.
Securities Litigation		
S. 3033 Sen. Cornyn (R-TX)	Securities Litigation Attorney Accountability and Transparency Act	To protect investors by fostering transparency and accountability of attorneys in private securities litigation.
H.R. 3931 Rep. Baker (R-LA)	Securities Litigation Attorney Accountability and Transparency Act	To protect investors by fostering transparency and accountability of attorneys in private securities litigation.

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