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MONITOR

Obama, Congress Face Regulatory Challenges

Source: Corbis Corporation

President Obama is sworn in.

The Securities and Exchange Commission's failure to stop the largest Ponzi scheme in history, despite repeated warnings by investment professionals familiar with Bernard L. Madoff's overblown promises to investors, has become a symbol of regulatory breakdown. The results of that breakdown have been catastrophic: shattered markets, broken financial structures, soaring unemployment, and state and local budget cuts.

Reconstructing the regulatory framework for the nation's financial system is critical to preventing future crises and improving the landscape for institutional and individual investors.

President Obama acknowledged as much when he talked about the market in his inauguration speech. "Its power to generate wealth and expand freedom is unmatched," Obama said, "but this crisis has reminded us that without a watchful eye, the market can spin out of control – and that a nation cannot prosper long when it favors only the prosperous."

— Continued on page 6

Michigan Systems to Lead Bear Stearns Case

The State of Michigan Retirement Systems, represented by Berman DeValerio, have been selected as lead plaintiff in a securities class action against Bear Stearns & Co., the once-dominant investment bank that was the first domino to fall in Wall Street's breathtaking collapse.

After rumors began circulating in March 2008 that Bear Stearns was suffering from a severe liquidity shortfall, the investment bank's stock plunged. Within days, JP Morgan Chase, at the urging of the Federal Reserve and the US Treasury Department, acquired Bear Stearns for a mere $10 a share; its stock had traded as high as $160.

In appointing the Michigan Systems as lead plaintiff, Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York determined that the Systems' stock loss of $62 million exceeded the losses sustained by other investors seeking lead plaintiff status in the case and that it was an adequate and typical representative for the proposed plaintiff class. Judge Sweet at the same time approved Berman DeValerio and Labaton Sucharow LLP as co-lead counsel representing the Michigan Systems.

Michigan Attorney General Mike Cox and Michigan Treasurer Robert J. Kleine said that the state would seek to "maximize recovery for victims" through its involvement with the case.

The Systems allege that Bear Stearns, its former chief executive James E. Cayne and other top executives failed to warn investors of mounting losses in two Bear Stearns hedge funds that threatened to fell the company. Several months after the problems became apparent to Bear Stearns management, a liquidity crisis triggered JP Morgan's acquisition of the firm. The Bear Stearns hedge funds had made highly leveraged investments in exotic securities backed by subprime mortgages.

— Continued on page 5

Editorial

This Bailout Must Have Transparency and Oversight

Peter A. Pease

It was Sunday, September 28, 2008. I was a passenger in a friend's truck headed south to the Maine coast from Township C, Lower Lake Richardson, towing his Eastern 20 to the boatyard for a long winter's rest. I had The New York Times in my hands and my stomach was in free fall.

Atop the front page was a picture of New Hampshire Senator Judd Gregg, the financial system bailout negotiator, surrounded by intent, grim reporters and microphones. His dark, sunken eyes and pinched, no-lipped frown said it all.

Also on the front page, AIG's Joseph Cassano peeked around a corner in London, where he used to run AIG Financial Products, writing credit default swaps to insure against defaults in various packages of debt, including sub-prime mortgages packaged into collateralized debt obligations. Since he saw no risk in the insurance, the unit had posted no collateral and booked enormous profits. In some years, 46 percent of the unit's revenue was paid out in compensation, some $3.56 billion going mostly to the unit's top 20 employees over the previous seven years.

The Times' excellent reporters detailed the history of AIG Financial Products and reported on recent meetings and negotiations on the bailout plan. I had hours before me, and read the whole tale aloud to my friend. We had thought, along with everyone else, that the national financial crisis was a banking problem, primarily due to imploding sub-prime mortgages. The bailout plan was going to get toxic assets off the banks' books so the banks could resume lending. But now, it seemed that the bailout plan would include AIG, the world's largest insurer.

I was amazed to read that there had been one Wall Street chief executive in a meeting a few weeks earlier at the Federal Reserve, Lloyd Blankfein of Goldman Sachs. Treasury Secretary – and ex-Goldman CEO – Henry Paulson and the regulators had already allowed Lehman Brothers to fail, and their bailout plan did not contemplate saving insurance companies. Blankfein was at the meeting, said Goldman, out of general concern for the financial system. However, others were saying that Goldman had up to $20 billion in exposure to AIG. In a matter of days the regulators changed course, and paid out $85 billion to AIG.

It does not inspire confidence when enormously significant decisions are made in secret. The whole bailout enterprise last fall was disturbingly like Paul Bremer's handling of the post-invasion rebuilding of Iraq. Unilateral decisions were made without consultation or accountability, and vast amounts of cash flew out the doors, never to be seen again.

We have watched for six months as billions have been spent and trillions committed. We support the efforts to stabilize and restore the financial system and the economy. That means that we should not shrink from taking the required action and should take over the toxic assets – all of them – in order to render the banks solvent, as originally planned. It worked in Sweden. We advised the Japanese to do that in the 1990's. They didn't and were plagued with zombie banks for another decade.

Fear that this action would amount to a Socialist "nationalization" of the banks seems to have paralyzed Washington for the moment. Please – let's get on with it. And as we embark upon a new round of massive spending, may it be done transparently, and with oversight and accountability. We should never have to read another newspaper like that of September 28, 2008. ■

"I got eight to twelve years, which was in line with Wall Street expectations."

Source: The New Yorker

Institutional Investors Now Dominate Largest Securities Class Actions

Institutional investors are taking the lead in a steadily growing number of securities class action lawsuits, judging from a new report.

The year-end study by RiskMetrics Group found that institutions acted as lead plaintiffs in 82 percent of the 100 largest securities class action settlements – a dramatic leap from 2005, when institutions headed just 56 percent of the top cases.

Institutional involvement in securities class actions got a boost from the Private Securities Litigation Reform Act of 1995, which directs courts to appoint the qualified investor with the largest loss to be lead plaintiff. Before that, judges often chose the first investor who filed a complaint, typically an individual, without considering his or her stake in the matter.

"Institutions are stepping up to the plate in increasing numbers, taking on the role Congress intended when it passed the PSLRA," said Glen DeValerio, a partner in the firm's Boston office. "In the last few years, we have seen more institutions actively seek to recover lost assets through the courts, particularly in the most egregious cases of fraud."

The SCAS Top 100, as the RiskMetrics study is known, also showed that many of the very largest settlements since the PSLRA have occurred in the last few years, coinciding with the predominance of institutional lead plaintiffs. Seven of the top 10 settlements have occurred since 2006. In addition, six of the top 100 settlements were reached in 2008.

The parade of mega-recoveries continued this year with January's approval of a $750 million settlement in a class action against Xerox Corp., which would rank 10th on the SCAS list. Berman DeValerio acted as co-lead counsel in the case, representing the Louisiana State Employees' Retirement System.

Meanwhile, another study predicted securities class action filings would hit a six-year high in 2008, due to fallout from the subprime mortgage crisis and related financial meltdown. NERA Economic Consulting estimated in its December report that total filings in 2008 would reach 267 – 37 percent more than in 2007. That would be the largest annual total since 2002, two years after the Internet bubble burst. The rising trend is continuing this year.

Not surprisingly, the 2008 spike can be attributed primarily to the credit crisis, which featured the collapse or government takeover of the nation's largest financial institutions. As of Dec. 14, 43 percent of the 255 cases filed at that time were credit related, almost triple the number from 2007, NERA said.

Settlement amounts declined, however. The median settlement was $7.5 million in 2008, down from $9.4 million in 2007. While investors have suffered unprecedented losses in the market downturn, the size of settlements in future cases may be limited in cases in which defendants do not have the deep pockets that could be tapped in better economic times.

"The subprime fiasco has prompted more lawsuits – and with good reason," DeValerio said. "Now, more than ever, investors need expert advice to help them navigate the confusing legal environment spawned by the economic crisis and find ways to recoup the money they have lost as a result of wrongdoing." ■

New Accounting Standards Could Hurt Investors

Jeffrey C. Block

Starting this year, about 100 major American corporations will abandon accounting standards that have been in place in the United States for nearly 75 years. These companies will be the first to replace decades-old rules with international accounting standards. How will this watershed event in the financial world impact institutional investors' portfolios and their ability to recover assets in cases of fraud?

The *Berman DeValerio Monitor* sat down with Jeffrey C. Block, a partner in the firm's Boston office, and Van Khang, one of our forensic CPAs.

BERMAN DEVALERIO MONITOR: Let's start with some basics. What are these accounting rules about, and why must publicly traded companies make the switch?

JEFF BLOCK: At a time of increased globalization, the Securities and Exchange Commission in November proposed a roadmap for bringing American accounting rules into alignment with the international standards used by companies in more than 100 countries, including Australia, Hong Kong, India, South Africa and all of the European Union. By 2016, all publicly traded U.S. companies are expected to convert from Generally Accepted Accounting Principles – popularly known as GAAP – to International Financial Reporting Standards – or IFRS.

BDM: And the main difference between them?

JCB: Basically, it boils down to this: rules versus principles. GAAP, which is three volumes thick, prescribes rule after rule for companies to follow in every aspect of corporate accounting. By contrast, the IFRS guidelines are more concise and let corporate accountants exercise their professional judgment when applying the guidelines.

The SEC backed IFRS because it wanted investors to be able to make apples-to-apples comparisons between American companies and their overseas counterparts.

BDM: This all seems like pretty dry stuff if you're not an accountant. Why should investors care?

JCB: This change could have a decidedly negative impact on investors. That's because IFRS will encourage corporate decisions to be made according to judgments, rather than rules. That gives companies a lot more accounting wiggle room than the current system allows. And you know that old expression about giving an inch and taking a mile.

BDM: Meaning that a company will be able to design what are ultimately fraudulent strategies that may seem to adhere to vague principles?

VAN KHANG: Precisely. Under GAAP, companies are subject to black-and-white accounting rules. These rigid rules dictate, for example, when it is appropriate for a company to write off a loss or to recognize revenue. Yet, as we well know, even rules have allowed clever accountants to get creative. With "principles" as their guide, companies and accountants will have even greater license to fudge.

JCB: Taking it one step further, we think principles-based accounting will also mean reduced transparency to investors; companies won't have to disclose as much of their inner accounting workings. Also, since companies can rely on "principles" instead of rules, the so-called apples-to-apples comparison sought will not occur as one company can apply its judgment one way and another company can apply its judgment another way, leading to completely opposite results.

BDM: Proponents of the shift are quick to point out, though, that IFRS is working perfectly well in international markets.

JCB: On the surface, that may seem true. But it's impossible to reach that conclusion definitively, because we can't make a direct comparison, for example, between Europe and the United States. The fact that there aren't many securities fraud lawsuits in Europe over revenue recognition issues may not indicate that there is less fraud in those countries. It may merely highlight the fact that Europe has a less litigious environment than the United States.

> *GAAP, which is three volumes thick, prescribes rule after rule for companies to follow in every aspect of corporate accounting.*

VK: Yes, revenue recognition is one area in particular where I see IFRS as a huge step backward for investors. There's a reason GAAP includes so many rules on revenue recognition – it's an easy area within which companies can blur lines. The more rules there are, the fewer opportunities exist for cooking the books. For example, Berman DeValerio and co-counsel recently won a $750 million class-action

— Continued on page 5

Standards

Continued from page 4

settlement for public funds from Xerox Corp. for prematurely recognizing revenue for its copy-equipment leases to customers; that suit was based on violations of clear rules for recording revenue under GAAP.

BDM: Will IFRS encourage securities litigation by institutional investors or dampen it?

JCB: Putting principles in place may foster more corporate abuse. However, investors may also find they are hamstrung when bringing lawsuits because of a lack of clear-cut rules against which to make a case. When the rules are clear, it is easier to show that they have been violated by a company's actions. On the other hand, as new chief financial officers or auditors step in, they may have different views of the proper accounting judgments to apply, which could lead to more restatements of financial reports and more securities litigation.

BDM: Are there benefits to IFRS?

VK: There are some. For one, the move to international standards will eliminate many of the rules that propelled massive frauds at companies like Enron and Citigroup. Enron executives manipulated earnings through special purpose entities, or SPEs, whose financial results were not carried on Enron's books and were invisible to investors. Unlike GAAP, IFRS flat out prohibits SPEs.

JCB: The Fannie Mae case offers another good example. Many liken derivatives – exotic financial contracts whose value is based on underlying debt, equity securities, commodities or currencies – to gambling. We know that Fannie Mae was an active investor that purchased billions in subprime mortgage-backed derivatives. IFRS has uniform standards for accounting for derivatives that do not have the loopholes that can be exploited under GAAP.

BDM: Who supports the change to IFRS?

VK: The Financial Accounting Standards Board, which monitors GAAP, is cooperating in the transition to new standards. Audit firms are also very strong advocates for IFRS. Not to sound overly cynical, but their support should come as no big surprise. They stand to reap huge financial rewards by helping companies convert from GAAP to the new standards.

Van Khang

BDM: Van, you speak from experience, since you worked for a Big Four auditing firm before you joined Berman DeValerio. What groups are against the switch?

VK: Many accountants are opposed, since they'll need to re-learn their profession. And companies have expressed concerns about the costs. They'll need to buy new software, retrain their employees and retain pricey auditing firms to oversee what will be a costly transition.

BDM: Bottom line predictions?

JCB: No one can forecast the precise impact of standards that won't take full effect for several years. But overall, we think the switch will create more problems for investors. And that's the last thing we need when our markets are already in turmoil. ■

Michigan Systems

Continued from page 1

"At a time that irresponsible behavior was rampant on Wall Street, Bear Stearns was a central player in the subprime mortgage scandal," said Berman DeValerio partner Jeffrey C. Block. "Investors were never warned of the problems that top executives knew were brewing in its highly leveraged hedge funds."

Some 20 complaints alleging securities fraud were filed against Bear Stearns and consolidated by the judge. Michigan Attorney General Mike Cox and Michigan Treasurer Robert J. Kleine said in a statement that the state would seek to "maximize recovery for victims" through its involvement with the case.

"We are fighting to ensure families are not cheated out of their pensions. I will do everything I can to ensure that Bear Stearns is held responsible for misleading investors," Attorney General Cox said. The Michigan Systems represent 574,000 participants and beneficiaries.

Judge Sweet rejected the defendants' efforts to consolidate the Michigan Systems' cases with another suit filed under the Employee Retirement Income Security Act (ERISA) on behalf of Bear Stearns' employee stock ownership plan, which invested in Bear Stearns stock. The judge said that "consolidation is not appropriate."

"The securities and ERISA actions involve different parties, claims, burdens, pleading standards, losses and insurance issues," he said.

The Michigan State Retirement Systems will file a detailed, amended complaint on February 27, 2009. ■

Obama

Continued from page 1

The president's new appointees – Mary Schapiro as chairman of the Securities and Exchange Commission and Timothy Geithner as Treasury Secretary – also have indicated that greater regulation will be a priority for the new administration.

Berman DeValerio decided to put together its own wish list for the new president, his regulators and the Democratic Congress.

Restore SEC's Vigilance

Regulation is not a dirty word, as revelations in recent months have demonstrated. The business lobby during the Bush administration pushed hard and successfully rolled back measures that were enacted following the corporate scandals at Enron, Tyco International and WorldCom. The agency also temporarily eased regulations on short selling in July 2007, a move that many market watchers believe fueled last year's collapse. Many now view the SEC as a toothless tiger that lost sight of its central missions: protecting investors and ensuring the integrity of the financial markets.

The agency is bringing fewer stock fraud prosecutions than it did eight years ago. According to Syracuse University's Trac database of federal information, the SEC initiated 145 securities fraud prosecutions in 2008, compared with 437 cases in 2000.

Only nine agency investigations led to Justice Department prosecutions in 2007, compared with 69 in 2000. Fines are down, too. Penalties dropped from $977 million in 2006 to $505 million in 2007, The New York Times reported last April.

SEC Chairman Mary Schapiro has spent most of her career as a regulator with the Financial Industry Regulatory Authority, the SEC and the Commodity Futures Trading Commission.

The laundry list of improvements she'll need to implement inside the SEC is long. In addition to increasing fraud referrals, the SEC needs to carefully regulate growing markets for exotic securities such as credit default swaps. More enforcement staff is also badly needed, for example, to assist existing mutual fund examiners currently overwhelmed by work. While Schapiro is widely praised for her commitment to investors, some question whether any one person can bring the change required. It is an enormous undertaking.

Yet, in her first few weeks on the job, Schapiro is off to a strong start. She reversed a three-year-old policy that required enforcement attorneys to obtain sign-off from SEC commissioners before assessing penalties on corporate wrongdoers. The requirement was widely viewed as dissuading enforcement. Schapiro also is examining proposals that would give shareholders more say on executive compensation and board elections.

And Sen. Charles Schumer last month introduced a bill to provide $110 million to the FBI, Justice Department and SEC to hire hundreds of new investigators and prosecutors for the sole purpose of cracking down on financial fraud. The Obama administration should support this as part of its broad economic recovery package.

Negate *Stoneridge*

The U.S. Supreme Court's 2008 decision, *Stoneridge v. Scientific Atlanta,* gave corporations a get-out-of-jail-free card, making it almost impossible for investors to sue third-parties – such as banks, accountants or, in this case, suppliers – for assisting in securities fraud. The Supreme Court ruled that private investors can sue only companies and individuals that made misleading statements to investors. Plaintiffs charged that Scientific Atlanta helped devise phony transactions that allowed its client, the cable company Charter Communications, to artificially inflate revenue. But the Supreme Court said that Charter's investors could not hold supplier Scientific Atlanta liable because it did not make the false statements contained in Charter's SEC filings. Not surprisingly, the decision was widely hailed as a victory by corporations and their defense attorneys.

The new Congress should pass legislation that negates *Stoneridge* and allows investors to hold companies responsible in clear-cut cases in which they were complicit in helping companies they do business with to cook the books – even if that outside party did not issue or sign the fraudulent financial statements.

Improve Corporate Governance

Institutional investors have long sought corporate governance improvements that will create stronger oversight inside corporate America. In recent years, institutional investors have managed to achieve some remedies through the courts, pushing for corporate governance reforms in securities litigation settlements. But more can be done at the federal level.

The SEC, for example, has blocked shareholder proxy requests that seek better disclosure of a company's financial risks. In a December letter to then President-elect Obama, a group of investor rights advocates cited one rejected resolution that sought disclosure by Washington Mutual of its exposure to mortgage risks: WaMu was acquired by J.P. Morgan Chase in a federal bailout last fall. The investor advocates urged the president to "reverse a pattern of recent SEC staff decisions that have been closing the door to important dialogues between shareholders and management."

— Continued on page 7

Obama

Continued from page 6

To send a message that shareholder rights are paramount, the SEC could also include more corporate governance changes as part of its fraud settlements. The Council of Institutional Investors and nearly 50 union and government pension funds are urging Congress to include corporate governance improvements in any regulatory reform.

"Investors need stronger tools to hold managers and boards accountable," the group said in a December letter to House Speaker Nancy Pelosi. "In our view, a number of key corporate governance reforms are essential to providing meaningful investor oversight of management and boards."

Items on the Council's wish list, which we would second, include:

- Majority voting for directors;
- Independent board chairs and independent compensation advisers;
- Advisory shareowner votes on executive pay and shareholder pay limitations;
- Stronger clawback provisions that require senior executives to return bonuses awarded due to fraud.

Curb Executive Pay

The collective outrage over excessive executive compensation grew more fervent last year as CEOs walked away from their ruined companies with hundreds of millions of dollars in pay and perks. The government's bailout package includes provisions that restrict executive compensation for financial institutions that receive taxpayer funds, but the requirements do not have enough teeth.

The excessive compensation highlighted in the financial crisis is part of a larger trend of runaway pay at the top of corporate America. According to the Economic Policy Institute, the average CEO earned 275 times that of a typical worker in 2007. "Put another way, a CEO earned more in one workday than an average worker earned in a year," President Obama said during the campaign. As Senator from Illinois, Obama once introduced a bill allowing shareholders a non-binding vote on CEO pay.

In addition to increasing fraud referrals, the SEC needs to carefully regulate growing markets for exotic securities such as credit default swaps. More enforcement staff is also badly needed, for example, to assist existing mutual fund examiners currently overwhelmed by work. While Schapiro is widely praised for her commitment to investors, some question whether any one person can bring the change required. It is an enormous undertaking.

The Council of Institutional Investors urged Congress to stiffen requirements for reporting executive pay in its letter to Speaker Pelosi.

Runaway executive pay needs to be reigned in – whether through Congressional passage of a "say on pay" law or through shareholder proxy votes.

Amend the PSLRA

Securities litigators may not have liked the Private Securities Litigation Reform Act of 1995 when it passed, but we have learned to work with it. One positive outcome: the rise of institutional lead plaintiffs such as government and union pension funds seeking to recover assets lost to their beneficiaries through fraud. (See article on page 3.)

Yet in its attempt to limit frivolous lawsuits, the PSLRA raised the pleading threshold so high that even strong fraud cases are filtered out. Unlike any other type of litigation, securities fraud plaintiffs cannot interview witnesses and request documents until after a judge has ruled their case meets the PSLRA's unusually high requirements. This "catch 22" – a tougher burden of proof without the ability to gather evidence – gives tremendous advantages to defendants.

Congress should revisit and amend the PSLRA to enhance discovery powers so that legitimate cases – and shareholders – get their chance in court.

Regulate Exotic Securities

The investment world has been transformed over the past decade. Mortgage-backed securities such as collateralized debt obligations, or CDOs, and exotic credit default swaps – insurance policies for investors – were largely to blame for the credit crunch. Had they been regulated, many argue, the nation might never have gotten into the current financial mess.

Congress and the SEC must completely rethink the new world of securities trading and investing and implement a sweeping overhaul of the regulatory framework to take these innovative new products into account. Wall Street is always evolving, and regulators in the future need to stay current with any new financial innovations that crop up. It is time to learn from the disastrous mistakes of the past. ■

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Berman DeValerio prosecutes class actions nationwide on behalf of institutions and individuals, chiefly victims of securities fraud and antitrust law violations. The firm, which was founded in 1982, has offices in Boston, San Francisco and Palm Beach Gardens, Florida. In addition to conducting litigation, the firm provides securities fraud monitoring, evaluation and advisory services to nearly 70 public pension funds, union funds and other institutional investors.

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BOSTON

SAN FRANCISCO

PALM BEACH GARDENS

New Year Brings New Look

Berman DeValerio has begun the New Year notably, receiving final court approval for the largest settlement in the firm's history and getting appointed as co-lead counsel in one of the signature fraud cases of the current financial crisis.

The *Berman DeValerio Monitor,* meanwhile, kicks off 2009 sporting a new name and look, which we hope you noticed while reading these pages. The redesign, as we enter our sixth year of publication, is one of a number of changes taking place at the firm, which is now officially known as Berman DeValerio.

We believe our new, shorter name, which we have used informally for years, and our redesigned logo will make it easier for people to connect our firm with our attorneys and the excellent work they produce. The change also coincides with a move by our Florida attorneys and staff to a new office in Palm Beach Gardens.

It is only natural that the *Monitor,* our quarterly printed newsletter, and the *Berman DeValerio News Update,* which we distribute each month by email, should get a sprucing up. Also in the works is a redesign of our website, www.bermandevalerio.com. What won't change is our commitment to our clients and our willingness to use our considerable legal skills, experience and resources to help them recover assets they lost due to fraud.

The two cases mentioned above are testimony to that dedication.

In early January, Berman DeValerio was appointed co-lead counsel, representing the State of Michigan Retirement Systems, in the securities fraud case stemming from the collapse of Bear Stearns & Co. The subprime mortgages at the heart of this complex matter are also at the core of the current financial crisis.

Later in the month, a federal judge approved a $750 million settlement in the Xerox Corp. class action. Berman DeValerio acted as co-lead counsel, representing the Louisiana State Employees' Retirement System, the only institutional lead plaintiff in the case.

An article about the Bear Stearns case appears on the *Monitor's* front page and we will give you fresh updates as it progresses. But our goal at the *Monitor,* which is also available on our website, is to give you much more than case news. We strive to offer information about best practices, current trends and important legal precedents that can help you better safeguard your fund assets and your members' futures. And we hope Berman DeValerio can be your partner as you continue that important work. ■

Our new business cards