

the scene in the fourth quarter. However, he reappeared in Q1 2009 in battles with both Biogen Idec, Inc. and Amylin Pharmaceuticals, Inc. Note also that Eastbourne Capital Management LLC was active with Amylin.

Meanwhile Pershing Square Capital Management L.P., another large, well-known activist firm that, for lack of a better term had been in hibernation in the fourth quarter of 2008, made headlines again in the first quarter as it pushed for board seats at Target Corp. In fact, on May 11, William Ackman—founding partner of Pershing Square—introduced shareholders to his five nominees for the board, promising their expertise could make the retailer a better company. “There is a lot to like, but that doesn’t mean it can’t be optimized,” Ackman said at a town hall-style meeting in midtown Manhattan. It is unclear if Ackman will ultimately be successful in his efforts. However, some feel that his involvement and position may motivate the existing board to do a better job.

In other news, Riley Investment Management, LLC was active with Ohio-based Regent Communications, Inc., a broadcasting company. The two parties reached a compromise or settlement. In the past Riley had sought board seats at Zilog, Inc., a technology concern. Zilog ultimately announced that it would appoint a member of the Riley team to its board.

Conclusions

It is possible that the number of activist cases could be higher in the second quarter of 2009 than in the second quarter of 2008, particularly if the equity markets continue to rebound. However, as mentioned previously, if history is any indicator there is typically a sequential slowdown from the first to the second quarter.

Also, as banks become more willing to lend money, the number of activist cases could increase. Remember activists are often attracted to situations where value might be unlocked by an asset sale or through the purchase of another entity. And so money or the ability to access it is often crucial.

Going forward we continue to believe the Consumer Discretionary sector will be among the top targets. Our logic is simple. Consumer Dis-

cretionary companies continue to have generally good longer-term earnings and cash flow generation potential. In addition, low stock prices (compared to historical levels) may make accumulating stakes in these types of companies favorable. Healthcare companies also may continue to be large targets. Low share prices coupled with anxious shareholders may embolden activist firms to play in this sandbox.

Finally, we believe that the demand for board seats is likely to continue for the foreseeable future. This is because this has tended to be the best way for the activist to obtain leverage and to push their agenda.

SEC/SRO Update:

Investment Advisory Committee Meeting; California IOUs; Diversity Initiatives; & an Alert about Investing in Bankrupt Companies

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SEC Investor Advisory Committee Announces First Public Meeting

On July 8, the Investor Advisory Committee of the Securities and Exchange Commission (SEC) announced that it would hold its first public meeting on Monday, July 27, 2009, at the SEC’s main offices in Washington, DC.¹ The meeting would be open to the public and would be webcast on the Commission’s Web site at www.sec.gov. The

agenda for the meeting includes opening remarks, introduction of Committee members, discussion of Committee agenda and organization, and discussion of investor views of possible refinements to the disclosure regime.

SEC Chairman Mary Schapiro announced the formation of the Investor Advisory Committee in early June with the goal of giving investors a greater voice in the Commission's work.² SEC Commissioner Luis A. Aguilar serves as the Commission's primary sponsor of the Committee.

The Investor Advisory Committee's charter, made publicly available on June 24,³ includes:

- Advising the Commission on matters of concern to investors in the securities markets;
- Providing the Commission with investors' perspectives on current, non-enforcement, regulatory issues; and
- Serving as a source of information and recommendations to the Commission regarding the Commission's regulatory programs from the point of view of investors.

The Advisory Committee is co-chaired by Richard (Mac) Hisey, President of AARP Financial Incorporated and AARP Funds, and Hye-Won Choi, Senior Vice President and Head of Corporate Governance for TIAA-CREF. Fred Joseph, President of the North American Securities Administrators Association and Securities Administrator for the State of Colorado, serves as an *ex officio* participant.

SEC Staff Issues Statement on California IOUs

On July 9, the SEC staff issued a statement expressing its belief that California's recently-issued IOUs are "securities" under federal securities law.⁴ As such, the SEC staff indicated holders of these IOUs and those who may purchase them are protected by the provisions of the federal securities laws that prohibit fraud in the purchase or sale of securities. The SEC also issued an Investor Alert about these IOUs, which contained additional background information and resources.⁵

On July 9, the SEC staff issued a statement expressing its belief that California's recently-issued IOUs are "securities" under federal securities law.

California began issuing the IOUs (called "registered warrants" by California) on July 2 to certain individuals and entities, including citizens who were entitled to a tax refund or vendors who were entitled to payments. The IOUs are obligations of the State of California, are negotiable, and bear interest. The staff's view that the IOUs are securities does not affect California's right to issue or repay the IOUs.

In addition to the antifraud provisions of the federal securities laws, other parts of the federal securities laws also apply to the purchase and sale of the IOUs. For example, the SEC staff indicated that persons acting as intermediaries between buyers and sellers of the warrants may need to register as brokers, dealers or municipal securities dealers, or as alternative trading systems or national securities exchanges.

The SEC staff also noted that in their view broker-dealers, as well as any potential secondary markets, should be aware that the requirements of the securities laws and the rules of the Municipal Securities Rulemaking Board apply to the IOUs.

Finally, the SEC staff concluded that although the IOUs are labeled "registered warrants," they are not registered with the SEC because the IOUs are municipal securities and therefore exempt from registration under federal securities law.

SEC Names First Chief Counsel for Diversity Initiatives

On July 13, the SEC announced that Ronald L. Crawford would become the agency's first Chief Counsel for Diversity and Policy Initiatives, in an effort to further bolster the SEC's commitment to diversity in the workplace.⁶

According to the press release accompanying the announcement, "the new position in the agen-

cy's Office of Human Resources reflects the SEC's ongoing commitment to recruiting and retaining a highly qualified and broadly diverse workforce with different backgrounds, experiences, and views."

In his new position, Mr. Crawford will advocate diversity in recruitment, training, leadership and employee relations. He will also work collaboratively with the SEC's Office of Equal Employment Opportunity to develop strategic plans and coalitions to advance the SEC's diversity and inclusion efforts.

According to the SEC's FY 2008 EEO Status Report referenced in the press release announcing the appointment, nearly half of the SEC's employees are female, approximately one-third belong to a minority group, and nearly 5% have a self-identified disability. In addition, last year, the press release indicated that the SEC became the first government agency to receive the *Distinguished in Diversity Award* from GAYLAW, the Gay, Lesbian, Bisexual and Transgender Attorneys of Washington.

SEC and FINRA Issue Joint Alert on Investing in Bankrupt Companies

On July 14, the SEC and the Financial Industry Regulatory Authority (FINRA) issued a joint Investor Alert because they believed "there may be widespread misunderstanding by investors that stock in the 'old' General Motors Corp. (now known as Motors Liquidation Co.) is related to the 'new' General Motors Co. (new GM)."⁷

On July 10, FINRA halted trading in old GM (which had been using the GMGMQ trading symbol) and issued a new ticker symbol for the old GM stock (MTLQQ) to avoid having it confused with the new GM, which currently has no publicly traded securities.

The Alert reminded investors that, in the view of the SEC and FINRA, holding shares of any company involved in bankruptcy, or buying shares in a bankrupt company in the hope that those shares will surge in value down the road, are highly risky courses of action. The primary risk noted in the Alert was that when companies emerge from bankruptcy, the common stock of

the "old" company is usually worthless and in most instances, the company's plan of reorganization will cancel the existing equity shares.

Furthermore, the Alert warned that as with the GM situation, companies in bankruptcy are often the subject of rumors in fax or email newsletters, Internet message rooms or on Web sites offering online stock tips. The Alert also indicated that investors may have received confusing, potentially misleading, information about the old GM, and that as recently as July 10, newsletters and other promoters were touting the purchase of the stock.

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The Alert also reminded investors of the meaning of the letter "Q" in the stock symbol of these types of companies, noting that the common stock of a bankrupt company may typically trade on either the OTCBB or the Pink Sheets, and that the stock symbol will have a fifth letter "Q" at the end to denote the company's bankrupt status.

Finally, the Alert recommended that investors who own shares in a company that has, or may be filing, for bankruptcy, or are considering purchasing shares of a bankrupt company, should check:

- the company's Web site for information about the bankruptcy;
- the company's SEC filings, available through the SEC's EDGAR database or on the company's Web site; and
- other publicly available information for company statements about its reorganization plan as well as a copy of the reorganization plan itself.

NOTES

1. SEC Rel. Nos. 33-9049, 34-60260 (July 8, 2009), available at <http://www.sec.gov/rules/other/2009/33-9049.pdf>.
2. See SEC Press Rel. 2009-126 (June 3, 2009), available at <http://www.sec.gov/news/press/2009/2009-126.htm>.
3. Available at <http://www.sec.gov/spotlight/invadvcomm/invadvcomm-charter.pdf>.
4. See SEC Press Rel. 2009-154 (July 9, 2009), available at <http://www.sec.gov/news/press/2009/2009-154.htm>.
5. Available at <http://www.sec.gov/investor/pubs/californiaiou-alert.htm>.
6. See SEC Press Rel. 2009-158 (July 13, 2009), available at <http://www.sec.gov/news/press/2009/2009-158.htm>.
7. Available at <http://www.sec.gov/investor/alert/bankruptcygmalert.htm>.

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