

# Market News

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A monthly review of IR developments for our clients and friends. . .

## **CFAs losing faith in the integrity of the U.S. equity markets**

It is not too surprising that on the heels of the worst market fall in recent memory the CFA Institute's Centre for Financial Market Integrity Index experienced its largest drop ever. Only 49 percent of the 2,000 Chartered Financial Analysts participating in the 2009 survey said they would recommend investing in the U.S. equity markets based on the integrity of participants, down from 68 percent a year ago. Corporate boards had the largest decline in trust factors, followed by executive management. Hedge fund managers had the lowest absolute rating for the second straight year. Respondents said Boards remain too dependent on management, that executives are driven by short-term rather than long-term incentives, and that the U.S. regulatory system was inadequate as a result of inadequate resources and effectiveness.

## **Some good news: Securities lawsuits plummet in 2009**

Cornerstone Research reports that lawsuits against the securities industry were down 22 percent in the first half of 2009 from the previous year's first-half totals. If the trend continues, 2009 will record almost 12 percent fewer securities lawsuits than the annual average for the 12-year period ending December 2008. Two-thirds of this year's cases were against financial companies triggered by losses in financial instruments affected by the credit crisis. Fifteen of the suits relate to Ponzi schemes, 11 of which were on behalf of investors in funds managed by Bernie Madoff.

## **SEC uses "clawback" provision for the first time**

Seven years after Sarbanes-Oxley became law the SEC has used the act's "clawback" provision for the first time, ordering a top executive to return compensation awarded during years his company misstated results. On July 22, 2009, the SEC ordered Maynard Jenkins, former CEO of CSK Auto Corporation, to give back more than \$4 million in bonuses and equity compensation he earned between 2002 and 2004 when the auto-parts retailer engaged in fraudulent accounting, artificially boosting its pre-tax earnings by \$66 million. Jenkins' attorney claims the agency "overreached," as Jenkins was not charged with misconduct. The Commission retorted that the CEO doesn't have to be found culpable of the misconduct to pay the price under the provision. While on the subject, data-tracker Equilar Inc. says 64 percent of Fortune 100 companies have put "clawback" provisions in their governance practices demanding top executives pay back compensation for years when fraudulent accounting is found. A year ago, 42 percent of Fortune 100 companies had "clawback" provisions.

### **CEO's tweet a bit indiscreet**

Ruby Tuesday CEO Sandy Beall, fairly new to Twitter, recently mentioned his work on the restaurant chain's secondary stock offering in a tweet. To some, his disclosure that could be seen as a violation of the SEC's rules concerning comments about an offering in progress. Beall tweeted: "In New York raising approximately \$70 million in equity to further strengthen our brand." His remark came after the company had announced the offering and filed its prospectus, which eliminates any Reg FD violation. But Beall could have tripped over SEC rules that any comment about a pending offering must include a reference to the prospectus and not go beyond info in the prospectus. Some also noted that Beall's tweeted comment was picked up and reported in his local newspaper, and especially that he mentioned the anticipated dollar amount to be raised in the offering, info not in the release or the prospectus. Securities-law expert Peter Romeo said Beall's tweet is unlikely to have violated SEC rules, but "may have been unwise."

### **Ban on "naked" short sales made permanent, but SEC hedges on disclosure**

On September 22, 2008, in the middle of the financial crisis, the SEC put in place a temporary ban against "naked" short selling — short sales where traders never borrow stock against their trade. Naked short selling allows market manipulators to drive down stock prices unfairly, and contributed to the speed and depth of the market's 2008 fall. Under the new rule, short-sellers must complete the trade within four days by replacing the borrowed stock, or be penalized. But the SEC is backing away from its earlier move to require hedge funds and other money managers to disclose their short positions weekly after they reach a certain volume. Instead, they will make institutional traders report on a one-month delay the time the trade took place and the size of the position, acknowledging that prompt reporting would reveal managers' trading secrets.

### **Rapid-fire Wall Street trading weapons raise concerns**

In the trading wars waged among Wall Street's elite firms, the guys with the fastest computers and smartest mathematicians are racking up the biggest profits. High-frequency trading via powerful, strategically located computers may manipulate prices unfairly, however, because they issue and quickly withdraw "flash" orders meant primarily to scout out the other sides' intentions. "This is where all the money is getting made," says former New York Stock Exchange (NYSE) CEO William H. Donaldson. "If an individual investor doesn't have the means to keep up, they're at a huge disadvantage." Exchanges say these high-frequency traders are in more than 50 percent of all trades. Senator Charles Schumer (D-NY) said he wants the SEC to take action, and warns he will do so with legislation if the SEC fails to act.

### **A cigar for Cuban: SEC's insider trading case dismissed**

A U.S. district court judge's decision to throw out an insider trading case against billionaire and former Broadcast.com CEO Mark Cuban has left many, including us, wondering what it takes to make such a case these days. Cuban had agreed with the CEO of Mamma.com not to divulge confidential negative information the CEO had shared with him, but was not asked to refrain from dumping his stake in the company to avoid a loss, which Cuban later did. The judge's ruling focused on whether the SEC could show that Cuban had a duty not to trade based solely on the confidentiality agreement between the two. The judge acknowledged that Cuban at one point declared himself "screwed" because he "[could not] sell," based on the news, but his inference of his obligation alone, minus an explicit agreement with the CEO not to trade, wasn't enough to allow the case to go forward.



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