



*December 2009*

# Market News

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

## **Despite drawbacks, F100s rapidly adopting clawbacks**

Clawbacks are becoming a more prevalent part of executive pay packages, according to the pay consultants at Equilar, Inc. Clawback policies typically let companies recoup compensation from their executive officers following a restatement or misconduct. Nearly three-quarters of the Fortune 100 companies now have clawback policies, Equilar says, up from 18 percent in 2006. Most such policies let companies to take back incentive compensation in the event of a financial restatement or ethical misconduct affecting results that drive such compensation. Some 80 percent of F100s permit recovery of compensation based on a financial restatement; 85 percent recoup pay if an executive behaves unethically. Other triggers include violations of non-compete provisions, ethical violations unrelated to restatements, and termination shortly after the exercise of options or vesting of restricted stock.

## **States take lead on credit-rating agency fraud**

We're probably not the only ones wondering when the SEC was planning to go after the ratings agencies for their role in the credit crisis/financial meltdown. Turns out, they won't be cracking down at all, thanks to Congress, which in 2006 put Fitch, Moody's, S&P, et al, off-limits from fines or fraud prosecutions, and even shielded them from civil lawsuits in exchange for agreeing to stricter reporting and registration requirements. The Credit Rating Agency Reform Act gave the SEC power to investigate the agencies for a few ethical lapses, following their failures in the Enron and WorldCom implosions, but denied it any authority to punish the agencies for fraud and "creates no private right of action" except under malice and other freedom-of-speech exceptions. Now, some state attorney generals are taking a shot. New York AG Andrew Cuomo investigated the agencies in 2007, but cut a deal that let them off the hook. California AG Jerry Brown has subpoenaed the agencies for information about whether they gave high ratings to securities they knew were undeserving, fraudulently inflated the quality and independence of the ratings, or "conspired with the companies whose products they rated to the detriment of investors."

## **Using sex appeal to get tips? We're not talking about restaurants**

Danielle Chiesi, a former analyst at New Castle Funds LLC, allegedly extracted hot tips from executives at technology companies and passed them to other hedge fund managers, including Galleon Group's Raj Rajaratnam. A Bloomberg account of her activities says that Chiesi used her sexuality to build sources at male-dominated tech companies, one of few cases in which sex is alleged to be the principal means of extracting insider information. But there have been others: James McDermott, the former CEO and chairman of investment bank Keefe, Bruyette & Woods, pleaded guilty to securities fraud and leaking inside information to his porn-star mistress. A defendant in another insider trading ring was a Playboy Playmate. Two other noted tipsters, David Pajcin and Gene Plotkin, are said to have tried to use exotic dancers to obtain confidential information about upcoming deals from their Wall Street clientele.

### **This time we mean it: international accounting convergence by mid-2011**

It's back to joining hands across the waters, financially speaking. The FASB and the IASB have reaffirmed their intent to converge accounting rules by mid-2011. In an update to their convergence plan, the bodies acknowledged growing concerns that one global set of accounting standards might not help much in efforts to repair and soothe global capital markets. And, that convergence is not at the top of the SEC's agenda as it sorts out its role in a reconfigured U.S. financial regulatory system. The to-do list for convergence remains long: major standard-setting projects on financial instruments, consolidations, de-recognition, fair-value measurement, revenue recognition, leases, financial instruments with the characteristics of equity, financial statement presentation, and a handful of other individual and joint projects outlined in their original agreements.

### **SEC staff says they are ill-equipped to do their jobs**

In a survey of 800 staff members by the SEC's Inspector General, more than half of the participants said they did not have adequate resources to successfully perform their jobs, and 53 percent said they were not familiar with annual performance goals and the criteria used to measure their accountability. To quote one comment made on the survey, "Priorities change like the flavor of the day. Whatever's 'hot in the news' becomes our priority." Forty-two percent of the survey participants said the Commission's enforcement department doesn't have an effective process in place for selecting cases to pursue. To quote another, "Everyone is afraid of making a mistake, so they take on every case, makes every case a priority, and a year later, when the dust settles, they have to close the case they never looked at on the grounds that they don't have sufficient resources."

### **Facebook and Investor Relations**

With social networking growing in popularity, investor relations professionals are investigating how they should or could use the various social media to their advantage. With more than 300 million users and built-in marketing features, Facebook is appealing to some investor relations officers who want to market their companies to a wider audience. Most companies using Facebook today incorporate their public relations and investor relations news on one Facebook page. Smaller companies are more apt to feature their investor relations news exclusively on their page. Facebook is preferred over Twitter by investor relations practitioners due to legal concerns such as safe harbors, entanglement, selective disclosure and privacy concerns. That is not to say that an IR presence on Facebook does not have its problems, including keeping content fresh and interesting. Most companies are still waiting to see what happens with others who incorporate social networking into their investor relations programs, hoping to profit from their experiences.

*At this special time of year, we always pause to remember that our business relies on the trust and confidence of the good people it is our fortune to work with. We appreciate your kindness and concern for us, and we want you to know how much we enjoy both our professional and personal relationships with you. In the New Year, we hope that we can continue to support you and your business, but equally important, we wish for continued friendship, and good health for you and your families throughout the year.*



**For investor relations or market questions, or to discuss our consulting services, please contact us at  
(937) 434-2700.**