BARROWAY TOPAZ

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INTRODUCING BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP

David Kessler, Esquire

It brings me great pleasure to announce that effective November 17, 2008, our law firm, formerly known as Schiffrin Barroway Topaz & Kessler, LLP, has changed its name to Barroway Topaz Kessler Meltzer & Check, LLP. In addition to adding Joseph H. Meltzer and Darren J. Check as named partners, we have appointed a management committee to oversee the firm.

We are pleased to recognize Joe and Darren's achievements, and we now have an exceptional management team in place to continue to meet our clients' evolving needs and cement our leadership position in all of our practice areas.

Joe leads the firm's ERISA Litigation Department, which is lead counsel in numerous nation-wide class actions brought under ERISA. He also manages the firm's Antitrust and Pharmaceutical Pricing practice groups. He is an honors graduate of the University of Maryland and received his law degree with honors from Temple University School of Law.

Darren concentrates his practice in the areas of securities litigation and institutional investor relations. He is the firm's Director of Institutional Relations and runs the firm's Business Development and Portfolio Monitoring Departments. Darren is a graduate of Franklin & Marshall College where he received a degree in History, with honors. He received his law degree from Temple University School of Law.

We may be changing our name, but Barroway Topaz Kessler Meltzer & Check remains uniquely focused and dedicated to advocating and protecting the rights of investors, employees and consumers worldwide.

NOT ALL FOREIGN PLAINTIFFS ARE EQUAL IN U.S. SECURITIES CLASS ACTIONS

Sharan Nirmul, Esquire and Jennifer L. Keeney, Esquire

On August 25, 2008, Judge Victor Marrero of the United States District Court for the Southern District of New York held that some, but not all, "foreign-cubed investors" — foreign plaintiffs who purchased securities of a foreign company on foreign exchanges — were barred from participating in a U.S. securities class action against Alstom S.A. ("Alstom" or the "Company"), a French company whose securities were traded on the Paris, New York and London stock exchanges. *See In re Alstom S.A. Sec. Litig.*, No. 03 Civ. 6595 (VM), 2008 WL 4053361 (S.D.N.Y. Aug. 25, 2008) (hereafter, *"Alstom"). Alstom* considers which foreign plaintiffs may be included as class

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David Russell is Co-Head of Responsible Investment for the Universities Superannuation Scheme (USS) Ltd. USS is the second largest pension fund in the United Kingdom, with assets of £30 billion and approximately 250,000 members. USS has a Responsible Investment (RI) team of four who work with USS's fund managers and other market participants on extra financial issues. USS's responsible investment strategy focuses on integrating extra financial factors into its investment processes, and on engaging with companies where these issues pose a risk to the fund's investments. David is a Steering Committee member of the Institutional Investors Group on Climate Change (IIGCC), and USS also provides a Board member for the Principles for Responsible Investment.

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ENHANCED ANALYTICS INITIATIVE JOINS FORCES WITH UNPRI

David Russell

In September 2008, the Enhanced Analytics Initiative[1] and the Principles for Responsible Investment[2] announced that the two initiatives were joining forces. The EAI and the PRI are both investment industry-led, international collaborations aimed at achieving better long-term investment returns by incorporating corporate extra-financial performance in investment decisions and activities.

The EAI was launched in 2004 to encourage the production of better mainstream research which covered long term and extra financial factors such as corporate governance, climate change and corporate reputation. Members included large pension funds in the US such as CalSTRs and NYCERS, as well as funds from Europe and Australia. EAI has been very successful in generating extra financial research in the European market, where there has been an exponential increase in extra financial research since its launch four years ago. However, it has been less successful in generating research in other global markets.

The former EAI process produced its final biannual evaluation of research providers in July 2008, identifying the follow sell side firms as the best in the previous 6 month period:

Outstanding
Citigroup • Goldman Sachs • Société Générale

Commended
CA Cheuvreux • Credit Suisse • JP Morgan • Oddo Securities • UBS

The PRI has a global reach, with over 400 signatories from countries around the world. These signatories represent over $18 trillion in assets. The six Principles were developed by a group of leading institutional investors in a process convened by UNEP Finance Initiative and the UN Global Compact. The Principles recommend actions for incorporating environmental, social and governance issues into mainstream investment decision-making and ownership practices.

The aim of this new partnership is to internationalise the encouragement of better investment research. EAI's primary objective is a natural fit with the PRI's Principle 1 (which calls for the integration of these issues into investment processes) and offers PRI an opportunity to make use of EAI's experience in translating its principles into execution. The linking of the two initiatives will also enable institutional investors around the world to get access to improved long term and extra financial research and in addition it will provide the producers of this research with a larger market for their analysis.

USS is a strong advocate of the view that the integration of extra financials into investment decision making will lead to better long term returns. The fund anticipates that the merger of these two initiatives will lead to both increased quality and quantity of investment research in markets around the world.

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1 http://www.enhancedanalytics.com

2 http://www.unpri.org/

LEHMAN BROTHERS FILES CHAPTER 11 BANKRUPTCY PROTECTION: THE DOWNFALL OF A WALL STREET FIRM

Michelle Newcomer, Esquire and Richard Russo, Esquire

158 years after its founding as a cotton brokerage in Alabama, on September 15 Lehman Brothers Holdings, Inc. shocked Wall Street and filed the largest bankruptcy in U.S. history. Soon after the filing, the FBI and SEC announced investigations into the firm's downfall and the adequacy of its past financial disclosures and Federal prosecutors from United States Attorneys' offices in Brooklyn, Manhattan and New Jersey reportedly issued grand jury subpoenas to twelve former executives, including CEO Richard S. Fuld Jr., and former CFO Erin Callan. According to The New York Times, the criminal investigations are focused on whether Fuld and other Lehman executives "made misleading statements about the bank's condition to investors who took part in a $6 billion infusion of capital announced by Lehman on June 9 . . . " The New York Times also reported that the Brooklyn and Manhattan prosecutors are looking, among other things, "at comments Lehman executives made during a Sept. 10 conference call five days before the company filed for bankruptcy. They are also investigating whether Lehman put proper values on its large commercial real estate holdings, people close to the matter said."

The fallout from Lehman's unprecedented collapse shook the economy. The Dow Jones Industrial Average fell 504 points, closing at 10,917 on the day Lehman collapsed, and equity and bond markets continued to suffer steep losses in

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BARROWAY TOPAZ SEEKS INJUNCTION TO LIMIT "GOLDEN PARACHUTE" PAYMENTS TO OUTGOING CEO

Michael J. Hynes

On November 18, 2008, attorneys from Barroway Topaz appeared in a South Carolina courtroom on an emergency application to block millions of dollars in severance payments to the outgoing Chairman and CEO of The South Financial Group (TSFG), Mack Whittle.

On September 3, 2008, TSFG announced that Whittle would retire by the end of 2008. Though TSFG's stock price had fallen by 80% over the past two years, Whittle was promised a lavish "golden parachute" of approximately $18 million.

In late September, as the financial crisis whipped through the economy, Congress began deliberating the terms of historic "bailout" legislation. A first effort to pass this legislation failed, but a second, the Emergency Economic Stabilization Act of 2008 (EESA), passed on October 3, 2008. One fundamental difference between the two versions of the proposed legislation was EESA's prohibition on "golden parachutes":

> Executives who made bad decisions should not be allowed to dump their bad assets on the government, and then walk away with millions of dollars in bonuses. In order to participate in this program, companies will lose certain tax benefits and, in some cases, must limit executive pay. In addition, the bill limits "golden parachutes" and requires that unearned bonuses be returned.

Under EESA, struggling banks were able to apply for funds through the Troubled Assets Relief Program (TARP) on or before November 14, 2008. On October 22, 2008, the company announced that it would seek TARP funds. The company's CFO noted that the TARP application criteria were far from certain, saying publicly that "there's not necessarily going to be a hard set of rules, but more guidelines that they will look to in evaluating each bank on its own merit to qualify and receive the capital."

Two days later, the bank applied for $347 million in taxpayer-backed TARP funding. The same day, the board of directors accelerated Whittle's retirement date from December to October, with the express purpose of exempting him from TARP's prohibition on "golden parachutes." Thus, at the same time it sought millions of dollars in federal aid, the company engineered a plan to pay its outgoing CEO millions of dollars it would not have needed to pay him under TARP.

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THE RIGHTS & RESPONSIBILITIES OF INSTITUTIONAL INVESTORS

12 MARCH 2009 • RENAISSANCE AMSTERDAM HOTEL • AMSTERDAM

Keynote Speaker

Portrait by: Timothy Greenfield-Sanders

Madeleine K. Albright
Former U.S. Secretary of State
(1997-2001)

Building on Institutions' Growing Interest in Active Engagement

Many institutions have moved from debating the efficacy of active engagement to discussing how to use these actions to best effect and to achieve what objectives. What remains constant is investors' desire to improve the long-term value of the companies they own, effect corporate governance and corporate behavior, and increasingly to champion specific social or ethical goals.

For the fourth year, Institutional Investor and our co-host, Barroway Topaz Kessler Meltzer & Check, LLP, are developing a private meeting for senior executives and compliance, corporate governance, and legal professionals at European public pension and insurance funds as well as leading asset management firms and mutual fund companies. The Rights & Responsibilities of Institutional Investors will explore the ways that European institutions are using the tools available to them to protect their assets and the interests of their beneficiaries.

With a central thesis that it is the fiduciary responsibility of Europe's pension funds and asset managers to actively engage the companies they invest in, this year's meeting will use case studies, academic research, and expert debate to examine how active ownership and the promotion of shareholder rights can be best executed to effect meaningful change consistent with the funds' financial, ethical, social, and legal priorities. The program will include a series of panels with leading experts on the key governance and fiduciary themes facing today's active owners, and a number of individual presentations from leaders in their field.

Over the course of the one day program, approximately 100 senior executives and compliance and legal professionals from European public pension plans, insurance and mutual fund companies, and asset management firms will gather to share experiences and learn more about the European and global approaches to active ownership. Only qualified representatives of these organizations can be registered to attend this meeting, but there is no registration fee for those who are invited.

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☐ Yes, I am interested. Please send me more information about the Rights & Responsibilities of Institutional Investors.

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Note: Please do not secure your travel arrangements until you have received written confirmation from Institutional Investor of your registration. Participation is strictly limited to qualified investors. Due to capacity restraints, all registrations will be accepted on a first come first served basis. Institutional Investor reserves the right to make any amendments to the program.

Registration is COMPLIMENTARY for qualified delegates.

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LESSONS FROM THE 2008 PROXY SEASON

Emanuel Shachmurove, Esq.

As in recent years, the 2008 proxy season[1] was once again an occasion for incremental improvement of corporate governance at many leading U.S. firms. Although the proxy season lacked a single watershed victory for shareholders and corporate governance advocates, it nonetheless included many small victories in areas including executive compensation and board independence.

Executive Compensation Proposals

Most executive compensation related shareholder proposals in 2008 fell into the category of "say on pay" proposals, although many shareholder resolutions also sought to address executive compensation issues such as "golden parachutes" and "pay for performance." Say on pay proposals, giving shareholders an advisory vote on executive compensation, were voted on at 69 companies,[2] including 41 of the Fortune 100 companies. Aflac Incorporated ("Aflac") became the first publicly traded U.S. company to adopt the following advisory say on pay proposal: "Resolved, that the shareholders approve the overall executive pay-for-performance compensation policies and procedures employed by the Company, as described in the Compensation Discussion and Analysis . . . in this Proxy Statement."[3] After receiving the support for the say on pay proposal from Aflac's Board of Directors, a remarkable 95% of shareholders voted to adopt the resolution.

Similarly, say on pay proposals were on the ballot at nearly every major American financial firm, including Merrill Lynch, JPMorgan, Wachovia, Citigroup, Morgan Stanley, Capital One, Wells Fargo, Bank of America, and Goldman Sachs. Support for say on pay proposals continued to be strong despite staunch opposition from boards of directors, garnering as much as 45% support at some financial firms such as Bank of America and Goldman Sachs and receiving an average of 42% support from shareholders.

In addition to say on pay proposals, shareholders also made additional inroads on other executive compensation matters at many U.S. firms. For example, despite opposition from its Board of Directors, 54% of Qwest Communications International, Inc. ("Qwest") shareholders voted in favor of the following resolution regarding severance compensation for Qwest executives:

> RESOLVED: that the shareholders of Qwest Communications, Inc. urge the Board of Directors to seek shareholder approval of future severance agreements with senior executives that would provide a total value exceeding 2.99 times the sum of an executive's base salary plus target bonus.
>
> . . . .
>
> The Board shall retain the option to seek shareholder approval after material terms are agreed upon.[4]

At The Black & Decker Corporation, a similar shareholder proposal to limit Supplemental Executive Retirement Plans (SERPs) was narrowly defeated on opposition from the Board of Directors, receiving 45% support from shareholders.

Director Election and Independence Proposals

Shareholder proposals relating to the process for electing directors and the independence of corporate boards made further headway in 2008 and continued, as in recent years, to focus on three key areas: declassification of boards, majority voting for directors and separation of the Chairman and CEO positions on boards (also referred to as an "Independent Chairman").

Proposals to declassify boards, ensuring that all directors must be re-elected at each annual meeting, were voted on by 76 companies.[5] Declassification proposals continued to garner significant shareholder support, receiving an average of 67% support from voting stockholders. Although attributable to strong shareholder advocacy in previous years, it is noteworthy that by the 2008 proxy season, 80 of the Fortune 100 companies have declassified boards or are in the final stages of declassifying the boards — a process that can take two to three years, depending on previous election cycles.

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[1] Proxy season is widely regarded as spanning from January 1st to June 30th of every year, when a majority of public U.S. corporations hold their annual shareholder meetings.

[2] This figure excludes shareholder proposals that were supported by management.

[3] Aflac Inc., Annual Proxy (Schedule 14A), at 43 (Mar. 18, 2008).

[4] Qwest Commc'ns Int'l, Inc., Annual Proxy (Schedule 14A), at 59-60 (Apr. 4, 2008).

[5] See note 2, supra.

BARROWAY TOPAZ SEEKS INJUNCTION TO LIMIT "GOLDEN PARACHUTE" PAYMENTS TO OUTGOING CEO *(continued from page 3)*

Barroway Topaz filed a shareholder derivative action in South Carolina state court, seeking emergency injunctive relief to block the payments to Whittle as a breach of the directors' fiduciary duties. As the complaint explained, "the Board's improper decision to grant Whittle a golden parachute immediately before seeking federal aid recklessly jeopardizes the Company's financial future for no legitimate business purpose."

Journalists covering the November 18, 2008 injunction hearing quoted Barroway Topaz partner Lee Rudy calling the board's conduct "reckless and unconscionable." "They're rolling the dice in a really big way with the company's future," Rudy said.

Based in part on the company's representation that Whittle will receive only a small fraction of his severance payments over the next several months, the court denied the request to block the payments in their entirety. Nonetheless, Barroway Topaz will begin reviewing documents and taking depositions shortly, and intends to return to court to press its claims and seek to invalidate the board's unlawful actions. As Rudy stated, "If the company needs this tax payer money, which it seems that they do, they should get it, but then they shouldn't give it away."

NOT ALL FOREIGN PLAINTIFFS ARE EQUAL IN U.S. SECURITIES CLASS ACTIONS

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members in a U.S. securities class action and provides a glimpse of the legal gymnastics that U.S. courts perform in determining whether foreign investors get their day in U.S. courts.

A Brief Background and Procedural History of the Alstom Litigation

The plaintiffs in *Alstom* alleged that Alstom and the Company's U.S. subsidiary, Alstom Transportation Inc. ("ATI"), located in Hornell, N.Y., made false and misleading statements regarding the financial performance of the French parent's operations and, separately, the operations of the American subsidiary and that these false statements were incorporated in the financial statements issued by Alstom. In an earlier decision in the case, resolving the question of the court's subject matter jurisdiction over the claims of the foreign cubed investors, Judge Marrero split the alleged Alstom fraud into two parts, the ATI Fraud and the Marine and Turbine Fraud. Judge Marrero concluded that plaintiffs who purchased Alstom securities on U.S. and foreign exchanges could bring claims against Alstom in U.S. court regarding the ATI Fraud. However, Judge Marrero found that plaintiffs who purchased Alstom securities on a foreign exchange could not bring claims relating to the Marine and Turbine Fraud in U.S. Courts. This decision rested on the "conducts and effects" test that U.S. courts use to determine whether to hear extra-territorial claims. *In re Alstom S.A. Sec. Litig.*, 406 F. Supp. 2d 346, 367 (S.D.N.Y. 2005). The court concluded that because the Marine and Turbine Fraud occurred almost exclusively outside of the U.S., there was no basis for the court to entertain claims by foreign-cubed investors in a U.S. court. *Id.* at 397. On the other hand, the court concluded that because the ATI Fraud occurred mainly in the U.S., the U.S. had an abiding interest in exerting jurisdiction over the claims of the foreign plaintiffs. *Id.* ("the claims of foreign purchasers abroad relating to the alleged fraud at ATI satisfy the restrictions of the conduct test").[1] The *Alstom* court, therefore, refused to preclude all claims of foreign purchasers abroad, holding instead that foreign cubed investors could pursue their securities fraud claims against Alstom in U.S. court to the extent those claims related to a fraud that occurred on U.S. soil. *Id.*

Having won the right to bring claims by foreign-cubed plaintiffs against Alstom (relating to ATI) in U.S. courts, three years later, the plaintiffs sought to certify a class that included foreign cubed investors. The *Alstom* plaintiffs decided to seek certification of a class that consisted of purchasers of Alstom securities who resided in the United States and the following

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[1] Notably, the basic principles of the conduct and effects test to determine subject matter jurisdiction over the claims of foreign plaintiffs against foreign defendants was recently addressed by the U.S. Court of Appeals for the Second Circuit in *In re National Austrialia Bank Sec. Litig.* --- F.3d ----, 2008 WL 4660742 (2d Cir. Oct. 23, 2008) (affirming dismissal of securities fraud suit involving foreign plaintiffs who purchased stock of Australian corporation on the Australian stock exchange).

four foreign jurisdictions: the Netherlands, England, France and Canada. It appears that plaintiffs' counsel selected the residents of these countries to be among the beneficiaries of the class action based in part on a previous decision issued by the Judge Richard Holwell in *In re Vivendi Universal, S.A. Sec. Litig,* 242 F.R.D 72 (S.D.N.Y 2007), a case involving securities fraud claims against a French company in which the court certified a class that included plaintiffs from these four foreign jurisdictions.

As explained below, however, Judge Marrero departed from the *Vivendi* decision in one critical aspect. He concluded that French investors could not participate in U.S. securities class actions while affirming the Vivendi precedent that Dutch, English and Canadian investors could. Judge Marrero based his decision on declarations from French law experts (put forth by the *Alstom* defendants) who testified that a class action with an opt-out mechanism — *i.e.*, a mechanism by which an individual is included in the class without any affirmative actions on the part of the individual to assent to inclusion — was against French public policy. As a result, French courts would more likely than not refuse to give preclusive effect — *e.g.*, barring plaintiffs from relitigating claims settled in U.S. courts in France — to any judgment obtained in the U.S. class action. Just one year earlier, based on its review of similar expert testimony, the *Vivendi* court came to the opposite conclusion.

Judge Marrero also addressed a second important issue that will likely resurface in future cases involving foreign plaintiffs: the impact of an exclusive jurisdiction clause in the articles of incorporation of a foreign corporation which vests a foreign jurisdiction with exclusive authority to hear shareholder claims against the company. On this issue, Judge Marrero found that an exclusive jurisdiction clause would prevent certain foreign investors from being included as members of a U.S. class action asserting claims against this foreign company because of the danger that foreign courts would not recognize the jurisdiction of the U.S. courts over the foreign investors' claims against the company, thereby allowing absent class members to relitigate the same issues in French court. Judge Marrero's reasoning and the impact of *Alstom* are discussed below.

The Superiority Requirement for Certification of a U.S. Class Action

The issue of whether foreign-cubed investors can participate in a recovery obtained in a U.S. class action is an issue that arises at the so-called class certification stage of the class action. Under U.S. class action procedure, the representative plaintiff in the proposed class action must petition the court to approve, or "certify," the plaintiffs' definition of the class. In a securities class action on behalf of the purchasers of an issuer's securities, this class definition usually focuses on the type of securities at issue in the case (common stock, preferred, options, etc.), the time frame in which the securities were purchased, and, increasingly, in the age of class actions involving foreign plaintiffs and foreign issuers, the residence and nationality of members of the proposed plaintiff class.

One of the many hurdles a class representative must overcome at class certification is establishing, to the court's satisfaction, that the class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). It is in analyzing this so-called "superiority requirement" that the residence and nationality of the proposed class members has become an issue before the court. Why? Under U.S. class action rules, once a court defines the membership of the class, any class member who falls within this definition and does not affirmatively opt-out of the class is considered a member of the class and, as a consequence, whether or not they participated in any recovery obtained in the action, are forever barred from filing a lawsuit in another court over the same events. For defendants in a class action, the barring of future claims by class members — so called *"res judicata"* — is a critical concept because it provides certainty to a defendant that a settlement or judgment in a class action has, once and for all, resolved all claims by the members of the class against the defendants involving the facts and circumstances at issue in the class action. U.S. courts have concluded, therefore, that for foreign plaintiffs to be properly included in a U.S. class action, plaintiffs must demonstrate that it is more probable than not that foreign jurisdictions in which these plaintiffs

Judge Marrero departed from the Vivendi decision in one critical aspect. He concluded that French investors could not participate in U.S. securities class actions while affirming the Vivendi precedent that Dutch, English and Canadian investors could.

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NOT ALL FOREIGN PLAINTIFFS ARE EQUAL IN U.S. SECURITIES CLASS ACTIONS

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reside, will recognize the judgment obtained in the U.S. courts and give it preclusive effect; essentially barring an absent class member who seeks to relitigate the same issues in the foreign jurisdiction. *Alstom*, 2008 WL 4053361, at *11 ("Courts may properly consider *res judicata* concerns when evaluating the Superiority Requirement with respect to a proposed class that includes foreign class members.").

Applying the Superiority Requirement in *Alstom* as Against French, English, Dutch and Canadian Plaintiffs

As mentioned above, in *Alstom*, the plaintiffs moved to certify a class that consisted of residents from the United States, Canada, England, the Netherlands and France. The defendants asserted that the foreign investors should be excluded from the proposed class because a U.S. class action was not the superior method for adjudicating these plaintiffs' claims as a resulting judgment would not be given *res judicata* effect by courts in France, England, the Netherlands, and Canada. *Alstom*, 2008 WL 4053361, at *11. Plaintiffs disagreed, relying principally on *Vivendi*, which held that it was more probable than not that the courts of France, England, the Netherlands and Canada would give preclusive effect to a U.S. class action judgment.

> *Judge Marrero held that new evidence had emerged since Vivendi that indicated that an opt-out mechanism would violate French public policy*

Judge Marrero was not persuaded by the plaintiffs' arguments, or the *Vivendi* court's analysis, that a French court would, more likely than not, recognize any judgment entered by his court barring the claims of absent French class members. *Id.* at *12. Relying on the legal expert testimony produced by the defendants regarding French law, the Court relied on two of several tests advanced by the defendants: (1) whether French courts would consider themselves as having exclusive jurisdiction over the claims of the French residents against the defendants, *Id.* at *14; and (2) whether French courts would recognize a U.S. styled opt-out class action, as a matter of public policy, as sufficient to bar claims of absent French investors. On the first test, the defendants highlighted a provision in Alstom's articles of incorporation, Article 23, which provided that, "any disputes that may arise during the term of the company . . . whether between the shareholders and the company . . . regarding corporate affairs, shall be submitted exclusively to the jurisdiction of [French courts]." *Id.* at *14. Relying on the defendants' submissions, the Court concluded that this clause was an exclusive jurisdiction clause under French law, which also would be given effect by the European Court of Justice, and as such, gave French investors the right to have their claims against Alstom S.A. heard by a French court. Given this exclusive jurisdiction clause, Judge Marrero concluded that it was more probable than not that a French court would refuse to bar attempts by absent French class members from relitigating the same issues in French court because the exclusive jurisdiction clause gave French investors the right to have a French court hear their claims against Alstom. *Id.* at *15.

Judge Marrero then looked at French public policy with respect to U.S. opt-out class actions as a whole. He concluded, again based on the legal opinion proffered by the defendants' experts, that "a French court, would likely conclude that any judgment rendered by this Court involving absent French class members offends public policy because absent French investors did not consent to this Court's jurisdiction over their claims and the United States' class action procedure would deny them an adequate opportunity to participate in the litigation." *Id.* The *Vivendi* court had arrived at a completely different conclusion regarding French public policy finding that French courts would not be offended by a U.S. class action barring claims of absent French shareholders. *Vivendi*, 242 F.R.D. at 101.[2] Relying on defendants' experts' declarations, Judge Marrero held that new evidence had emerged since *Vivendi* that indicated that an opt-out mechanism would violate French public policy. Since the *Alstom* decision, the defendants in *Vivendi* have sought reconsideration of that court's inclusion of French shareholders in that case

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[2] It is important to note that Judge Marrero's decision does not overrule the decision in *Vivendi*. Because both opinions emanate from the United States District Court for the Southern District of New York, both are valid until the United States Appeals Court for the Second Circuit takes up the issue and decides whether the result in *Alstom* or *Vivendi* or neither is appropriate.

based, in part, on this evidence. That briefing has yet to be decided. In each case, however, each court relied on extensive legal opinion proffered by each side as to how French courts would view U.S. class actions.

With regard to the inclusion of English, Dutch and Canadian investors, the *Alstom* court sided with the plaintiffs' arguments that the courts of England, the Netherlands and Canada would recognize and give preclusive effect to opt-out U.S. class actions. *Alstom,* 2008 WL 4053361, at *20-23. As such, the court approved the inclusion of these investors in the U.S. class action.

It appears, however, that the exclusive jurisdiction clause in Alstom's articles of incorporation— Article 23 — and the defendants' arguments concerning the effect of this clause may have caught the class representatives in *Alstom* by surprise. The defendants argued that Article 23, in addition to giving French courts exclusive jurisdiction to hear the claims brought by French investors against Alstom, would also likely be honored by English and Dutch courts, in deference to the French court. As such, the defendants argued, English and Dutch courts would refuse to bar claims by absent class members in favor of the French courts' exclusive jurisdiction to hear these claims. Once again, expert legal testimony introduced by the defendants served as the basis for these arguments. Judge Marrero noted that the plaintiffs had not contested this argument and held that English and Dutch courts, because they would consider Article 23 binding against Alstom's shareholders, would refuse to recognize a U.S. opt-out judgment barring claims against Alstom. Accordingly, the *Alstom* court eliminated from the U.S. class action any claims by English and Dutch investors against Alstom, while preserving these investors' claims against other defendants in the case.

Considerations for Class Representatives and Foreign Plaintiffs in Light of Alstom

As increasing numbers of foreign cubed investors look to U.S. courts, and specifically the U.S. class action, as a potential forum to recover losses caused by securities fraud, the superiority requirement of U.S. class action procedure creates uncertainty at the inception of a securities class action as to who, ultimately, will be included in the class recovery. Much of this uncertainty is the result of the analysis itself — what appears to be a searching examination of competing legal opinion of the law of foreign jurisdictions. In *Alstom*, Judge Marrero examined expert testimony regarding French law a year after Judge Holwell in *Vivendi* reached a completely different conclusion as to French public policy with respect to U.S. class actions. A provision in Alstom's articles of incorporation, which seemed ambiguous at best, was used as a sword by Alstom's lawyers to exclude English and Dutch class members from recovering from any judgment against Alstom rendered by a U.S. court. No doubt, foreign issuers like Alstom that are hauled into U.S. courts on securities fraud claims will find other creative ways to convince U.S. courts that foreign plaintiffs should not be allowed to participate in these suits.

What *Alstom* illustrates is that for foreign institutional investors, who are on notice of U.S. securities class actions involving foreign issuers, being a passive member of the class provides no certainty to recovery. Indeed, *Alstom* and its ilk serve as a reminder for foreign investors that active involvement in U.S. securities class actions, through participation as lead plaintiffs and through individual opt-out litigation, provides the most certainty of recovery from losses caused by securities fraud. As the *Alstom* court concluded with respect to the claims of French shareholders, only *absent* French investors were excluded from participation as class members in the lawsuit. *Alstom,* 2008 WL 4053361, at *19. This implies that French shareholders who elect to opt-in to the class action by serving as class representatives, or who serve as lead plaintiffs, would be entitled to participate in the case notwithstanding the exclusion of their fellow French nationals. This is because the foreign plaintiff is submitting to the jurisdiction of the U.S. court, and the questions raised in *Alstom* regarding the enforcement of the class action judgment against absent class members, are moot. Of course, this presumes, as in *Alstom*, that the U.S. court will exercise subject jurisdiction over the foreign-cubed plaintiffs' claims at the outset of the litigation.

In sum, we anticipate that the class certification issues addressed in *Alstom* and *Vivendi* will persist as foreign investors continue to participate in U.S. securities fraud class actions. We encourage foreign plaintiffs to take affirmative steps to assess the risks of their being able to participate in these actions and take appropriate steps to preserve claims in the event that there are significant risks of exclusion.

LESSONS FROM THE 2008 PROXY SEASON

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Although it is a far more recent phenomenon than shareholder opposition to classified boards, majority voting proposals have made significant strides at U.S. companies in the past two years. Majority voting proposals by shareholders generally require that directors be re-elected only if they receive a majority of the votes cast by shareholders.[6] The strong support among shareholders for majority voting of directors is indisputable, receiving average support from approximately 50% of shareholders voting on such proposals. Significantly, by June 2008, after years of investor pressure, an overwhelming 73% of S&P 500 companies had implemented majority voting policies or bylaws.

Finally, shareholder proposals to create an independent board chair, separate and apart from the CEO position, increased average shareholder support from 25% in 2007 to 30% in 2008, despite staunch opposition from boards and management. For example, shareholders of Washington Mutual, Inc. ("WaMu") notched an important victory during the 2008 proxy season when shareholders voted in favor of the following resolution: "RESOLVED: Shareholders of Washington Mutual, Inc. ('WaMu') request that the Board of Directors adopt a policy that the Chairman of the Board shall be a director who is independent from the Corporation."[7] The WaMu proposal for an independent chair received the support of 52% of shareholder votes cast and caused WaMu to separate the role of CEO and Chairman. Similar proposals for independent board chairs at Time Warner, Pfizer and Weyerheuser also saw strong investor support, garnering in excess of 40% of votes cast at each company.

Looking Ahead to the 2009 Proxy Season

Shareholders' successes and failures during the 2008 proxy season can provide us with many lessons and trends for the upcoming 2009 proxy season, including:

- Shareholder proposals relating to executive compensation matters will continue to increase in scope, covering a far wider range of specific compensation concerns such as "golden parachutes," retirement benefits and "clawback" policies.[8] As shareholders have become more educated about the extent and different types of executive compensation, they have become increasingly concerned about what they are seeing and are likely to seek further reform.
- Shareholder proposals related to say on pay will continue to remain at the center of the debate for shareholders at every major U.S. corporation, especially in the financial sector, and legislative action on say on pay remains a possibility.
- Shareholder proposals related to governance matters such as majority voting and independent chairs of boards will continue to enjoy strong support from shareholders and will spread far beyond large-cap companies to mid-sized public companies.

Finally, as dedicated shareholder advocates for many decades, we would like to remind you of the critical importance of casting an informed vote on every proposal that comes to a vote at shareholders' annual meetings. Unfortunately, the recommendations of boards and management are often not in the best interest of stockholders and the proxy campaigns of activist investors and shareholder advocates cannot replace shareholder vigilance.

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[6] A common variation on the pure majority voting proposals are proposals that require directors who receive less than a majority of votes cast to tender their resignation to the board of directors; leaving the remaining directors with the discretion of accepting or rejecting the resignation.

[7] Wash. Mut., Inc., Annual Proxy (Schedule 14A), at 71 (Mar. 14, 2008).

[8] A "clawback" resolution seeks to recoup executive compensation in cases of financial restatements. Notably, some type of "clawback" policy is now in place at a majority of S&P 100 firms.

LEHMAN BROTHERS FILES CHAPTER 11 BANKRUPTCY PROTECTION: THE DOWNFALL OF A WALL STREET FIRM *(continued from page 3)*

the following weeks as investors sold equity and debt securities and sought safety in treasury bills. Within days of the bankruptcy filing credit markets seized up and the government has since made $250 billion in capital infusions to shore up the U.S. banking industry.

The direct exposure to Lehman's collapse extends far beyond the holders of Lehman securities. Billions of dollars of contracts known as "credit default swaps" were tied to Lehman's debt. Credit default swaps essentially act as a hedge that investors may purchase to protect against a bond losing all of its value if the issuer of the bonds defaults. An October 10 auction to settle the price of the Lehman credit default swaps pegged at 91.375 cents on the dollar the price that sellers of the contracts would have to pay. As a result, hedge funds, insurance companies, banks, and other market participants would have to pay as much as $365 billion to buyers of the contracts. There has been wide speculation that sellers of credit default swaps had hedged their exposure, blunting the overall loss, but the overall exposure to Lehman credit default swaps remains less than fully transparent.

Lehman's downward spiral into bankruptcy is grounded in the firm's massive exposure to the residential and commercial real estate markets. In the three-year period between 2004 and 2007, Lehman's balance sheet nearly doubled to over $600 billion in total assets as the firm became a major participant in virtually all aspects of the real estate markets. Lehman's rapid expansion into subprime lending began when it purchased BNC Mortgage LLC in 2004. The firm also purchased Aurora Loan Services LLC, a mortgage originator that issued so-called Alt-A mortgages, which are just a notch above subprime loans. Lehman's 2007 Annual Report revealed that the firm had originated nearly $60 billion in mostly subprime and Alt-A mortgages in 2006, and $47 billion more in 2007. The subprime and Alt-A loans provided Lehman with a steady stream of mortgage debt, which Lehman pooled and securitized into mortgage-backed securities that Lehman sold to investors. As the mortgage and housing markets melted down in 2006 and 2007, and mortgage assets became increasingly illiquid, Lehman continued to swell its mortgage-related portfolio, growing from $57.7 billion at year-end 2006 to over $89.1 billion by year-end 2007. Lehman also invested directly in commercial real estate, including $2 billion in deals with SunCal Companies, a southern California real estate developer that suffered steep losses from the housing downturn, and in October 2007 Lehman partnered with Tishman Speyer to pay $22.2 billion for a leveraged buyout of Archstone-Smith, the owner of hundreds of apartment buildings throughout the United States.

By November 2007, while other major Wall Street banks marked down billions of dollars in real estate assets and two Bear Sterns hedge funds collapsed as a result of their exposure to the credit markets, Lehman's real estate assets swelled to over 30 times its shareholder equity, known as "gross leverage" in accounting parlance. In other words, the firm had just 3.3 cents in equity to back each dollar of its assets. With over $600 billion in reported assets, and approximately $22.5 billion of shareholder equity, Lehman's gross leverage had bloated to where a markdown in its assets by just over 3% would have totally eviscerated the firm's total shareholder equity.

Beginning in the third quarter of 2007, Lehman started to writedown the value of its real estate holdings, yet market analysts began questioning the sufficiency of the markdowns. In a March 20, 2008 article titled "The Debt Shuffle," Condé Nast Portfolio reported:

> Lehman's write-downs seem tiny: Lehman finished the quarter with $87.3 billion of real estate assets. These include residential mortgages and commercial real estate paper. The bank only wrote these assets down by 3 percent. And its Level III assets — the hardest to value portion of these instruments — were written down by only the same percentage. The indexes and publicly traded instruments and companies that serve as proxies for these securities generally fell more than that in the quarter.

On June 10, 2008, Bloomberg News quoted David Einhorn, president and cofounder of hedge fund Greenlight Capital Inc., who questioned the transparency of Lehman's markdowns, stating:

> The burden is on [Lehman] to be much more forthcoming and transparent in their disclosures and discussion and analysis of their high-risk assets. . . . This confirms a lot of things we've been saying. The credit market did not really deteriorate between February and May. Most of these losses are losses that were probably evident quarters ago.

By September 2, 2008, reports had surfaced that Lehman was in talks to sell up to a 25% stake to state-owned Korea Development Bank ("KDB"), but by September 9 reports indicated that talks with KDB had ended. On September 10 Lehman pre-announced its third quarter results and reported that it had lost $3.9 billion, after $5.6 billion in ad-

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ditional writedowns. Fuld said the firm was "on track to put these last two quarters behind us" and added that he would consider all "strategic alternatives." By September 12, Bank of America ("BoA") was rumored to be in discussions to acquire Lehman in a deal that would have called for guarantees from the Federal Reserve similar to JP Morgan's acquisition of Bear Stearns six months earlier, but on September 14, BoA said that it would instead acquire Merrill Lynch, leaving Lehman without a suitor.

The end came at about 2:00 a.m. on September 15, when Lehman filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code, marking the largest bankruptcy in U.S. history. Fuld, however, has fared much better. According to Forbes, of the 500 biggest companies in the U.S., Fuld ranked No. 11 in CEO compensation, earning $71.9 million in total compensation in 2007, and according to the U.S. House Oversight Committee, Fuld earned $484 million in salary, bonuses and stock options since 2000.

Unfortunately, the loss to Lehman shareholders is enormous. Lehman's common stock, which had traded at $66.03 on December 31, 2007, is now virtually worthless, trading as low as $0.02 per share on September 30, 2008. With roughly 510 million shares outstanding at 2007 year-end, Lehman shareholders have lost more than $35 billion in market capitalization. Barroway Topaz Kessler Meltzer & Check, LLP is currently serving as the court-appointed co-lead counsel on behalf of a group of institutional investors, including Alameda County Employees' Retirement Association, Government of Guam Retirement Fund, Northern Ireland Local Government Officers' Superannuation Committee, City of Edinburgh Council as Administering Authority of the Lothian Pension Fund, Operating Engineers Local 3 Trust Fund, Police and Fire Retirement System of the City of Detroit, Brockton Contributory Retirement System, Teamsters Allied Benefit Funds, American European Insurance Company, and Inter-Local Pension Fund Graphics Communications Conference of the International Brotherhood of Teamsters (the "Pension Fund Group") in a consolidated securities class action captioned Operative Plasterers and Cement Masons International Association Local 262 Annuity Fund v. Lehman Brothers Holdings, Inc., No. 1:08-cv-05523-LAK (S.D.N.Y.) pending before Judge Lewis Kaplan in the Southern District of New York.

On October 27, 2008, the Pension Fund Group filed a consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws against certain individual defendants and underwriters of various Lehman offerings. The Bankruptcy Code prevents Lehman from being a named defendant in this action. Defendants' response is currently due on January 23, 2009.

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