

Pomerantz Takes on Excessive Compensation

by Marc I. Gross

The Pomerantz firm recently commenced a lawsuit on behalf of the Louisiana Municipal Police Employees' Retirement System to recoup an extraordinary \$75 million bonus awarded to Chesapeake Energy Corp's CEO and co-founder, Aubrey McClendon. McClendon's total compensation for 2008 was \$105 million, making him the highest paid executive in the country at a time when the company's earnings plummeted 50% and stock price tumbled 60%.

Our lawsuit prompted the articles "Shareholders Who Act Like Owners" by Gretchen Morgenson in the *New York Times*; "Chesapeake Holders Denounce CEO's Pay" by Ben Casselman in the *Wall Street Journal*; and "Major CEOs Feeling the Recession . . .

Somewhat" in *The Associated Press*.

The circumstances of the bonus warrant the public attention and court scrutiny. The company claims that it granted the bonus – five times McClendon's average annual compensation, including both salary and bonus – to reward him for his role in selling off certain oil and gas properties during 2008.

The real purpose of the bonus, we submit, was to bail out McClendon from his personal financial problems precipitated by the fall in the company's share price. In other words, Chesapeake used corporate funds to insulate its CEO from the consequences of the corporate meltdown, while shareholders got stuck with their losses.

The bail out was even larger than at first appeared. After the lawsuit was filed, Chesapeake issued a Proxy Statement indicating that it also agreed to pay McClendon over \$12 million for his personal art collection.

In its opposition to our lawsuit, Chesapeake argues that if it weren't for the bonus, McClendon might have jumped ship in favor

of other opportunities. This seems far fetched, given that McClendon founded the company and still has a sizable stake in its wells. Moreover, the Board had other ways to insure his retention, like lowering the share ownership requirement – which it did – and providing loans to help him meet his obligations.

We began the litigation by serving a "books and records" demand on Chesapeake in an effort to compel production of materials considered by its Board of Directors when awarding the bonus. Analysis of these documents will enable us to recommend how best to proceed. This "books and records" strategy was used successfully at the start of the

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Disney/Ovitz excess compensation case, and is favored by Delaware courts. Although Chesapeake is an Oklahoma corporation, that state follows Delaware corporate law.

We believe that this case warrants support by other public pension funds concerned with corporate governance reforms, either by direct intervention or a letter to the court. If ever there was a time to draw the line on excess compensation, it is now.

If you are interested in doing so, please contact Marc I. Gross at the firm.

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One final note. In pursuing this claim, the Pomerantz firm harkens back to its roots. The firm's first major case was *Gallant v. Mitchell*, where Abe Pomerantz sought to recoup interest free loans that officers of National City Bank awarded themselves to tide them through the Great Depression (loans which they ultimately forgave). After trial, Abe recovered \$1.8 million, a small fortune in the 1930's. Interestingly, National City Bank eventually became Citibank, which shows that the more things change, the more they remain the same.

Return of the Overpaid Investment Banker

As the Chesapeake story shows, when it comes to sharing the pain caused by the economic downturn, corporate America has two standards: one for the working class, and another for

highly-paid executives.

When business hits the skids, workers are routinely asked to, and do, shoulder large cuts in pay and benefits, and many are laid off. For example, auto workers and airline employees have suffered repeated layoffs and drastically reduced their total compensation under hard-earned collective-bargaining agreements. But corporations treat their executive compensation agreements differently. Contracts suddenly become "inviolable," or are even sweetened substantially, as in Chesapeake. Companies rarely ask their top executives to take a paycut, even when they are hurtling towards insolvency.

Nowhere is the insulation of top executives from the consequences of their own failures more apparent than at the investment banks. All have taken billions of dollars in taxpayer bailouts after their recklessness drove the global economy into a recession. Under these circumstances, one would expect that belt-tightening would be in order. Although payouts were down last year, they seem ready to bounce right back.

Salaries at large Wall Street institutions currently stand at near all-time record levels. As the *New York Times* recently reported, the first quarter 2009 payments suggest that Goldman Sachs will pay its employees an average of \$569,220 per worker, less than 1% down from 2007's record payout. First quarter salaries for the 26,142 employees in JPMorgan's investment banking and trading divisions annualize out to an average of \$510,000. These figures are not averages of only the bankers, but of all employees from receptionist to CEO.

Investors pay a heavy cost for these obscene salary levels. Compensation costs can eat up 50% or more of an investment bank's revenue. Reducing them would substantially increase profitability, allowing the banks to return more to investors in the way of dividends and share buybacks, and to redeem more quickly the TARP handouts they receive from U.S. taxpayers. This in turn would reduce the banks' expenses and increase their tangible common equity.

Investment banks wrongly attempt to justify huge salaries by saying their most important assets walk out the door every night. Skilled workers are critical for all businesses. But investment bankers have driven their companies, and our economy, to the brink of disaster. As a group, they deserve pay cuts, not increases.

The worst show of arrogance comes from one of the worst banks – Citigroup. Shareholders have seen their investments lose over 90% of their value since CEO Vikram Pandit took the reins. Yet last year, Pandit's compensation package totaled \$10.8 million. Despite the stock's drubbing, Citi touts that Pandit is critically valuable both to the bank and our economy. Citi's CFO even told an interviewer that replacing Pandit would be "incredibly destabilizing" for our entire financial "system."

There are glimmers of hope. CalPERS and other institutional investors forced Bank of America to separate its Chairman and CEO positions after learning that CEO Ken Lewis approved huge bonuses for Merrill Lynch executives right before that company (now a subsidiary of Bank of America) disclosed huge operating losses. But as the first quarter 2009 figures indicate, the country's top investment banks still don't get the message. Banking salaries need to adjust to our new economic reality.

Joshua B. Silverman

Movement Grows to Split Chair, CEO Posts

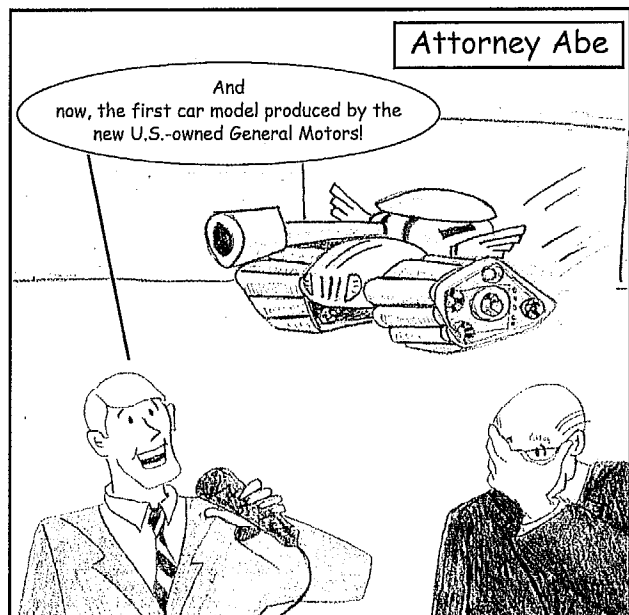
The shareholder ouster last month of Bank of America CEO Ken Lewis from the company's chairmanship position highlights the growing sentiment that the roles of chairman and CEO should be split. In recent months, in part due to the financial crisis, there has been a renewed cry among governance advocates that U.S. public companies should divide the leadership roles of chief executive officer and chairman of the board of directors among two individuals. It is no coincidence that the major finan-

cial institutions that have floundered the most, such as Bear Stearns, Lehman, Citigroup, Bank of America, Washington Mutual and Wachovia, all had one person in the combined roles before the current crisis exploded.

According to a study by the Corporate Library, nearly two thirds of S&P 500 companies are led by one person, who can easily influence the Board's process. The Corporate Library believes that a "board that retains the dual role out of reluctance to challenge a powerful chief executive may not be a strong protector of shareholder interests in other respects" and be "more likely to have certain troubling governance characteristics than companies where the roles are separated." This is a stark contrast to European public companies. All German and Dutch companies divide the roles. In Great Britain, since a major 1992 corporate governance reform, almost 95% of the FTSE 350 companies have different individuals in the chair and CEO positions.

In his op-ed article in the *Wall Street Journal*, Gary Wilson, a director of Yahoo, states that such "a CEO can dominate his board and is accountable to no one."

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Where there is both a CEO and a separate chairman of the Board, the CEO can focus on running the business while the independent chairman can lead the board, recruit new members and manage CEO succession. Simply put, the independent chairman, among other things, curbs conflicts of interest, promotes oversight of risk and manages the relationship between the board and CEO. Indeed, in Europe, according to Wilson, the separation "has shifted the power balance to the board and owners, and away from management, and it appears that the owners are getting more bang for their euro in executive compensation." John Weston, the former CEO of BAE, agrees that splitting the two roles is vital to a company because the separate chairman model "makes it very clear the chief executive has somebody else he is responsible to besides shareholders." More importantly, the board of directors can truly focus on the best interest of shareholders, not the CEO.

Opponents of this reform argue that separating the two roles can cause confusion in the chain of responsibility and create unnecessary power struggles when the outside chairman get too heavily involved in day-to-day operations. Another argument opponents make is that a lead director who mainly conducts executive meetings among outside board members takes care of this concern.

These arguments fall short. For example, Paul Myners, the chairman of Land Securities Group PLC and former chairman of Marks & Spencer Group, quit his membership on the board of Bank of New York Co. in 2006, saying that a single chairman and CEO "allows one person to be too dominant." The lead director model falls short in achieving independence and is not equivalent to an outside chair because "the lead director has little practical power and is frequently selected by the chairman/CEO" according to Wilson. Moreover, with an outside chairman, directors tend to speak more freely, shaping board dialogue.

Spearheading the reform effort is the Chairmen's

Forum, a peer organization of independent chairmen of corporate boards convened by The Millstein Center for Corporate Governance and Performance at the Yale School of Management. The group is led by Harry Pearce, a retired General Motors Corp. vice chairman who is the Non-Executive Chairman of Nortel Networks Corp. and the Chairman of MDU Resources Group, Inc. The group recognizes that an independent chairman "is a key factor in good corporate governance and the protection of shareholder interests" and in this current economic crisis "the establishment of an independent chairmanship by corporate boards is an important element in restoring market trust." Thus, the Chairmen's Forum recommends that public companies appoint independent, non-executive chairmen and if they do not, that they explain to shareholders "why, in their view, combining the chairman and CEO responsibilities in one person, or naming a non-independent chair, represents a superior approach to optimizing shareowner value." Recently, the group published a policy briefing, entitled *Chairing the Board: The Case for Independent Leadership in Corporate North America*, arguing that "an independent chairman is a means to ensuring chief executives are accountable for managing public companies in close alignment with the interests of shareholders, while recognizing that managing a public company board is a separate, time intensive responsibility."

In a recent speech to the Council of Institutional Investors, the new SEC Chair, Mary Schapiro, hinted that the SEC is "considering whether boards should disclose to shareholders their reasons for choosing their particular leadership structure – whether that structure includes an independent chair, a non-independent chair, or a combined CEO/chair." According to the RiskMetrics Group, the recent vote by Bank of America shareholders to separate the two positions is the first time that shareholders have forced an S&P 500 company to split the two posts.

Fei-Lu Qian

The Value of Private Enforcement of the Securities Laws

We have long recognized that private enforcement of the securities laws is a necessary supplement to the enforcement capabilities of the Securities and Exchange Commission ("SEC"). This proposition is embodied in the idea of a "private attorney general" to police violations of the securities laws, and was endorsed explicitly by the United States Supreme Court since the mid-1960s.

As has often occurred, private litigation focuses on retroactive payments to damaged investors and corporate governance, while SEC enforcement actions result in injunctive relief, including "cease and desist" orders or the barring of individuals from serving as officers or directors of public companies. More recently, the SEC has itself obtained monetary awards as restitution and sought to disseminate such awards to injured investors directly under the Fair Funds Act. Some commentators have now questioned the need for private securities litigation at all, suggesting that the SEC should be the sole enforcement mechanism for violations of our securities laws.

In light of this, it is legitimate to review the value of past private securities litigation in order to determine whether it should continue. An article by James D. Cox and Randall S. Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the Enforcement of U.S. Securities Law*, does just this. Professors Cox and Thomas are the authors of a number of papers on securities enforcement, including the influential *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, published in the *Columbia Law Review*, noting that courts have overwhelmingly favored institutional investors as lead plaintiffs under the PSLRA, and the now-classic *Leaving Money on the Table: Do Institutional Investors Fail to File Claims in Securities Class Actions?* in which the answer, unfortunately, was

"yes." In response, Pomerantz developed its *PomTrack*® portfolio monitoring system to assist institutional clients.

In their newest study, Cox and Thomas offer an overview of recent empirical research on SEC and private actions, precisely in order to determine "if private securities fraud class actions are a necessary supplement to SEC enforcement actions." Their findings are significant. A sample of private class actions filed from 1990 to 2001 reveals that only 15% overlapped with SEC enforcement actions. A subsequent sample of post-2001 private class actions showed that in less than 23% had the SEC filed a parallel enforcement action. Critically, the SEC has tended to focus its enforcement efforts on smaller targets, "suggesting that the big fish get away," and the authors suggest – following the Madoff scandal – that "the SEC may be under-enforcing the securities laws."

The impact on the stock price of companies when an SEC enforcement action is disclosed is also greater. Combined with the fact that the monetary penalties extracted by the SEC tend to be smaller than those resulting from private litigation, companies facing an SEC enforcement action typically occur higher "reputational costs" but lower monetary exposure.

One of the major complaints among commentators against private securities litigation is that institutional investors who continue to hold shares in a defendant after a settlement do not benefit, since settlement amounts when paid by a defendant weigh down its stock price. It appears, however, that these even larger reputational costs – which may depress stock prices even more – have not been considered in their entirety. And while commentators have long emphasized the effect of attorneys' fee awards on the amount available to investors – now addressed by the PSLRA – they have ignored the effect of defense litigation costs that are often paid directly by the companies, and which the PSLRA did nothing to resolve.

Perhaps most significant are the findings that the
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The Value of Private Enforcement of Securities Laws
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SEC appears not to be the most important entity in detecting corporate fraud, and that class actions may lead to improvements in corporate governance. As the authors conclude: "Good corporate governance practices should lead to better quality disclosures, better monitoring of management, a reduced incidence of fraudulent misconduct by corporate managers and an improved alignment of corporate managers' incentives with those of shareholders."

Lack of Due Diligence is the Focus of Pomerantz Lecture

Each year, Pomerantz hosts the Pomerantz Lecture at Brooklyn Law School, honoring the life and work of Abraham L. Pomerantz, a 1924 graduate of Brooklyn Law School and founding partner of the firm. This year's lecture was "*Due Diligence: Failures and Remedies*," with featured speaker Bernard S. Black, the Hayden W. Head Regents Chair for Faculty Excellence at the University of Texas School of Law, and Professor of Finance at the University of Texas.

Professor Black argued that insufficient due diligence in connection with subprime mortgage securitizations was a major cause of the mortgage meltdown. When the volume of subprime loans soared from \$2 trillion in 2000 to \$8 trillion in 2006, mortgage originators began lending money knowing that defaults would be substantial and that "the only way you get your money out is when someone else puts new money in." That would be the investment banks, who "securitized" these mortgages and then sold them all over the world.

Lack of proper due diligence was no accident. All of the market participants had "too much incentive not to look too closely at how the structured finance goose produced golden eggs." Said Professor Black, "the more-or-less willfully blind sold to the more-or-less willfully blind. And in the land of the blind, the one-eyed banker is out of a job, the one-eyed money manager underperforms and loses clients, and the one-eyed rating agency rates no deals."

Professor Black would like to see created a "web of diligence" in which all market participants are responsible – and liable – to each other. We need explicit diligence standards in the form of written guidelines and rules for bankers, money managers, and rating agencies, he said. There must be diligence disclosure and effective liability for bad diligence – not just for affirmative misstatements, but for "not having done your homework."

Professor John C. Coffee, Professor of Law at Columbia Law School, also noted that loan originators recognized that investment banks would buy any portfolio of mortgage loans without due diligence. Bankers, in turn, knew that they could securitize and sell these loan packages worldwide if they carried investment grade ratings. Because structured finance had become such a huge source of income for the rating agencies, they chose to preserve their core business rather than their reputations. Professor Coffee recommends revising Regulation AB ("*Asset-Backed Securities*"), adopted in 2005, to include due diligence requirements, and re-defining "recklessness" under SEC Rule 10b-5 to include the failure to give a security rating without conducting reasonable verification.

Pomerantz Partner, Marc I. Gross, suggested that large financial firms simply lacked the internal controls needed to head off the mortgage crisis. Although the big banks relied on normally reliable quantitative measures, the perfect storm hit, leading to the 1% of scenarios that the banks' models were ill-equipped to handle. This situation landed banks in a "black hole" where the models no longer worked and the old rules no longer applied. Mr. Gross suggested that we need enhanced regulatory regimes that require increased standards for investment and far greater disclosure of risk. He also suggested a universal reorientation of financial performance measurement from the short to the long term, which would serve to reduce the appeal of risky investments with the attendant hope of large near-term profits.

R. James Hodgson

PomTrack© Class Actions Update

The Pomerantz Firm, through its proprietary PomTrack© portfolio monitoring system, monitors client portfolios in order to identify potential claims for securities fraud and to identify and evaluate clients' potential participation in class action settlements.

NEW CASES:

A selection of recently filed securities class action cases are listed below. If you believe your fund is affected by any of these cases, contact Pomerantz for a consultation.

<u>Case Name</u>	<u>Ticker</u>	<u>Class Period</u>	<u>Lead Plaintiff Deadline</u>
Regions Financial Corp. (8.875 Preferred)	RF Z	N/A	June 1, 2009
Wells Fargo MBSPTC	N/A	N/A	June 1, 2009
Citigroup, Inc. (Preferred Series F)	C	N/A	June 2, 2009
Morgan Stanley Dean Witter Capital I	N/A	March 14, 2006	June 5, 2009
Austin Capital Mgmt. Ltd.	N/A	January 2, 2005 – December 11, 2008	June 8, 2009
Mechel OAO	MTL	October 3, 2007 – July 25, 2008	June 8, 2009
Zynex, Inc.	ZYNX; ZYXI	May 21, 2008 – March 31, 2009	June 8, 2009
Barclays Bank Plc (Preferred Series 5)	BCS	April 11, 2008 – April 11, 2008	June 9, 2009
Bank of America	N/A	N/A	June 15, 2009
Coach, Inc.	COH	January 23, 2007 – October 22, 2007	June 15, 2009
Barclays Bank Plc (Preferred Securities)	BCS..	N/A	June 19, 2009
Income-Plus Investment Fund	N/A	January 1, 1999	June 19, 2009
Meridian Capital Partners, Inc.	N/A	January 2, 2008 – December 11, 2008	June 19, 2009
MRU Holdings, Inc.	UNCL	July 9, 2007 – September 19, 2008	June 19, 2009
Bernard L. Madoff (Tremont Group Holdings)	N/A	December 11, 2008	June 21, 2009
Oppenheimer Core Bond Fund	OBR.	April 27, 2007	June 22, 2009
Oppenheimer New Jersey Municipal Fund	ONJ..	April 24, 2006 – October 21, 2008	June 23, 2009
Thornburg Mortgage Home Loans, Inc.	N/A	January 2, 2000 – December 31, 2009	June 26, 2009
Cox Radio, Inc.	CXR	Current Holders	June 29, 2009
Liz Claiborne, Inc.	LIZ	February 28, 2007 – April 30, 2007	June 29, 2009
Oppenheimer Pennsylvania Municipal Fund	OPA..	November 28, 2005	June 29, 2009
Sequenom, Inc.	SQNM	June 4, 2008 – April 29, 2009	June 30, 2009
Bernard L. Madoff (Ariel Fund Ltd.)	N/A	December 22, 2003 – December 16, 2008	July 6, 2009
Bidz.com, Inc.	BIDZ	August 13, 2007 – November 26, 2007	July 6, 2009
Idearc, Inc.	IDARQ	August 20, 2007 – March 31, 2009	July 7, 2009
Popular Inc.	BPOPN	January 23, 2008 - January 22, 2009	July 13, 2009

SETTLEMENTS:

The following class action settlements were recently announced. If you purchased securities during the listed class period, you may be eligible to participate in the recovery.

<u>Case Name</u>	<u>Amount</u>	<u>Class Period</u>	<u>Claim Filing Deadline</u>
TD Banknorth, Inc.	\$50,000,000	November 19, 2006 – April 20, 2007	June 15, 2009
NPS Pharmaceuticals	\$15,000,000	August 7, 2001 – May 2, 2006	June 25, 2009
Natural Health Trends Corp.	\$2,750,000	April 16, 2002 – November 15, 2005	June 26, 2009
Himax Technologies, Inc.	\$1,200,000	March 30, 2006 – November 6, 2006	July 6, 2009
Hollinger International, Inc.	\$37,500,000	August 13, 1999 – March 31, 2003	July 8, 2009
Hollinger International, Inc. (Ontario)	\$37,500,000	August 13, 1999 – March 31, 2003	July 8, 2009
Hollinger International, Inc. (Quebec)	\$37,500,000	August 13, 1999 – March 31, 2003	July 8, 2009
Hollinger International, Inc. (Saskatchewan)	\$37,500,000	August 13, 1999 – March 31, 2003	July 8, 2009
Industrial Enterprises of America	\$3,800,000	December 4, 2006 – November 7, 2007	July 8, 2009
WRT Energy Corp.	\$1,800,000	February 1, 1995 – October 27, 1995	July 10, 2009
Sterling Financial Corp.	\$10,250,000	April 27, 2004 – May 24, 2007	July 16, 2009
SOURCECORP, Inc.	\$3,000,000	May 3, 2001 – October 27, 2004	July 20, 2009
Exide Technologies	\$13,700,000	May 5, 2004 – May 17, 2005	July 22, 2009
LJ International, Inc.	\$2,000,000	February 15, 2007 – September 6, 2007	July 22, 2009
McAfee, Inc. (SEC)	\$50,000,000	August 17, 1998 – December 26, 2000	July 27, 2009
Sunrise Senior Living, Inc.	\$13,500,000	February 26, 2004 – July 28, 2006	July 27, 2009
Basin Water Inc.	\$7,000,000	November 14, 2006 – August 8, 2008	August 4, 2009
HealthSouth Corp. (2004)	\$109,000,000	April 24, 1997 – March 18, 2003	August 11, 2009
BP Prudhoe Bay Royalty Trust	\$43,250,000	March 31, 2005 – February 5, 2007	August 20, 2009
Collins & Aikman Corp. (2003)	\$10,800,000	August 7, 2001 – August 5, 2002	August 24, 2009
Home Solutions of America (2007)	\$5,100,000	May 10, 2007 – February 15, 2008	September 8, 2009
Merrill Lynch & Co., Inc. (2007)	\$475,000,000	October 17, 2006 – December 31, 2008	September 9, 2009



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The Pomerantz Firm is acknowledged as one of the premier firms in the areas of corporate, securities, antitrust, and insurance litigation. Founded by the late Abraham L. Pomerantz, who was known as the 'dean of the class action bar,' the Pomerantz Firm pioneered the field of securities class actions. Today, more than 70 years later, Pomerantz continues in the tradition that Abe Pomerantz established, fighting for the rights of victims of securities fraud, breaches of fiduciary duty, and corporate misconduct. Prior results, however, do not guarantee a similar outcome in future cases.

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