

Client Alert

Latham & Watkins
Finance Department

Lehman Bar Date Order Introduces Complexity For Derivatives Claims

The Bankruptcy Court handling the joint Chapter 11 proceedings of Lehman Brothers Holdings Inc. and certain US affiliates has issued an Order that sets September 22, 2009 (the Bar Date) as the last date on which creditors can file claims against the debtors. (The full text of the [Order](#) is available online. In addition to establishing the claims Bar Date, the Order also 1) provides a Lehman-specific version of the usual Proof of Claim Official Form 10 that must be filed by any creditor and 2) sets some special procedures that creditors must follow to preserve claims arising from certain types of transactions. These special procedures, which add some novel requirements to the claims filing process, have a significant impact on creditors making claims based on derivative contracts and guarantees. The Order also introduces special procedures for claims based upon debt securities and structured notes issued by Lehman, but the impact of these procedures is harder to assess at this time. Some of the most noteworthy aspects of these new procedures are discussed in detail in this *Alert*.

Procedure for Derivatives Claims

The Order specifies that any creditor making a claim based on a Derivative

Contract must file a proof of claim by the Bar Date and, in addition, must fill out a so-called "Derivative Questionnaire" and file supporting material online no later than October 22, 2009, one month after the Bar Date. (Many creditors objected to the fact that the Questionnaire approach will force creditors to provide more information than might otherwise have been the case, but the court was not sympathetic to those concerns.)

For the purposes of the Order, the term "Derivative Contract" is defined to mean A) any "swap agreement" as defined in Section 101(53B) of the Bankruptcy Code or B) any "forward contract" as defined in Section 101(25) of the Code provided that a cash-market purchase or sale of a security or loan (*i.e.*, any purchase or sale of a security or loan for settlement within the standard settlement cycle for the relevant market), exchange-traded future or option, securities loan transaction, repurchase agreement in respect of securities or loans, and any guarantee or reimbursement obligations which would otherwise be included in the definition of "swap agreement" or "forward contract" pursuant to the definition of such terms in the Bankruptcy Code shall not be considered a Derivative Contract for the purposes of this definition. (The original definition of this term proposed

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by Lehman included commodities contracts, securities contracts and repo agreements, so this definition has been scaled back considerably. Creditors must still file proofs of claim for amounts owed under those other types of contracts, but those filings are not be subject to the special derivatives procedure.) Any notes, bonds or other securities issued by the any of the Lehman debtors or any affiliate of one of the Lehman debtors is excluded from the definition of "Derivatives Contracts" even if it is a structured note with an embedded derivative.

The Order contemplates that each creditor will receive by mail from Lehman a hard copy of the Proof of Claim form that contains a "unique identification number" applicable to that creditor and that unique ID number should be used in filling out the Questionnaire. However, the Order contemplates that a Proof of Claim and Questionnaire filed without the unique ID number will still be effective.

The **Questionnaire** is available online, but registration is required before the Questionnaire can be accessed. Registration works most efficiently if the unique identification number sent by Lehman is available for use.

The instructions to the Derivative Questionnaire state that, in the absence of a master agreement, a creditor must complete one questionnaire per Derivative Contract.

The information requested by the Derivative Questionnaire is generally the same information that is required in connection with the termination of an ISDA master agreement. The Questionnaire, however, also asks for details (including documentation) of any replacement trade "with the same economic terms as the terminated transaction" that has been executed by the creditor. That information is not required under the terms of the ISDA master.

Any creditor under a Derivative Contract that has already filed a proof of claim must amend its original filing to conform to the procedures set forth in the Order, including filling out the Derivative Questionnaire and filing supporting material electronically.

Procedure for Guarantee Claims

A separate proof of claim must be filed for each claim against a Lehman entity based on a guarantee, such as a guarantee of a Lehman swap counterparty by the holding company. Each claimant under a guarantee must also fill out a "Guarantee Questionnaire" (similar to the Derivatives Questionnaire) and file supporting material online by October 22.

If the claim arises from the guarantee by a Lehman debtor of obligations under a Derivative Contract of a Lehman entity that is not a debtor, then the claimant must fill out a Derivatives Questionnaire with respect to the Derivative Contract in addition to filling out a Guarantee Questionnaire even though no proof of claim is being filed against the direct counterparty with respect to the Derivative Contract.

Procedure for Securities Claims

The Order clarifies that any creditor asserting a claim as holder of any security listed on the **Master List of Securities (the Master List)** does NOT have to file a proof of claim; instead, the indenture trustee for that security will file a proof of claim on behalf of all holders of that security. The Order also allows for holders to petition to have any issue of securities added to the Master List by making a request prior to August 5, 2009. For other securities, holders do have to file proofs of claim and, in the case of certain securities (the Lehman

Programs Securities) issued by the Debtors and their affiliates outside of the United States, a special procedure and a special bar date (November 2, 2009) will apply.

A Lehman Programs Security is any security listed [here](#). The Lehman Debtors have been ordered to publish a final list of the relevant securities by July 17, 2009 so the information may be updated between now and then.

The Order requires Lehman to publish special notices about the claims process for Lehman Program Securities in several different countries because many of the securities are held by non-US persons.

The Debtors are required to create a proof of claim form specifically tailored to the Lehman Program Securities.

Persons or entities filing a claim based on a Lehman Program Security are not required to attach or submit any documentation supporting the claim, although they may be called upon to do so if the claim is disputed.

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Members of the Latham Derivatives and Insolvency Practice Groups are available to provide additional information about the Lehman Order.

If you have any questions about this *Client Alert* or the Lehman Order, please contact one of the members of the Derivatives Practice Group listed below or the Latham attorney with whom you normally consult:

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