Katten
KattenMuchinRosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

February 24, 2012

## SEC/CORPORATE

### House Committee on Financial Services Approves Two Securities Reform Bills

On February 16, the House Committee on Financial Services approved H.R. 3606 (the Reopening American Capital Markets to Emerging Growth Companies Act of 2011) and H.R. 2308 (the SEC Regulatory Accountability Act).

H.R. 3606 would exempt "emerging growth companies" from certain requirements under the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act), and rules of the Securities and Exchange Commission. A company is deemed an "emerging growth company" until the earliest of (i) the last day of the fiscal year in which it had gross annual revenues in excess of one billion dollars, (ii) the last day of the fiscal year following the fifth anniversary of its equity initial public offering (IPO), and (iii) the date on which it is deemed a "large accelerated filer." Among other things, emerging growth companies would be exempt from (a) the say-on-pay, say-on-frequency and golden parachute vote requirements of Section 14A(a) and (b) of the Securities Exchange Act of 1934 (the Exchange Act), (b) executive compensation disclosure requirements mandated by Section 14(i) of the Exchange Act and Section 953(b)(1) of the Dodd-Frank Act (the latter being the comparison of median employee compensation to CEO compensation), (c) the requirement imposed by Section 404(b) of Sarbanes-Oxley that requires a company's auditor to attest to the effectiveness of the company's internal controls over financial reporting, and (d) the audit firm rotation provisions of Section 103(a)(3) of Sarbanes-Oxley. In addition, Section 7(a) of the Securities Act of 1933 would be amended to allow emerging growth companies to present only two years of audited financial statements in any registration statement filed in connection with an equity IPO. Finally, research reports (as defined) distributed by brokers and dealers about an emerging growth company that is the subject of a proposed public offering, even if a registration statement has not yet been filed, would not constitute an offer for sale or offer to sell, even if the broker or dealer is participating or will participate in the registered offering.

H.R. 2308 would require, among other things, that before issuing a regulation, the SEC clearly identify and assess the significance of the problem to be addressed, utilize the Office of the Chief Economist to assess the costs and benefits of any proposed regulation or order, identify and assess alternatives, and only propose or adopt a regulation or order after determining that the benefits of the regulation justify the costs of the regulation and that the regulation imposes the "least burden" on various constituencies. In addition, the SEC would be required to ensure that regulations are accessible, consistent, written in plain language and easy to understand. Finally, the SEC would be required to periodically review its regulations and orders in effect prior to the enactment of the bill to determine whether any such regulations are outmoded, ineffective, insufficient or excessively burdensome and to modify any such regulations as necessary as a result of such review.

Click here to read H.R. 3606.

Click here to read H.R. 2308.

# LITIGATION

### District Court Grants Motion for Summary Judgment in Case Involving the Sale of Unregistered Securities

Defendant Great American Broadcasting, Inc. (GAB) purchased all of the shares of plaintiff Supernova Systems, Inc. (Supernova) through a Stock Purchase Agreement in July 2008. GAB agreed to issue Supernova 53,350 shares of GAB in addition to cash and a promissory note. Supernova alleged that GAB violated the registration requirements of the Indiana Uniform Securities Act (IUSA). GAB moved for summary judgment, arguing that the transaction was exempt from the IUSA's registration requirements and that it was therefore entitled to judgment as a matter of law.

IUSA makes it unlawful to sell unregistered securities unless the security or transaction is exempted or it involves a federal covered security. GAB asserts that although it sold Supernova unregistered stock, the sale was lawful because it fell under the IUSA's private placement exemption.

The case turned on a condition that requires the issuer to provide an offering statement and that the securities commissioner not disallow the exemption. The issuer does not have to fulfill this requirement if certain other conditions are met, including all Indiana purchasers qualifying as "accredited investors." Despite the fact that one of Supernova's shareholders did not qualify as an "accredited investor," GAB argued that it reasonably believed that all of Supernova's shareholders were "accredited investors" based on Supernova's representation and warranty in the Stock Purchase Agreement that it was an "accredited investor" as that term is defined in Regulation D of the 1933 Securities Act.

Supernova argued that in order for GAB to hold a "reasonable belief" that Supernova was an "accredited investor," GAB should have relied on other objective evidence such as shareholder financial questionnaires and reviews of shareholder financials. The Court, however, concluded that Supernova's representation and warranty in the Stock Purchase Agreement was sufficient to cause GAB to reasonably believe that Supernova was an "accredited investor," and granted GAB's summary judgment motion.

*Supernova Systems, Inc. v. Great American Broadband, Inc.*, 2012 WL 425552 (N.D.Ind. Feb. 9, 2012).

### District Court Partially Denies Motion to Dismiss for Failure to Allege Ulterior Motives

Plaintiff Vincent Licata agreed to sell the assets of his temporary employment services businesses to Tri-State Employment Services, Inc., a New York corporation (Tri-State). An affiliate of Tri-State (Services) had previously negotiated the purchase and formed an entity that would facilitate the acquisition. The plaintiff and Tri-State also entered into an employment agreement which named Plaintiff vice-president of Tri-State and included various commission-based compensation clauses.

The plaintiff claims that defendants Services and Robert Cassera (according to the complaint, Tri-State's President and Chairman) interfered with his ability to get commissions by causing his clients to terminate their relationships with Tri-State. The plaintiff further alleges that Services and Cassera, through their affiliated entity Defendant Corporate Resource Services, Inc. (Corporate Resource), acquired a business without paying the plaintiff a commission required under his employment agreement. The defendants moved to dismiss the plaintiff's claim for tortious interference with a business relationship.

The court granted dismissal as to defendants Cassera and Services, but denied the motion as to Corporate Resource. Under Florida law, the interfering party must be a stranger to the business relationship. When the interfering defendant is a party's agent, the agent is considered a party and his or its interference is justified (and thus permissible) unless the agent acts solely with "ulterior motives" and against the principal's best interest. The plaintiff did not sufficiently allege that Services and Cassera acted with such ulterior motives in their interference. The court was not convinced that Corporate Resource enjoyed the same privilege to interfere, since, based on the face of the complaint, it does not appear that Corporate Resource was involved in the employment agreement or otherwise acting as an affiliate or agent of Tri-State.

*Licata v. Tri-State Employment Services, Inc.*, 2012 WL 447484 (M.D.Fla. Feb. 13, 2012).

# EXECUTIVE COMPENSATION AND ERISA

### Income for Life: Push to Lifetime Income Options in Defined Contribution Retirement Plans

To encourage defined contribution plans (such as 401(k) plans) to offer annuities, the Treasury Department issued several pieces of guidance on February 2.

The purpose of the guidance is to encourage more retirement plans to offer annuities, giving retirees a stream of income for life.  Historically, employers offered defined benefit pension plans, which guarantee income for life. Since the advent of 401(k) plans, however, employers have been moving toward defined contribution plans and freezing and terminating their pension plans.  Because pension plans are no longer as popular as they once were, and because defined contribution plans are not currently required to offer annuity options, concern over retirees outliving their savings has increased.

Two pieces of the lifetime income guidance that apply directly to defined contribution plans are summarized below.

### Qualified Longevity Annuity Contracts in Defined Contribution Plans

The recent guidance introduces Qualified Longevity Annuity Contracts (QLACs) in defined contribution plans.  The premise behind the QLAC is to allow a retiree to take a partial distribution currently to meet current cash needs, but still have an annuity that would begin much later in life, but not later than 85.  This way, if the retiree outlives his financial planning, he will still have a stream of income through the QLAC.

QLACs would be subject to several requirements, including a maximum premium cost, certain death benefits, prohibition on a cash surrender value, death benefits only in the form of lifetime annuities to beneficiaries, and a specific intent to be treated as a QLAC.

For more information, click here.

### Spousal Annuity Protections in Defined Contribution Plans

Another piece of the recent guidance, Revenue Ruling 2012-3, describes the spousal consent rules for annuities offered by defined contribution plans that are not QLACs.  Interestingly, the guidance treats an annuity as a form of investment—not a form of distribution.  In summary, if the participant can change his investment to and from the annuity at any time, the typical spousal consent rules—which, in order to protect the spouse from being left without an income stream if the participant predeceases the spouse, require the spouse's notarized consent to any change in beneficiary or distribution option—do not apply.  On the flip side, if investments into an annuity cannot be moved, the spousal consent rules would apply if the participant were to chose a different form of distribution. Further, if the qualified preretirement survivor annuity feature cannot be waived, the spousal consent rules apply, while the ability to waive this feature results in no spousal consent requirement.

For more information, click here.

# EU DEVELOPMENTS

### European Council Adopts Short Selling Regulation

On February 21, the Council of the European Union announced the adoption of the Regulation on Short Selling and Certain Aspects of Credit Default Swaps.  The version of the Regulation adopted by the Council is substantially the same as the version adopted by the European Parliament in November 2011.

The Regulation establishes a two-tier disclosure regime for shares of companies listed on an EU market. Up to a lower threshold, non-public notification of short positions to the relevant regulator is required.  Above a higher threshold, positions must be publicly disclosed to the market. Reportable net short positions relating to EU sovereign debt issuers at all levels are subject only to non-public disclosure to regulators.  The proposed regime also provides for (non-public) notification of significant positions in credit default swaps relating to EU sovereign debt issuers.

The Regulation effectively prohibits naked short sales by providing that at the time of the relevant short sale transaction the market participant entering into the transaction must have either borrowed the relevant instruments, entered into an agreement to borrow them or made other appropriate locate arrangements. These restrictions do not apply where the transaction serves to hedge a pre-existing long position.

National regulators may impose restrictions on short selling in certain market emergency situations. In such cases the Regulation gives the European Securities and Markets Authority (ESMA) a coordination role designed to ensure consistency among national regulators.

The Regulation will come into force on the day after it is published in the Official Journal and will apply from November 1, 2012.

For more information, click here.

### Agreement Reached on EMIR

On February 9, it was announced that the European Parliament, the Council of the European Union and the European Commission had reached agreement on the proposed European Market Infrastructure Regulation (EMIR).

The agreement follows lengthy negotiations (as reported in the January 27, 2012 edition of *Corporate and Financial Weekly Digest*) on various contentious issues.

In the agreed version of EMIR:

- The central counterparty (CCP) clearing obligation will apply to over-the-counter (OTC) derivatives, whereas the requirement to report trades to trade repositories will apply to all derivatives, not just OTC derivatives.
- The CCP authorization process will include binding intermediation by the European Securities and Markets Authority (ESMA) between national authorities in any dispute over the CCP authorization.
- In order for non-EU CCPs to be recognized under EMIR, their home country regulatory framework must provide an effective system for reciprocal recognition of EU CCPs.

Final approval of EMIR by the European Parliament and Council is still required. The European Parliament is due to consider EMIR in its March 12–15 session. Once approved, EMIR will enter into force 20 days after publication in the Official Journal and it will apply from a date in 2013 yet to be established.

For more information, click here.

### ESMA Publishes Discussion Paper on EMIR Technical Standards

Following on from the February 9, announcement of agreement with respect to the European Market Infrastructure Regulation (EMIR) on February 17, the European Securities and Markets Authority (ESMA) published a discussion paper on draft technical standards for the regulation of over-the-counter (OTC) derivatives, central counterparties (CCPs) and trade repositories.

The discussion paper addresses the technical standards ESMA is required to draft under EMIR in relation to OTC derivatives, CCP requirements and trade repository reporting.

The OTC derivatives section focuses on the clearing obligation, risk mitigation techniques for contracts not cleared by a CCP, and exemptions to certain requirements.

In relation to CCP requirements the discussion paper considers collateral requirements and the proposed definition of “highly liquid” collateral, use of bank guarantees and the framework for determining “haircuts” that a CCP can apply to certain types of collateral.

In relation to trade repositories the discussion paper considers the content and format of the information to be reported and the information to be made available by trade repositories to the relevant regulators.

The comment period runs until March 19.  For more information, click here.

### ESMA Consults on AIFMD Key Concepts

On February 23, the European Securities and Markets Authority (ESMA) published a discussion paper on key concepts of the EU Alternative Investment Fund Managers Directive (AIFMD). The discussion paper covers a number of areas, including:

- The definition of an AIFM (alternative investment fund manager) including clarification of the functions an AIFM must carry out under the AIFMD and permitted it delegation.

- Guidance on the scope of the AIFMD’s definition of an alternative investment fund.

- Guidance on the interaction between the AIFM Directive and the EU UCITS IV Directive (2009/65/EC) on undertakings for collective investment in transferable securities and whether a management company authorized under one of those two Directives may provide services under the other.

- Clarification of the status under AIFMD of investment firms authorized under the EU Markets in Financial Instruments Directive (2004/39/EC) (MiFID) and credit institutions authorized under the EU Banking Consolidation Directive (2006/48/EC) (BCD) in relation to the provision of services to AIFs (alternate investment funds) and their treatment under the AIFMD.

The comment period runs until March 23, following which ESMA expects to release a consultation paper in the second quarter of 2012 setting out formal proposals for draft regulatory technical standards and to submit draft regulatory technical standards to the European Commission for endorsement before the end of 2012.

For more information, click here.

## UK DEVELOPMENTS

### HFSB Publishes Revised Standards

On February 17, the Hedge Fund Standards Board (HFSB) published a revised version of its Standards.

In its accompanying announcement, the HFSB stated that the purpose of the changes was to make the standards more suitable for non-EU managers — particularly those in the U.S. and Asia with a different governance structure.  In this regard, the key change involves strengthening fund governance requiring investors to have a vote on significant issues unless the fund has an independent governing body.

The standards have also been strengthened in a number of areas in the light of the financial crisis, including investor disclosures, risk management, valuation and safeguards to prevent market abuse.

Existing HFSB signatories will need to review their approach to complying with the standards, and may need to adapt their disclosure statements.  To give signatories time to carry out this exercise, the revised standards will not come into force until September 1, 2012.

For more information, click here.

**For more information, contact:**

SEC/CORPORATE

| | | |
|---|---|---|
| **Robert L. Kohl** | 212.940.6380 | robert.kohl@kattenlaw.com |
| **David A. Pentlow** | 212.940.6412 | david.pentlow@kattenlaw.com |
| **Robert J. Wild** | 312.902.5567 | robert.wild@kattenlaw.com |
| **Kari E. Hoelting** | 312.902.5668 | kari.hoelting@kattenlaw.com |

FINANCIAL SERVICES

| | | |
|---|---|---|
| **Janet M. Angstadt** | 312.902.5494 | janet.angstadt@kattenlaw.com |
| **Henry Bregstein** | 212.940.6615 | henry.bregstein@kattenlaw.com |
| **Wendy E. Cohen** | 212.940.3846 | wendy.cohen@kattenlaw.com |
| **Guy C. Dempsey, Jr.** | 212.940.8593 | guy.dempsey@kattenlaw.com |
| **Daren R. Domina** | 212.940.6517 | daren.domina@kattenlaw.com |
| **Kevin M. Foley** | 312.902.5372 | kevin.foley@kattenlaw.com |
| **Jack P. Governale** | 212.940.8525 | jack.governale@kattenlaw.com |
| **Maureen C. Guilfoile** | 312.902.5425 | maureen.guilfoile@kattenlaw.com |
| **Arthur W. Hahn** | 312.902.5241 | arthur.hahn@kattenlaw.com |
| **Joseph Iskowitz** | 212.940.6351 | joseph.iskowitz@kattenlaw.com |
| **Carolyn H. Jackson** | 44.20.7776.7625 | carolyn.jackson@kattenlaw.co.uk |
| **Kathleen H. Moriarty** | 212.940.6304 | kathleen.moriarty@jkattenlaw.com |
| **Raymond Mouhadeb** | 212.940.6762 | raymond.mouhadeb@kattenlaw.com |
| **Marilyn Selby Okoshi** | 212.940.8512 | marilyn.okoshi@kattenlaw.com |
| **Ross Pazzol** | 312.902.5554 | ross.pazzol@kattenlaw.com |
| **Kenneth M. Rosenzweig** | 312.902.5381 | kenneth.rosenzweig@kattenlaw.com |
| **Fred M. Santo** | 212.940.8720 | fred.santo@kattenlaw.com |
| **Peter J. Shea** | 212.940.6447 | peter.shea@kattenlaw.com |
| **Marybeth Sorady** | 202.625.3727 | marybeth.sorady@kattenlaw.com |
| **James Van De Graaff** | 312.902.5227 | james.vandegraaff@kattenlaw.com |
| **Meryl E. Wiener** | 212.940.8542 | meryl.wiener@kattenlaw.com |
| **Lance A. Zinman** | 312.902.5212 | lance.zinman@kattenlaw.com |
| **Krassimira Zourkova** | 312.902.5334 | krassimira.zourkova@kattenlaw.com |

LITIGATION

| | | |
|---|---|---|
| **William M. Regan** | 212.940.6541 | william.regan@kattenlaw.com |
| **Jason F. Clouser** | 212.940.6309 | jason.clouser@kattenlaw.com |

EXECUTIVE COMPENSATION AND ERISA

| | | |
|---|---|---|
| **Ann. M. Kim** | 312.902.5589 | ann.kim@kattenlaw.com |

EU/UK DEVELOPMENTS

| | | |
|---|---|---|
| **Edward Black** | 44.20.7776.7624 | edward.black@kattenlaw.co.uk |

* Click here to access the *Corporate and Financial Weekly Digest* archive.



Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND SHANGHAI WASHINGTON, DC

*Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997).*

*London affiliate: Katten Muchin Rosenman UK LLP.*