CORPORATE & FINANCIAL
WEEKLY DIGEST

January 27, 2012

SEC/CORPORATE

SEC Reduces Exchange Act Fees for Securities Transactions

On January 20, the Securities and Exchange Commission announced that, effective February 21, most Securities Act of 1934 transaction fees will decrease from $19.20 per million dollars to $18.00 per million dollars. The assessment on security futures transactions will remain unchanged at $0.0042 for each round turn transaction. The SEC had previously announced fee rates for fiscal year 2012 on May 2, 2011, but these fee rates never became effective.

Section 31 of the Securities Exchange Act of 1934 requires each national securities exchange and national securities association to pay transaction fees to the SEC. Section 31 also requires the SEC to annually adjust the rates of such transaction fees, and in some circumstances, make a mid-year adjustment. The Dodd-Frank Wall Street Reform and Consumer Protection Act amended Section 31 to establish a new method for annually adjusting such fee rates based on a uniform adjusted rate that is reasonably likely to produce aggregate fee collections equal to the regular appropriation to the SEC for the applicable fiscal year.

These fees should not be confused with the fees that public companies and other issuers pay to register their offerings of securities with the SEC under the Securities Act of 1933. Such fees are currently $114.60 per million dollars.

Click here for the SEC's press release announcing the reduced fees (Fee Rate Advisory #5 for Fiscal Year 2012). Click here for the SEC order reducing the fees, which includes the calculation methodology.

BROKER DEALER

Institutional Customer Suitability: New Compliance Certificate for Broker-Dealers

As of July 9, broker-dealers must comply with the new suitability standards established by FINRA Rule 2111 (which is modeled after NASD Rule 2310). With respect to customers' institutional accounts (as defined by FINRA Rule 4512(c)), broker-dealers will be required to fulfill customer-specific suitability obligations by having: (1) a reasonable basis to believe that the institutional customer is capable of evaluating investment risks independently and (2) the institutional customer affirmatively indicate that it is exercising independent judgment in evaluating the broker-dealer's recommendations.

The Securities Industry and Financial Markets Association (SIFMA) and its members are developing a standardized certificate and client letter to assist broker-dealers in meeting the requirement to obtain a customer's affirmative indication of its exercise of independent judgment. Once they are released, broker-dealers should consider using SIFMA's standard certificate and form letter to assist them in compliance with FINRA Rule 2111. If clients would like assistance in drafting such a certificate and letter, they should contact our Financial Services Practice.

Click here to read FINRA Rule 2111

CFTC

CFTC Roundtable to Discuss "Available to Trade" Provision

The staff of the Commodity Futures Trading Commission (CFTC) will hold a public roundtable to discuss the "available to trade" provision for swap execution facilities (SEFs) and designated contract markets (DCMs) on January 30, at 9:30 am (Eastern Time). The roundtable is set to discuss: (1) the filing process under Part 40 of the CFTC's regulations for a DCM or SEF to notify the CFTC that it has determined that a swap is "available to trade"; (2) the factors that a DCM or SEF must consider to make an "available to trade" determination; and (3) the meaning and parameters of "economically equivalent swap."

A copy of the roundtable agenda is available here. The CFTC press release containing further information regarding the roundtable is available here.

CFTC Releases Results of Limited Reviews of Future Commission Merchants

On January 25, the Commodity Futures Trading Commission released the findings of limited reviews of future commission merchants (FCMs) conducted to assess compliance with requirements to segregate customer funds (including a review of an FCMs obligation to set aside, in secured accounts, funds deposited by customers for trading on foreign boards of trade). As of the review date for each FCM, all of the FCMs that were reviewed were in compliance with the segregation or secured amount requirements.

Further information regarding the scope, methodology, and findings of the limited review are available here.

LITIGATION

Delaware Follows "Reasonable Conceivability" Standard for Motions to Dismiss

The Delaware Supreme Court recently held that a "reasonable conceivability" rather than a "plausibility" standard governs motions to dismiss in state court proceedings. The Court held that notwithstanding the (federal) "plausibility" standard adopted by the U.S. Supreme Court in two recent decisions, the governing pleading standard in Delaware to survive a motion to dismiss, "reasonable conceivability," was a "minimal" one. The Delaware Supreme Court explained that the federal "plausibility" standard "invites judges to determin[e] whether a complaint states a plausible claim for relief and draw on . . . judicial experience and common sense" whereas, under the less stringent "reasonable conceivability" standard, a complaint cannot be dismissed unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances. The Delaware Supreme Court re-emphasized that until it decides otherwise, or a change is duly effected through the Civil Rules process, the governing pleading standard in Delaware to survive a motion to dismiss will remain the "reasonable conceivability" standard.

Cambium Ltd. v. Trilantic Capital Partners, No. 363, 2011 (Del. Supr. Jan. 20, 2011).

Court Dismisses Securities Fraud Claim for Failure to Allege Economic Loss

Notwithstanding a high level corporate officer's allegedly duplicitous conduct, the U.S. District Court for the Western District of Pennsylvania recently dismissed a securities fraud claim based on the plaintiff's failure to allege economic loss attributable to the alleged misrepresentation of the defendant. The plaintiff, a corporation that sells graphite, brought this action against its former president, alleging, among other things, that the defendant had violated Section 10(b) of the Securities Exchange Act. Specifically, the plaintiff alleged that the defendant had made material misrepresentations in his nondisclosure, noncompetition and nonsolicitation agreements, which had induced the plaintiff to issue to the defendant shares of common stock as a part of an employee stock purchase agreement. The defendant operated the company for several years without disclosing that he had, all the while, not actually resigned from his former employer, a competitor of plaintiff's in the graphite sales industry. The Court classified this 10(b) claim as a "non-typical" one, *i.e.*, one where the allegations do not involve the price of a publicly-traded security. The Court agreed with the defendant that the plaintiff had failed to allege that it had suffered any economic loss, and by extension, loss causation, *i.e.*, economic loss attributable to the alleged misrepresentation of the defendant, both of which are necessary to state a claim for securities fraud. As such, the court dismissed the securities fraud claim.

Specialty Graphite Services, Inc. v. Chiodo, No. 2:11-cv-1438 (W.D. Pa. Jan. 19, 2012).

BANKING

CFPB and FTC Pledge to Work Together

On January 23, the Consumer Financial Protection Bureau, which regulates banks over $10 billion in assets and non-bank consumer financial products and services, and the Federal Trade Commission entered into a Memorandum of Understanding to develop a framework for working together in many areas, including:

- coordinating rules, law enforcement and "other activities";
- consulting prior to beginning an investigation;
- cooperating on consumer education efforts; and
- sharing consumer complaints.

The arrangement, which among other things seeks to avoid duplication or conflict with respect to certain rulemaking activities, was required by law.

Click here for more information.

FSB Announces Creation of Legal Entity Identifier Expert Group and Industry Advisory Panel

The Financial Stability Board (FSB), created under the auspices of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), announced last week the creation of a Legal Entity Identifier (LEI) Expert Group. The LEI Expert Group will be made up of public officials from around the world and supported by an industry advisory panel. The FSB has committed the group to deliver proposals by April on the implementation of a global LEI system for review by the FSB and delivery to the G-20 at the June 2012 Summit. The Treasury Department stated, "During the financial crisis, market participants and regulators did not have the information they needed to assess exposures to risky or failing companies globally. In the United States, the Dodd-Frank Act addressed this gap by creating the Office of Financial Research (OFR) to improve the information we have about our financial system. One of the OFR's most important initiatives to date has been advancing the establishment of a legal entity identifier, a global standard that will enable regulators and companies around the world to, for the first time, quickly and accurately identify parties to financial transactions.

For more information, click here.

EXECUTIVE COMPENSATION AND ERISA

Victory for Board of Directors in Executive Pay Lawsuit

Plaintiffs' lawyers have recently attempted to convert a negative shareholder advisory "say on pay" vote under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) into a breach of fiduciary duty where the board of directors implements a compensation program and awards thereunder. A U.S. district court in Oregon has rejected such a claim on procedural grounds, applying Delaware corporate law in affirming the business judgment presumption for the directors' vote. Plumbers Local No. 137 Pension Fund v. Davis.

While the "say on pay" rules issued by the Securities and Exchange Commission are mandated by Dodd-Frank, it is those SEC rules that require companies to have such a vote. More importantly, the vote is on ALL executive compensation and its elements, not any specific aspect thereof.

The company in question, Umpqua Holdings Corp., indicated in its corporate proxy statement that its executives had met their independent and collective goals for 2010 and were rewarded with incentive pay. The board approved the compensation program and awards thereunder and then submitted the program and awards to shareholders for an advisory vote under Dodd-Frank. A majority of the shareholders rejected the entire package – not any specific aspect thereof. Thereafter, the board notified shareholders that it would endeavor to more closely link executive pay to stock price and dividend performance, but maintained the incentive award.

A shareholder derivative suit followed. The defendants moved to dismiss on the grounds that no pre-lawsuit demand was made, as is normally required for derivative suits. The court granted defendants' motion because shareholders were unable to establish that the pre-lawsuit demand was futile, as plaintiffs failed to plead facts establishing that the directors were not independent or disinterested. The court also rejected the shareholder argument that the demand be excused because the board members faced a substantial likelihood of liability. In doing so, the court rejected the holding of a similar case brought under Ohio law against Cincinnati Bell, Inc. in NECA-IBEW Pension Fund v. Cox.

The court noted that futility can be shown where reasonable doubt is created that the challenged action was otherwise the valid exercise of business judgment and rejected the argument that reasonable doubt existed merely because of the company's poor financial performance and the shareholder's disapproval of the incentive pay package. In this case, the board's actions did not violate any corporate bylaws, shareholder agreement or legally mandated reporting or disclosure requirement. Accordingly, the attempted leveraging of the advisory "say on pay" vote by shareholders was unsuccessful.

UK DEVELOPMENTS

David Einhorn and Greenlight Capital Inc. Fined £7.2M for Insider Trading

On January 25, the UK Financial Services Authority (FSA) announced the imposition of penalties totaling £7.3M (approximately $11.5M) on David Einhorn and Greenlight Capital Inc. (Greenlight), for market abuse in June 2009 in relation to trading in equities of Punch Taverns plc (Punch).

On June 9, 2009, when 13.3% of Punch's outstanding equity capital was held by funds managed by Greenlight, Einhorn participated in a forty five minute conference call (the Punch Call) during which it was disclosed to him by a corporate broker acting on behalf of Punch that the company had reached an advanced stage of planning a sizeable equity fundraising. Very shortly after the end of the Punch Call ,Einhorn gave instructions for the sale all of Greenlight's holding in Punch The FSA Decision Notice states that "Mr. Einhorn decided to sell on the basis of the inside information he received on the Punch Call (albeit not solely on this basis)." Between June 9 and June 12, 2009, Greenlight sold 11.65 million Punch shares, reducing its holding in Punch from 13.3% to 8.98%.

On June 15, 2009, Punch announced a £375 million (approximately $588 million) fundraising. Following that announcement the price of Punch shares dropped by just under 30%. Greenlight's sale of shares prior to the fundraising announcement therefore avoided losses of approximately £5.8 million (approximately $9.1 million).

The FSA Decision Notice states that, "Despite being a serious case of market abuse which merits the imposition of a substantial financial penalty, the market abuse was not deliberate or reckless. Mr. Einhorn did not believe that the information that he had received was inside information, and he did not intend to commit market abuse. Nevertheless, the FSA considers Mr. Einhorn's error of judgment to be a serious failure to act in accordance with the standards reasonably expected of market participants." The Decision Notice also states that, "Having received the information, although it is accepted that he did not believe that it was inside information, before dealing he should have taken steps to ensure that it was not before dealing, such as obtaining compliance or legal advice, or contacting Punch management again to specifically clarify whether the information he had been given was inside information."

Tracey McDermott, FSA's acting director of enforcement and financial crime, said: "Einhorn is an experienced professional with a high profile in the industry. We expect someone in his position to be able to identify inside information when he receives it and to act appropriately. His failure to do so is a serious breach of the expected standards of market conduct. It is highly damaging to market confidence when privileged shareholders commit market abuse, and the high penalty reflects the seriousness of his breach."

Einhorn's fine is £3,638,000 (approximately $5.7 million), a penalty element of £3 million and £638,000 with respect to disgorgement of financial benefit. Greenlight's fine is £3,650,795 (approximately $5.7 million), a penalty element of £3 million and £650,795 with respect to disgorgement of financial benefit.

For more information about David Einhorn, click here.
For more information about Greenlight Capital, click here.

FSA Issues Discussion Paper on Implementing AIFMD

On January 23, the UK Financial Services Authority (FSA) published a discussion paper (DP12/1) on the implementation of the EU Alternative Investment Fund Managers Directive (2011/61/EU) (AIFMD). The UK is required to transpose the AIFMD into UK Law by July 22, 2013.

In DP12/1, the FSA indicates that its objectives are (1) to develop a well-informed proportionate and effective regulatory policy in relation to AIFMD; and (2) to assist stakeholders towards "AIFMD-readiness." The FSA seeks comments on the following topics:

- How the AIFMD will be implemented in the UK.
- The scope of the AIFMD.
- Operating requirements on alternative investment fund managers (AIFMs) including general principles. organizational requirements, risk management, delegation and prudential requirements.
- Management requirements on AIFMs including valuation, liquidity management, use of leverage and securitization.
- Transparency issues such as annual reporting, disclosure to investors and reporting to the FSA.
- Requirements on Depositaries including duties such as the safekeeping of assets, oversight of administrative functions and the standard of liability.
- Requirements for marketing, including passporting notifications, private placement, marketing to retail investors and public offers of listed alternative investment funds (AIFs).
- Categories of AIFs and specialist regimes that apply to certain AIFs such as listed AIFs.

The consultation process under DP12/1 will run for a two-month period from January 23 to March 23, 2012. Responses should be submitted by March 23 at the latest.

DP12/1 is the first part of the UK's AIFMD implementation and consultation process. A consultation paper from the Treasury is expected to be issued in February.

For more information, click here.

EU DEVELOPMENTS

EU Council of Ministers Updates Position on EMIR

On January 24, the EU Council of Ministers (the Council) published a press release setting out its evolving position with respect to the proposed European Market Infrastructure Regulation (EMIR).

The press release indicates that the Council has adjusted its position in negotiations on EMIR with the European Parliament to "facilitate rapid agreement" so as to enable EMIR to be adopted by the European Parliament at first reading.

The main change relates to the introduction of an enhanced role for European Securities and Markets Authority (ESMA) and the college of national regulator supervisors in the procedure for authorizing central counterparties (CCPs). The Council's earlier approach specified that authorization of a CCP by its home member state regulator could only be blocked by a negative opinion of the college of supervisors supported by a vote of "unanimity minus one" (i.e. all members of the college, excluding the home state regulator). The Council has now adopted an amended position introducing two additional alternative safeguards. First, following a negative opinion of the college of supervisors, with "unanimity minus one", the home member state can refer the matter to ESMA for binding mediation; and second, if a sufficient majority in the college of supervisors opposes authorization of a CCP, the issue maybe referred to ESMA for binding mediation. ("Sufficient majority" is defined as two-thirds of college members, with votes in the college limited to two per member state for colleges of up to and including 12 members, and three for colleges above that size.)

The Press Release also mentions changes in the Council position on two other points:

- CCPs from third countries will only be recognized in the EU if the legal regime of the relevant third country provides for an effective equivalent system for the recognition of CCPs authorized under foreign legal regimes.

- Pension schemes will be exempt from the clearing obligation for three years, extendable by another two years, and then a further year, subject to reports justifying the deferrals.

EMIR is due to be considered by the European Parliament in February 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
Daniel J. Silverthorn	312.902.5502	daniel.silverthorn@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
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
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

Michael S. Gordon	212.940.6666	michael.gordon@kattenlaw.com
Elizabeth D. Langdale	212.940.6367	elizabeth.langdale@kattenlaw.com

BANKING

Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com

EXECUTIVE COMPENSATION AND ERISA

Gregory K. Brown	312.902.5404	gregory.brown@kattenlaw.com

UK DEVELOPMENTS

Edward Black	44.20.7776.7624	edward.black@kattenlaw.co.uk

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

Published for clients as a source of information. The material contained herein is not to be construed as legal advice or opinion.

CIRCULAR 230 DISCLOSURE: Pursuant to regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND 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.