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SEC/CORPORATE

SEC's Division of Corporation Finance Issues Bulletin Regarding Shareholder Proposals

On October 18, the staff of the Division of Corporation Finance of the Securities and Exchange Commission issued a legal bulletin (No. 14F) providing guidance relating to shareholder proposals under Rule 14a-8 promulgated under the Securities Exchange Act of 1934, as amended. This bulletin discusses the staff's reversal of its position regarding proof of ownership for shareholder proposals, clarifies the treatment of revised shareholder proposals, provides guidance on common errors shareholders can avoid when submitting proof of ownership to issuers, clarifies procedures for withdrawing no-action requests for proposals submitted by multiple proponents, and outlines the SEC's use of email to transmit no-action responses.

Proof of Ownership for Shareholder Proposals

Under Rule 14a-8(b), to be eligible to submit a shareholder proposal, a shareholder must have continuously held at least $2,000 in market value, or 1%, of the issuer's securities entitled to be voted on the proposal at the shareholder meeting for at least one year as of the date the shareholder submits the proposal. A shareholder that is not the registered owner of the securities must prove its eligibility to submit a proposal by submitting a written statement from the record holder verifying that, at the time the proposal was submitted, the shareholder held the required amount of securities continuously for at least one year. Most shareholders are not registered owners of securities, but hold their securities in book-entry form through a securities intermediary, such as a broker or a bank, which deposits customer securities with, and holds the securities through, the Depositary Trust Company (DTC). In *The Hain Celestial Group, Inc.* (Oct. 1, 2008), the staff had previously taken the position that an introducing broker could be considered a record holder for purposes of Rule 14a-8(b)(2)(i) even though the introducing broker does not hold the securities. As introducing brokers generally are not DTC participants, and therefore typically do not appear on the DTC's securities position listing, *Hain Celestial* had required issuers to accept proof of ownership letters from such brokers in cases where, unlike the positions of registered owners and brokers and banks that are DTC participants, the issuer is unable to verify the positions against its own or its transfer agent's records or against the DTC's securities position listing. In light of two recent court cases, the staff has reversed its position in *Hain Celestial*, and, going forward, only banks and brokers who are participants in DTC will be viewed as record holders of securities that are deposited at DTC. The result of the staff's reversal is that a shareholder that has purchased shares through an introducing broker must submit a proof of ownership statement from the introducing broker and from the DTC participant holding shares for the account of the introducing broker. However, the staff will grant no-action relief to an issuer on the basis that the shareholder's proof of ownership is not from a DTC participant only if the issuer's notice of defect adequately describes the required proof of ownership. Under Rule 14a-8(f)(1), the shareholder will have an opportunity to obtain the requisite proof of ownership after receiving the notice of defect.

Submission of Revised Shareholder Proposals

The bulletin clarifies that a shareholder that submits a revised proposal before the deadline for receiving shareholder proposals is deemed to have effectively withdrawn the initial proposal and is not in violation of the one-proposal limitation in Rule 14a-8(c). Further, if the issuer intends to submit a no-action request, it must do so

with respect to the revised proposal. If a shareholder submits revisions to a proposal after the deadline for receiving shareholder proposals, the issuer is not required to accept the revisions. If the issuer does not accept the revisions, it must treat the revised proposal as a second proposal and submit a notice stating its intention to exclude the revised proposal, which notice may cite Rule 14a-8(e) as the reason for exclusion.

Additional Guidance

The bulletin provides the following additional guidance concerning shareholder proposals:

- the staff noted common errors shareholders make when submitting a proof of ownership letter to an issuer, including a failure of the letter to verify the shareholder's ownership for the entire one-year period preceding and including the date the proposal is submitted and a failure of the letter to confirm continuous ownership of the securities for the requisite time period, and the bulletin provides form language that a shareholder may instruct his or her broker or bank to include in the required verification of ownership;

- where a shareholder proposal has been submitted by multiple proponents and an issuer has submitted a no-action request, the staff will now process an issuer request withdrawing the no-action request if the issuer provides a letter from the lead filer that includes a representation that the lead filer is authorized to withdraw the shareholder proposal on behalf of each proponent identified in the issuer's no-action request; and

- the staff encourages issuers and proponents to include email contact information in any correspondence to each other or the staff and announced that the staff will transmit its no-action responses solely by email to issuers and proponents where email contact information has been provided.

Click here for Staff Legal Bulletin No. 14F.

House Committee Approves "Facebook" Bill

On October 26 the House Committee on Financial Services approved H.R. 2167 (the "Private Company Flexibility and Growth Act") and sent the Bill to the House floor.

The Bill would amend the Securities Exchange Act of 1934 to change the threshold number of shareholders requiring registration under the Exchange Act to 1,000 holders of record. Excluded from the definition of holders of record will be securities held by persons who receive the securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of section 5 of the Securities Act of 1933.

Under current law a private company is required to register under the Exchange Act if, among other things, its securities are held of record by more than 500 persons. According to published reports, no corresponding legislation has as yet been introduced in the Senate.

To view the Bill, click here.

BROKER DEALER

FINRA Requests Comments on Proposal to Require Carrying or Clearing Member Firms to Maintain and Keep Current Certain Records in a Central Location

The Financial Industry Regulatory Authority, Inc. has issued Regulatory Notice 11-48 (the Notice), which seeks comment on proposed new FINRA Rule 4516 (the Rule). The proposed rule would require each carrying or clearing member firm to maintain and keep current certain records in one central location. The comment period expires December 9.

According to the Notice, FINRA proposed the Rule because it is essential that regulators be able to take prompt action with respect to customer accounts of a carrying or clearing member firm that can no longer continue to operate due to financial or operational problems. To that end, FINRA believes it is critical that a carrying or clearing member firm maintain and keep current certain documents and information at a specially designated area

in the firm's principal office that would be immediately available to representatives of FINRA, the Securities and Exchange Commission, and Securities Investor Protection Corporation. Specifically, the records to be maintained and kept current must contain: i) a description of all customer accounts and ranges on the general ledger and identification of the associated persons responsible for such accounts; ii) a mapping of the general ledger accounts; iii) a description of any system under FINRA Rule 4370(g) that is necessary to ensure processing of transactions; iv) a list of all bank accounts and related documentation; v) an identification of all accounts and ranges on the stock record; vi) an identification of all control locations; vii) copies of subordination agreements; viii) copies of clearing agency, clearing bank, and custodian agreements; ix) copies of agreements related to the outsourcing of functions critical to the transfer of customer accounts or member firm liquidation; and x) the most recent copy of a member firm's business continuity plan.

Click here to read Regulatory Notice 11-48.

FINRA Provides Guidance on Advertising Regulation Issues

The Financial Industry Regulatory Authority, Inc. has issued Regulatory Notice 11-49 (the Notice), which provides guidance to member firms on certain issues regarding NASD Rule 2210 (the Rule) and communications with the public. The Notice reminds firms that: i) the Rule 2210(c) filing requirement concerning sales literature and advertisements of registered investment companies includes research reports that fall within the definition of advertisement or sales literature, and ii) the Rule 2210(c) filing requirement concerning sales literature and advertisements of public direct participation programs includes the advertisements and sales literature of exchange-traded products organized as grantor trusts that meet the definition of a FINRA Rule 2310 direct participation program.

The Notice notifies firms that, due to inconsistent treatment by firms of the inflation adjustment when calculating the yield of a fund investing in Treasury Inflation-Protected securities, FINRA interprets Rule 2210(d) to require a firm to include the fund's current yield in its advertisements and sales literature, along with certain disclosures. The Notice also instructs firms that it is a violation of FINRA IM-2210-4 for firms and their associated persons to include in any firm or associated person trademark the FINRA trademark or reference to FINRA membership. In addition, FINRA reminds firms to identify related prior filings when the firm submits a new communication filing to the Advertising Regulation staff for review.

Click here to read Regulatory Notice 11-49.

PRIVATE INVESTMENT FUNDS

SEC Adopts Form PF

On October 26, the Securities and Exchange Commission adopted Form PF, which it jointly designed with the Commodity Futures Trading Commission to collect systemic risk data about hedge funds and other private funds. The CFTC is expected to vote on adopting the form within the next week. While Form PF is not yet available, SEC Chairman Mary Schapiro indicated that the new form reflects changes to the original proposal. These changes include:

- establishing a minimum threshold for filing of $150 million for all private fund advisers and increasing the filing threshold for private equity fund advisers;
- extending the filing deadline from 15 days to 60 days after the end of each quarter for larger hedge fund advisers and from 90 days to 120 days after the end of each year for smaller advisers and large private equity fund advisers;
- decreasing filing frequency from quarterly to annually for large private equity fund advisers;
- reducing the amount of information collected from large private equity fund advisers; and
- permitting the use of internal rather than standardized calculation methodologies.

There will be a two-stage phase-in period for compliance with Form PF. Most private fund advisers will be required to begin filing the form following the end of their first fiscal year or fiscal quarter, as applicable, that ends on or after December 15, 2012. However, private fund advisers with at least $5 billion in assets under management must begin filing the form following the end of their first fiscal year or fiscal quarter, as applicable, to end on or after June 15, 2012.

To read the SEC press release and fact sheet, click here.

To read Mary Schapiro's speech, click here.

To read a summary of the original Form PF proposal in the January 28, 2011 edition of *Corporate and Financial Weekly Digest*, click here.

CFTC

CFTC Allows U.S. Trading of Taiwan Futures Exchange's Futures Contract on GTEX

On October 24, the Commodity Futures Trading Commission's Office of General Counsel issued a no-action letter allowing the offer and sale in the United States of the GreTai Securities Market Capitalized Weighted Stock Index (GTEX) futures contract that is traded on the Taiwan Futures Exchange.

A copy of the no-action letter may be found here.

INVESTMENT COMPANIES AND INVESTMENT ADVISORS

Please see " SEC Adopts Form PF" in **Private Investment Funds** above.

LITIGATION

New Jersey District Court Dismisses Securities Fraud Action With Prejudice

The plaintiff, a former officer of Alfacell Corporation (Alfacell), a biopharmaceutical company engaged in the development of cancer therapies, brought an action against his former employer, alleging violations of Section 10(b) of the Securities and Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5. The plaintiff, who had been granted stock options in Alfacell, alleged, *inter alia*, that Alfacell had knowingly and/or recklessly disseminated false and misleading information concerning the completion date of a clinical trial for an experimental new cancer treatment. The U.S. District Court for the District of New Jersey dismissed the plaintiff's claims under Section 10(b) and Rule 10b-5 with prejudice. After considering Alfacell's alleged statements in the context of the "the total mix of information available to investors," the court determined that the plaintiff had failed to demonstrate that the alleged statements and omissions constituted material misrepresentations. The court reasoned that, even assuming the statements at issue were false, a reasonable investor, viewing all of the information made available by Alfacell, would not have considered Alfacell's statements as "having significantly altered the total mix of information available" to the investing public.

Love v. Alfacell Corp., No. 09-5199 (MLC), 2011 WL 4915874 (D.N.J. Oct. 17, 2011)

PA District Court Deems "Piercing the Corporate Veil" to be Independent Cause of Action

The plaintiff filed an action alleging sexual harassment and retaliation by the defendants, but the only claim asserted against defendant, Pressley Ridge Foundation (the Foundation), was a claim for "piercing the corporate veil." This claim did not plead a separate cause of action, but rather, sought to pierce the corporate veil in order to assess liability against the Foundation for the alleged wrongful acts of the other two defendants. The U.S. District Court for the Western District of Pennsylvania held that piercing the corporate veil was a valid, independent cause of action. However, the Court granted the Foundation's motion to dismiss the complaint, finding that plaintiff's mere recitation of the elements of a veil-piercing claim was insufficient and that such a claim needed to be supported by specific factual averments rather than mere legal conclusions.

Patroski v. Ridge, No. 2:11-cv-1065, 2011 WL 4955274 (W.D. Pa. Oct. 18, 2011)

BANKING

Federal Reserve Announces Annual Indexing Related to Reserve Requirements Under Regulation D

The Federal Reserve Board (the Board) on October 26 announced the annual indexing of the reserve requirement exemption amount and of the low reserve tranche for calendar 2012. These amounts are used in the calculation of reserve requirements of depository institutions. The Board also announced the annual indexing of the nonexempt deposit cutoff level and the reduced reporting limit that will be used to determine deposit reporting panels effective in 2012.

All depository institutions must hold a percentage of certain types of deposits as reserves in the form of vault cash, as a deposit in a Federal Reserve Bank, or as a deposit in a pass-through account at a correspondent institution. Reserve requirements currently are assessed on the depository institution's net transaction accounts (mostly checking accounts). Depository institutions must also regularly submit deposit reports of their deposits and other reservable liabilities. For net transaction accounts in 2012, the first $11.5 million, up from $10.7 million in 2011, will be exempt from reserve requirements. A three percent reserve ratio will be assessed on net transaction accounts over $11.5 million up to and including $71.0 million, up from $58.8 million in 2011. A 10 percent reserve ratio will be assessed on net transaction accounts in excess of $71.0 million. These annual adjustments, known as the low reserve tranche adjustment and the reserve requirement exemption amount adjustment, are based on growth in net transaction accounts and total reservable liabilities, respectively, at all depository institutions between June 30, 2010 and June 30, 2011.

For depository institutions that report weekly, the low reserve tranche adjustment and the reserve requirement exemption amount adjustment will apply to the 14-day reserve computation period that begins Tuesday, November 29, 2011, and the corresponding 14-day reserve maintenance period that begins Thursday, December 29, 2011. For depository institutions that report quarterly, the low reserve tranche adjustment and the reserve requirement exemption amount adjustment will apply to the seven-day reserve computation period that begins Tuesday, December 20, 2011, and the corresponding seven-day reserve maintenance period that begins Thursday, January 19, 2012.

The Board also announced changes in two other amounts, the nonexempt deposit cutoff level and the reduced reporting limit, that are used to determine the frequency with which depository institutions must submit deposit reports. The linked Federal Register notice contains a description of the new boundaries for deposit reporting that will be effective in 2012.

To view the notice, click here.

EU DEVELOPMENTS

European Commission Publishes MiFID II Proposals

On October 20, the European Commission published the MiFID II proposals for amendments to MiFID (the Markets in Financial Instruments Directive (2004/39/EC)) The MiFID II proposals consist of a Regulation (MiFIR) on markets in financial instruments and on OTC derivatives, central counterparties and trade repositories and a Directive (MiFID II) on markets in financial instruments amending MiFID. The use of a Regulation directly applicable into the law of each EU member state reflects the need to achieve a uniform set of rules in certain areas.

The MiFID II proposals are intended to:

- Introduce more robust and efficient market structures.
- Take account of technological and market developments since MiFID was implemented in November 2007.
- Increase transparency of the markets for equities, derivatives and other investments.
- Reinforce supervisory powers and introduce a stricter framework for commodity derivatives markets.
- Introduce stronger investor protection.

The MiFID II proposals will now pass to the European Parliament and the Council of the European Union for consideration, negotiation and adoption. Once adopted, the Regulation, the MiFID II Directive, and the necessary technical rules implementing these requirements, will come into force on the same date. This is likely to be towards the end of 2014.

The proposed MiFIR sets out requirements relating to:

- Publication of trade transparency data;
- Transaction reporting;
- Non-discriminatory access to clearing facilities;
- Mandatory trading of derivatives on organized trading venues;
- Specific supervisory actions regarding financial instruments and positions in derivatives;
- Provision of services by third-country firms.

The proposed MiFID II, which will replace Directive 2004/39/EC and amend existing requirements on the:

- Authorization, organizational and conduct of business requirements for investment firms and trading venues.
- Authorization and ongoing obligations for providers of market data and other reporting services.

The proposed EU legislation on over-the-counter (OTC) derivatives, central counterparties and trade repositories (known as the European Market Infrastructure Regulation (EMIR)), and on short-selling and credit default swaps, both complement MiFID II. EMIR aims to minimize counterparty credit risk and operational risk. The proposed Regulation on short selling and certain aspects of credit default swaps is intended to reduce risks associated with short selling and the use of credit default swaps. Each is likely to enter into force before MiFID II

Katten Muchin Rosenman LLP will produce a series of *Client Advisories* on various aspects of the MiFID II proposals. The first two of these Advisories will address proposals affecting proprietary traders and algorithmic traders and issues relating to the mandatory trading of derivatives on organized trading venues and mandatory clearing.

For more information about the MiFID II proposals, 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
James B. Anderson	312.902.5620	james.anderson1@kattenlaw.com

FINANCIAL SERVICES

Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@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
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

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

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