

CORPORATE & FINANCIAL

WEEKLY DIGEST

November 16, 2012

Due to the holiday, *Corporate and Financial Weekly Digest* will not be published on November 23. The next issue will be distributed on November 30.

SEC/CORPORATE

SEC Rejects Motion to Stay Resource Extraction Disclosure Rules

On November 8, the Securities and Exchange Commission denied a motion to stay the effective date of the recently enacted resource extraction disclosure rules. These rules, adopted by the SEC on August 22, require public companies that are engaged in the development of oil, natural gas or minerals to publicly disclose each payment of more than \$100,000 made to any foreign government or the US federal government for each “project” related to extractive industries. Various trade associations and the Chamber of Commerce of the United States of America filed the motion to stay on October 25 in connection with their lawsuit challenging the resource extraction disclosure rules, which they filed on October 10. Click [here](#) to view a *Katten Corporate & Financial Weekly Digest* article discussing the resource extraction disclosure rules, and [here](#) to view a *Katten Corporate & Financial Weekly Digest* article discussing the lawsuit.

The SEC ruled that the movants failed to show that implementation of the resource extraction disclosure rules as scheduled would cause “imminent, irreparable harm.” In doing so, the SEC noted that a determination in the lawsuit could come as soon as the spring of 2013. The resource extraction disclosure rules do not require a company to file a Form SD until 150 days after the first fiscal year ending after September 30, 2013, at which point the lawsuit will likely have been determined. The SEC found that initial compliance costs that companies may incur to prepare for the rules would not constitute irreparable harm.

The SEC also found that the movants did not demonstrate a likelihood of success on the merits, noting that the adopting release for the rules contained strong explanations regarding the validity of the rules and an appropriately thorough economic analysis. The SEC was also not persuaded that a stay would serve the public interest.

In contrast to this ruling, in 2010 the SEC granted a request to stay the effective date of the proxy access rules implemented by Exchange Act Rule 14a-11 pending judicial review. The SEC noted that the stay would avoid potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the proxy access rules were to become effective during the pendency of a challenge to their validity. The United States Court of Appeals for the District of Columbia Circuit vacated Rule 14a-11 in 2011.

Click [here](#) to view the SEC’s order denying the stay.

Register for Our 2013 Proxy Season Update Webinar

On Thursday, December 13 at noon CST please join Katten Muchin Rosenman LLP, Ernst & Young LLP and Georgeson Inc. for a timely discussion via webcast of key developments and trends impacting public companies in the 2013 Annual Report and Proxy Season.

Further details are available [here](#); click [here](#) to register.

Please see “[SEC and Department of Justice Release Detailed FCPA Resource Guide](#)” in [Litigation below](#)

CFTC

CFTC Proposes Swaps Report

On November 14, the Commodity Futures Trading Commission issued a proposed version of a report the CFTC is required to produce (as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act) that aims to provide the public with information concerning the swaps market (Swaps Report). The Swaps Report will include information on par with, or in greater detail than, information market participants are currently accustomed to receiving with regard to the CFTC’s Commitments of Traders Report, which provides trade information pertaining to the futures and options markets. It is proposed that such information will include the estimated notional amounts of swaps outstanding (broken down by asset class) and total weekly swap transaction volumes for interest rates swaps, credit swaps, equity swaps and commodity swaps.

The Swap Data Recordkeeping and Reporting Rule (17 CFR Part 45) sets forth the type of information required to be reported by swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, major swap participants and other swap counterparties. The CFTC plans to publish the Swaps Report weekly (every Wednesday at 3:30 p.m., beginning in spring 2013).

More information on the Swaps Report can be found [here](#).

CFTC Issues FAQ on Energy Agreements

The Commodity Futures Trading Commission has responded to questions raised by market participants regarding whether such participants must classify physical commercial agreements for energy supply and consumption as “commodity options.” The FAQ describes in more detail the three-part test (included in the CFTC’s and Securities and Exchange Commission’s release on the definition of “swap” and its counterparts) to be used in making this determination.

More information on the FAQ can be found [here](#).

House Financial Services Committee Releases Staff Report on MF Global

The US House of Representatives Financial Services Subcommittee on Oversight and Investigations (Committee) has released a report on the collapse of MF Global (Report). The Report finds that Jon Corzine, MF Global’s Chairman and CEO, made a number of decisions that ultimately caused MF Global’s bankruptcy. The Committee also found fault with the regulatory agencies, rating agencies and the New York Federal Reserve Board, among others. In particular, the Report faults the Commodity Futures Trading Commission and the Securities and Exchange Commission for failing to share critical information that would have provided a more complete picture of the company’s financial health. The Report also found that rating agencies, such as Moody’s and S&P, failed to sufficiently review MF Global filings or understand the nature of various aspects of MF Global’s business, thereby missing the opportunity to identify many risks that should have been identified.

The Committee’s report can be found [here](#).

CFTC to Appeal Federal Court Decision to Vacate Position Limits Rule

In a 3-2 vote, the commissioners of the Commodity Futures Trading Commission voted to appeal a federal court’s September decision vacating the position limits rule. In a statement, the CFTC stated that enforcement of the position limits rule is “critically important” to the marketplace.

More information on the appeal can be found [here](#).

LITIGATION

SEC and Department of Justice Release Detailed FCPA Resource Guide

On November 14, the Criminal Division of the Department of Justice and the Enforcement Division of the Securities and Exchange Commission released long-awaited guidance on the Foreign Corrupt Practices Act (FCPA). The FCPA was enacted in 1977 and contains both anti-bribery and accounting provisions aimed at eliminating corruption within, and increasing the transparency of, United States corporations operating abroad. The key component of the FCPA is a prohibition against bribing foreign officials and a requirement that companies keep accurate and transparent books and records when dealing with foreign entities. According to the Department of Justice and the SEC, the new guide aims to help public companies better understand the FCPA in order to prevent violations of the FCPA, which in turn will better protect investors in those companies.

Although significant legal ambiguities still remain within the FCPA, the new guide offers some additional insights into the Department of Justice's and SEC's views of the statutory requirements of the FCPA, such as what they view as a *de minimus* gift to a foreign official. The guide also provides actual examples of enforcement actions and, more importantly, instances where enforcement actions were never brought because of a company's self-reporting and robust compliance measures.

It is important to note that the guide represents the Department of Justice's and SEC's views and interpretations of the FCPA, which is invaluable in predicting how they will enforce and prosecute FCPA violations, but the guide is in no way binding on the courts. Indeed, in certain instances courts have rejected some of the views expressed therein.

A Resource Guide to the U.S. Foreign Corrupt Practices Act by the Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission is available [here](#).

Delaware Supreme Court Rejects Chancery Court's Determination that Default Fiduciary Duties Apply to All LLC Members

The Delaware Supreme Court ultimately affirmed the ruling of the Delaware Chancery Court in finding the manager of an LLC in violation of his contractual fiduciary duties, but while doing so it took pains to reject as unnecessary the Chancery Court's decision that default fiduciary duties apply to all LLC members under the Delaware Limited Liability Corporation Act (Delaware LLC Act).

Peconic Bay, LLC (Peconic Bay), a limited liability company formed to hold a long-term lease and to develop a golf course, appointed as its manager Gatz Properties, which is managed, controlled and partially owned by William Gatz (Gatz). As a sublease held by Peconic Bay was nearing its end, Gatz was approached by a third party interested in acquiring Peconic Bay's long-term lease. Despite several attempts by the third party, Gatz refused to negotiate. Instead, Gatz arranged for Peconic Bay to be sold to himself at an unfair price in a flawed auction, violating his contractual fiduciary duties as a manager of the LLC.

The Delaware Supreme Court upheld the Chancery Court's ultimate decision that Gatz violated his fiduciary duties, but only on contractual grounds. It wholly rejected the Chancery Court's conclusion that the Delaware LLC Act imposes default fiduciary duties on LLC members. The Delaware Supreme Court held that "reasonable minds could differ" on whether such default fiduciary duties were imposed by the Delaware LLC Act, and thus the Court of Chancery should not have reached that question when a contractual duty clearly existed.

Gatz Properties, LLC v. Auriga Capital Corporation, No. 11-1937-cv (Del. Nov. 7, 2012).

UK DEVELOPMENTS

FSA Requires Asset Managers to Address Conflicts of Interest

On November 9, the UK Financial Services Authority (FSA) issued a paper entitled "Conflicts of interest between asset managers and their customers: Identifying and mitigating the risks" (the Paper). The Paper resulted from a

thematic review of asset management firms conducted between June 2011 and February 2012 assessing their arrangements for managing conflicts of interest. The FSA stated that the thematic review was “prompted by evidence from our other supervisory work that some firms no longer saw conflicts of interest as a key source of potential detriment to their customers and had relaxed controls that we had considered to be well-established market norms.”

The matters covered in the thematic review and addressed in the paper include:

- How firms identified and controlled conflicts of interest;
- How firms managed the purchase of research and trade execution services on behalf of customers;
- How firms managed gifts and entertainment;
- How firms ensured customers have equal access to all suitable investment opportunities;
- How firms managed personal dealing by employees; and
- How firms allocated the cost of errors between themselves and their customers.

The FSA has concluded that the findings from the thematic review require it to take action to ensure firms comply with the various FSA rules relating to conflicts of interest. In particular, the FSA will require the board of directors of each asset management firm to consider the Paper at a board meeting and the CEO will be required to file an “attestation” in the form set out in the Paper confirming that the firm manages conflicts effectively and in compliance with FSA rules.

[Read more.](#)

FSA Publishes Consultation Paper on AIFMD Implementation

On November 14, the UK Financial Services Authority (FSA) published consultation paper CP12/32 “Implementing the Alternative Investment Fund Managers Directive” (AIFMD). CP12/32 includes FSA’s AIFMD implementation proposals in the following areas:

- The prudential regime applicable to alternative investment fund managers;
- The regime for depositaries, including eligibility, capital requirements and independence requirements;
- Incorporation into the FSA Rules of the AIFMD’s requirements as to organizational matters, duties in relation to management of funds and transparency obligations.

The FSA anticipates publishing a second AIFMD consultation paper in February 2013. A combined policy statement, relating to both consultations, will be published in June 2013. If it considers it practicable, the FSA endeavors to provide information at an earlier date on key issues arising from the consultation, to help affected firms prepare for AIFMD implementation with effect from July 2013.

Responses to the consultation are requested by February 1, 2013.

[Read more.](#)

FSA Fines Manager for Systemic Suitability Failings

On November 14, the UK Financial Services Authority (FSA) announced that it had fined Savoy Investment Management Limited (Savoy) £412,000 (approximately \$653,000) for failing to take reasonable care to ensure the suitability of the investment portfolios of its wealth management clients. Savoy was found to be in breach of

Principle 3 (management and control), Principle 9 (customers: relationships of trust) and rules COBS 9.2.1 to 9.2.3 on suitability requirements.

The FSA stated that Savoy had limited front office controls over the provision of investment advice and portfolio management services and it failed to take reasonable care to ensure the suitability of its advice and portfolio management services. This included failures to collect and record “know your client” information and compliance monitoring failures. The FSA had reviewed Savoy as part of its thematic review of the wealth management sector, which found there was an unacceptable risk of clients of wealth management firms experiencing unfavorable outcomes. Twenty-three of the sample of 52 Savoy files reviewed by the FSA were found not to contain sufficient information to determine suitability.

[Read more.](#)

For more information, contact:

SEC/CORPORATE

Robert L. Kohl	212.940.6380	robert.kohl@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
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@kattenlaw.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
Christopher T. Shannon	312.902.5322	chris.shannon@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
Robert Weiss	212.940.8584	robert.weiss@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 M. Rosensaft	212.940.6631	michael.rosensaft@kattenlaw.com
Allison Wuertz	212.940.6675	allison.wuertz@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.

©2012 Katten Muchin Rosenman LLP. All rights reserved.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

CENTURY CITY CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND ORANGE COUNTY 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.

