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SEC/CORPORATE

SEC Sets Rulemaking Agenda for 2013

In its fiscal year 2012 Agency Financial Report released last week, the Securities and Exchange Commission published its rulemaking agenda for 2013 under both the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and the Jumpstart Our Business Startups Act (JOBS Act) as follows:

- Propose and adopt rules to implement four executive compensation related provisions of the Dodd-Frank Act: new listing standards relating to specified "clawback" policies; disclosure requirements regarding performance-related executive compensation; executive pay ratios; and employee and director hedging. These rulemaking mandates did not have a statutory deadline under the Dodd-Frank Act;

- Finalize rules that disqualify securities offerings involving "bad actors" from relying on the safe harbor from registration provided by Rule 506 of Regulation D under the Securities Act of 1933 (the '33 Act); and

- Adopt rules to require many of the entities that the SEC regulates to establish programs to detect and respond to indications of identity thefts.

Under the mandates contained in the JOBS Act, the 2013 agenda includes adopting rules modifying the prohibition against general solicitation and general advertising in Rules 506 and 144A under the '33 Act (the SEC proposed these rules on August 29, as reported in a September 17, 2012 Katten *Client Advisory*) and implementing exemptions under the '33 Act for "crowd funding" offerings as well as modifying or adopting parallel provisions to Regulation A under the '33 Act to include offerings of up to $50 million.

The SEC did not provide a time frame within 2013 for the proposal and/or adoption of the above rules.

Read more.

SEC Accountants Speak at AICPA Conference

On December 3, staff of the Office of the Chief Accountant (OCA) of the Securities and Exchange Commission spoke at the 2012 National Conference of the American Institute of Certified Public Accountants (AICPA) Conference on Current SEC and Public Company Accounting Oversight Board (PCAOB) Developments. Topics discussed included the possible incorporation of International Financial Reporting Standards (IFRS) for US issuers; accounting standards convergence projects regarding revenue, leases and financial instruments; auditor independence and consultancy practices; internal control over financial reporting and the Committee of Sponsoring Organizations of the Treadway Commission's (COSO) framework update; the auditor's reporting model; audit policy matters and various international considerations.

In particular, the OCA's Acting Chief Accountant, Paul A. Beswick, noted that incorporating IFRS into the financial reporting system for US issuers may be the single most important accounting determination for the SEC since the 1930s. A Senior Associate Chief Accountant, Jenifer Minke-Girard, discussed and summarized the SEC's findings in its Final Staff Report on the Work Plan for considering the incorporation of IFRS into the financial reporting system for US issuers, which was originally issued by the OCA on July 13. Ms. Minke-Girard noted that the report was designed to provide information to the SEC and not to answer the fundamental question of whether transitioning to IFRS is in the best interests of the US securities markets and US investors. She also noted that the SEC has not made any policy decision as to whether IFRS should be incorporated into the financial reporting system for US issuers. Click here to view a Katten *Corporate and Financial Weekly Digest* article discussing the report, and click here for a copy of the report, titled "Work Plan for the Consideration of Incorporating International Financial Reporting Standards into the Financial Reporting System for U.S. Issuers – Final Staff Report."

The full text of the speeches made on December 3 by various members of the OCA is available here.

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.

CFTC

CFTC Issues No-Action Relief from CPO Registration

The Division of Swap Dealer and Intermediary Oversight (DSIO) of the Commodity Futures Trading Commission issued three no-action letters granting relief from commodity pool operator (CPO) registration for operators of certain funds of funds, family offices and business development companies (BDCs). In the first letter, DSIO provided relief to any operator of a fund of funds that, among other things, does not know and could not have reasonably known that the fund's indirect exposure to commodity interests exceeds the levels prescribed in CFTC Regulations 4.5 or 4.13(a)(3)(ii)(A) or (B). In order to obtain relief, an interested party must submit a claim to the CFTC prior to December 31, 2012. Such relief is available until the later of June 30, 2013, or six months after the DSIO issues revised guidance on *de minimis* calculation thresholds in Regulations 4.5 and 4.13(a)(3). The no-action letter regarding funds of funds is available here.

The second letter provides no-action relief to any operator of a family office, as defined by the Securities and Exchange Commission, if the eligible operator files for relief before December 31, 2012. The no-action letter regarding family offices is available here.

Pursuant to the third no-action letter, an operator of a BDC that is regulated by the SEC as such is also exempt from CPO registration under certain circumstances. An eligible operator of a BDC must file a claim with the CFTC before December 31, 2012, in order to obtain relief. The BDC no-action letter is available here.

NFA Issues Guidance on Annual Affirmation Requirement for CPO and CTA Exemptions

Commencing in 2012, each person or entity claiming an exemption from commodity pool operator (CPO) or commodity trading advisor (CTA) registration must annually affirm the applicable exemption within 60 days of the end of each calendar year. Any person or entity that does not affirm its applicable CPO or CTA exemption will be deemed to have requested to withdraw the exemption. The affirmation process can be completed through the National Future Association's online exemption system.

More information is available here.

Joint Press Statement Regarding OTC Derivatives Market

Global leaders and authorities overseeing the over-the-counter (OTC) derivatives market issued a joint press statement in furtherance of the agreement at the G-20 Pittsburgh Summit in 2009. In the joint statement, the leaders and authorities renewed their commitment to cooperate and consult each other in implementing sweeping changes to the OTC derivatives market, such as determinations regarding mandatory clearing requirements for certain derivatives products.

The joint press statement is available here.

LITIGATION

Court Finds Personal Jurisdiction over Foreign Business Under a Conspiracy Theory

The Delaware Supreme Court recently held that a foreign business entity was subject to personal jurisdiction in the state of Delaware under a conspiracy theory. The foreign defendant allegedly conspired with other defendants to divest the plaintiff of his interest in a joint venture, which plan was accomplished, in part, by causing the dissolution of a Delaware limited liability company (LLC) co-founded by the plaintiff. The Delaware Supreme Court held that in order to establish personal jurisdiction over a foreign entity under a civil conspiracy theory, facts must be alleged from which the court can infer that the foreign defendant knew or should have known that the conspiracy would have a Delaware nexus. The lower court found this requirement lacking, and held that the foreign defendant did not know about the Delaware connection until after the Delaware LLC had been dissolved. The Delaware Supreme Court disagreed with the trial court's analysis as to both the foreign defendant's knowledge and the overall scope of the conspiracy, reasoning that even if there was no direct evidence that the foreign defendant knew about the dissolution before it occurred, the facts established that the defendant *should have known* it was dealing with a Delaware company. Further, the Delaware Supreme Court found that the conspiracy did not begin or end with the dissolution of the Delaware company and that the foreign defendant knew that its business partner had been a Delaware entity shortly after the dissolution, while the conspiracy was still ongoing. On these bases, the Delaware Supreme Court reversed the lower court's dismissal of the action for lack of personal jurisdiction.

Matthew v. Flakt Woods Group SA, C.A. No. 5957-VCN (Del. Supr. Nov. 20, 2012).

Former Hedge Fund Founder Ordered to Pay $5 Million for Securities Law Violations

The US District Court for the Southern District of New York recently ordered the investment adviser to two hedge funds, and its managing director, to pay nearly $5 million in disgorgement, prejudgment interest and civil penalties for violations of the federal securities laws. Defendant Chetan Kapur, through his company ThinkStrategy Capital Management, LLC, induced investors into buying shares in two hedge funds he managed by making misstatements about the hedge funds' past and present performance, their assets, longevity, and other material misrepresentations. Defendants subsequently entered into consent judgments with the Securities and Exchange Commission and the court, and agreed to pay disgorgement of ill-gotten gains, prejudgment interest thereon, and civil penalties. The SEC requested disgorgement in the amount of $3.25 million; the approximate profits derived from the violations. The court rejected defendant's' argument that any legitimate business expenses should be deducted from this amount on the grounds that Kapur commingled business and personal expenses and did not maintain any books and records that distinguished between these expenses. On this basis, the court: (i) approved the entire amount of disgorgement requested by the SEC, (ii) approved over $700,000 in prejudgment interest, and (iii) granted the SEC's request for third-tier civil penalties, the most severe level available.

Securities and Exchange Commission v. Kapur, LILABOC, LLC d/b/a/ ThinkStrategy Capital Management, LLC, 11 Civ. 8094 (PAE) (S.D.N.Y. Nov. 29, 2012).

BANKING

FDIC Announces Systemic Risk Advisory Committee Meeting to Be Held December 10

The Federal Deposit Insurance Corporation (FDIC) on December 4 announced that it will hold a meeting of its Systemic Risk Advisory Committee on December 10. The meeting "will feature a discussion with Paul Tucker, Deputy Governor of the Bank of England on US and United Kingdom cross-border cooperation, as well as discussions on Title I (Resolution Plans) and Title II (Orderly Liquidation Authority)." No reason was given for the late-breaking announcement.

The meeting, to be held at the FDIC's headquarters building at 550 17th, N.W., Washington, D.C., "will commence at 8:45 a.m., with opening remarks by FDIC Chairman Martin J. Gruenberg and is expected to adjourn at approximately 3:00 p.m." In June 2011, the FDIC Board of Directors approved establishing the Systemic Risk Advisory Committee to advise the corporation on the effects on financial stability and economic conditions from a systemically important company's failure.

A copy of the agenda is available here.

UK DEVELOPMENTS

FSA Consults on Regulation of Benchmarks

On December 5, the UK Financial Services Authority (FSA) announced a consultation on its new regulatory framework for financial benchmarks – CP12/36 *The Regulation and Supervision of Benchmarks*. This follows on from the work of the Wheatley Review of the London Interbank Offered Rate (LIBOR) (as reported in the September 28, 2012, and October 19, 2012, editions of *Corporate and Financial Weekly Digest*).

The FSA has considered both the Wheatley Review recommendations and the Government's proposed legislation in designing an approach to regulating benchmarks. At least initially, the only "regulated benchmark" in the UK will be LIBOR. However, the proposals provide a framework for regulation that can be extended to cover additional benchmarks in the future.

The proposals include:

- a requirement for benchmark administrators to corroborate submissions and monitor them for any suspicious activity;
- a requirement for those submitting benchmark data to implement appropriate systems and controls including a clear conflicts-of-interest policy; and
- the creation of two new significant influence-controlled functions for the benchmark administrator and submitting firms under the FSA's Approved Persons Regime.

CP12/36 also seeks comments on ensuring the continuity of LIBOR and broadening participation in the rate setting. The consultant period closes on January 16, 2013.

Read more.

EU DEVELOPMENTS

ESMA Issues Guidelines on Repo Arrangements for UCITS Funds

On December 4, the European Securities and Markets Authority (ESMA) published final guidelines on repurchase and reverse repurchase agreements for UCITS funds established under the Undertakings for Collective Investment in Securities Directives.

Under the guidelines:

- for repurchase arrangements, UCITS funds should be able to recall at any time the assets subject to such arrangements; and
- for reverse repurchase agreements, UCITS funds should be able to recall at any time the full amount of cash on either an accrued or a mark-to-market basis. However, when cash is recalled on a mark-to-market basis, the mark-to-market value of the reverse repurchase agreements should be used for the calculation of the net asset value of the UCITS.

The repo guidelines will be incorporated into ESMA's Guidelines on exchange-traded funds and other UCITS issues, published in July 2012 (as reported in the July 27, 2012, edition of *Corporate and Financial Weekly Digest*).

The guidelines will come into force on a date to be announced, which will be two months after the publication of translations of the Guidelines into all EU official languages on ESMA's website.

Read more.

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