Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

July 20, 2012

SEC/CORPORATE

SEC Issues Cautionary Staff Report On IFRS

On July 13, the Office of the Chief Accountant of the Securities and Exchange Commission issued a Final Staff Report on the Work Plan for considering the incorporation of International Financial Reporting Standards (IFRS) into the financial reporting system for U.S. issuers. The Work Plan, published by the SEC in February 2010, was to consider specific areas and factors relevant to an SEC determination as to whether, when and how the current financial reporting system for U.S. issuers should be transitioned to IFRS.

The Final Report contains no recommendation or conclusion with respect to either the ultimate adoption of IFRS or any particular timetable or phase-in period for its adoption, though it concludes that there is “relatively less support” within the U.S. financial reporting community for pursuing the designation of the standards of the International Accounting Standards Board (IASB) as authoritative for use by U.S. issuers but “substantial support” for exploring other methods of incorporating IFRS to ultimately obtain a single set of high quality globally accepted accounting standards.

Utilizing this focus, and exploring, for example, an endorsement mechanism with respect to specific applications of IFRS or continued convergence of accounting standards issued by the Financial Accounting Standards Board and the IASB, the Final Report nevertheless strikes a cautionary note with respect to IFRS finding, among other things, that (i) there “continue to be areas underdeveloped,” (ii) the IFRS Interpretations Committee “should do more to address issues on a timely basis,” (iii) a majority of U.S. issuers expressed concern that moving to IFRS has the potential to result “in significant expense to the company and confusion for investors” and, finally (iv) significant effort would be required to change the references from U.S. GAAP, as U.S. GAAP is “imbedded throughout laws and regulations and in a significant number of private contracts.” Several commentators, including officials of the IASB, expressed disappointment with the Final Report, particularly since it was not accompanied by a recommended action plan for the SEC and did not specifically endorse either a method or a timetable for adopting or incorporating IFRS for U.S. issuers.

For more information, click here.

FINANCIAL MARKETS

FSOC Designates Eight Systemically Significant Financial Market Utilities

Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Payment, Clearing and Settlement Supervision Act of 2010) has the purpose of mitigating financial risk in the financial system and promoting financial stability by giving the Board of Governors of the Federal Reserve authority to set risk management standards for entities that have been designated as systemically important financial utilities by the Financial Stability Oversight Council (FSOC). On July 18, FSOC designated the following eight entities as being systemically important utilities:

- The Clearing House Payments Company, L.L.C., on the basis of its role as operator of the Clearing House Interbank Payments System
- CLS Bank International
- Chicago Mercantile Exchange, Inc.
- The Depository Trust Company
- Fixed Income Clearing Corporation
- ICE Clear Credit LLC
- National Securities Clearing Corporation
- The Options Clearing Corporation

Further information may be found here.

CFTC

CFTC Approves NFA Segregated Funds Reporting Requirements

On July 13, the Commodity Futures Trading Commission approved National Futures Association (NFA) rules and a related interpretive notice that create new requirements for futures commission merchants (FCMs) with respect to customer segregated funds and secured amount accounts.

The new NFA rules require FCMs to maintain written policies and procedures regarding the FCM's residual interest in customer segregated fund and customer secured amount accounts. The policies and procedures must identify a target amount for an FCM's residual interest. The target amount is to be established after a due diligence inquiry considering several specified factors. The rules additionally prohibit an FCM from withdrawing, transferring or otherwise disbursing funds from customer segregated or secured amount accounts in amount that exceeds 25% of the FCM's residual interest unless the firm's CEO, CFO or other financial principal who fulfills certain requirements pre-approves the withdrawal or series of withdrawals that exceed the 25% threshold. If an FCM withdraws more than 25% of its residual interest it must electronically file a written notice immediately after the CEO, CFO or financial principal approves the disbursement. These requirements do not apply to disbursements to customers.

The rules also require FCMs to report their adjusted net capital, minimum net capital and excess capital, whether customer segregated funds or secured amounts are deposited with an affiliate, and the firm's leverage ratio to NFA on a monthly basis. The monthly reports are due seventeen business days after the end of the month, beginning with September 2012, with the first such report being due October 23.

More information is available here.

NFA Announces Review of FCM Audit Practices

On July 16, National Futures Association (NFA) announced that it will conduct a review of its audit practices and procedures and the execution of those procedures with respect to Peregrine Financial Group, Inc. (PFG). The announcement comes a week after NFA issued an emergency enforcement action against PFG for failing to maintain adequate funds in customer segregated accounts and falsifying bank records and regulatory reports. NFA's internal review of its audit practices is intended to indentify and implement any regulatory oversight changes that may be necessary to improve fraud detection and protect customer funds. NFA's Special

Committee for the Protection of Customer Funds, which consists of the public representatives on NFA's Board of Directors, will oversee the review.

More information is available here.

CFTC Issues Temporary No-Action Relief For Non-Clearing Swap Dealers

On July 17, the CFTC's Division of Market Oversight granted non-clearing member swap dealers temporary no-action relief from the larger swap trader reporting requirements for physical commodities indentified in CFTC Regulation 20.4. Regulation 20.4 requires daily reports from clearing members and swap dealers. Under the large trader reporting rule, swap dealers that are not clearing members are required to comply with Part 20, including the daily reporting requirements proscribed by Regulation 20.4, by the effective date for the CFTC's final regulations providing a further definition for the term swap dealer (July 23). The no-action relief indicates that the CFTC will not recommend an enforcement action against non-clearing member swap dealers for failure to submit Section 20.4 reports until 60 days after the swap dealer registration application date, which is defined as the effective date of the further definition of the term swap.

The CFTC provided an additional six months of no-action relief for non-clearing member swap dealers that satisfy the conditions for Regulation 20.10(e), provided that the swap dealer files a notice with the CFTC that describes: (i) resource limitations or lack of experience in reporting transactions that cause it to be unable to submit fully compliant Regulation 20.4 reports; (ii) arrangements that are being made to submit fully compliant reports; and (iii) the anticipated date of full compliance with the Part 20 requirements. Regulation 20.10(e) grants the CFTC discretion to extend the compliance date based on resource limitations or lack of experience reporting transactions for a swap dealer that is not an affiliate of a bank holding company, is not a registered FCM or broker-dealer or affiliate of an FCM or broker-dealer, and is not supervised by any Federal prudential regulator.

The no-action letter is available here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

CFTC's Division of Swap Dealer and Intermediary Oversight Issues Time-Limited No-Action Relief to Certain CPOs and CTAs to Meet Registration and Compliance Obligations

On July 13, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) provided a limited time period of no-action relief for commodity pool operators (CPOs) and commodity trading advisors (CTAs) who must register and comply with certain requirements due to amendments to CFTC Rules 4.5 and 4.13.

In February, the CFTC adopted amendments requiring advisers of registered investment companies (registered funds) who were previously excluded from registration under Rule 4.5 to comply with amended Rule 4.5 or register upon the later of (1) December 31, 2012 or (2) 60 days after the CFTC adopts final rules defining the term "swap."

In the same release, the CFTC rescinded the CPO and CTA registration exemption provided by Rule 4.13(a)(4), which, among other requirements, generally exempted from registration advisers of private funds (private pools) offered to "qualified eligible persons" (and non-natural persons who were "accredited investors"). The amendment to Rule 4.13 required advisers to private pools previously relying on Rule 4.13(a)(4) exemptions to claim another exemption or register by December 31, 2012.

Prior to the no-action relief on July 13, advisers of new registered funds and private pools that had not claimed an exemption prior to the effective date of the Rule 4.5 and 4.13 amendments would have needed to immediately claim an exemption or register as a CPO or CTA.

DSIO deemed it proper to set one compliance date for all similarly situated CPOs and CTAs. As such, DSIO has granted no-action relief for CPOs and CTAs of new registered funds and private pools launched after the issuance of the no-action letter for failure to register as CPOs or CTAs until December 31, 2012, as long as such CPOs and CTAs comply with certain requirements. A CPO or CTA who meets such requirements must file a claim for use of

the no-action relief, which must include certain information. Provided that the claim is materially complete, the claim will be effective once filed.

Additionally, in the no-action letter, DSIO decided not to delay the inclusion of swaps within the trading threshold calculation past December 31, 2012 since the further definition of “swap” was adopted on July 10, providing CPOs and CTAs adequate time to perform such calculations before December 31, 2012. Furthermore, DSIO does not think the margin requirements for uncleared swaps need to be finalized in order to comply with the inclusion of swaps within the threshold.

To view the CFTC no-action letter, click here.

To view the related CFTC press release on July 13, 2012, click here.

To view Katten Muchin Rosenman LLP’s *Client Advisory* on February 22, 2012 regarding amended Rule 4.5, click here.

LITIGATION

FTC Correctly Treated Merger Between Large Manufacturer and New, Smaller Entrant to Industry as One Between “Actual Competitors” that Violated Antitrust Law

The U.S. Court of Appeals for the Eleventh Circuit last week affirmed the Federal Trade Commission’s (FTC) decision that Polypore International Inc.’s 2008 acquisition of Microporous Products, both manufacturers of battery separators that are used to prevent short circuits and regulate the flow of electrical currents, was likely to substantially lessen competition. In doing so, the court expanded an antitrust presumption against horizontal mergers to two likely, but not actual, competitors. On appeal, Polypore argued that Microporous should not have been treated as an actual competitor in the battery separator market but as a potential competitor, since Microporous, a much smaller company, had not yet entered the market for particular separators at the time of the acquisition. The court determined that the FTC properly applied an anti-competitive presumption reserved for actual competitors, because the acquisition further protected Polypore’s high market concentration and eliminated any decrease in market share that could result from Microporous’s potential entry into that particular portion of the market. The court also rejected Polypore’s argument that the FTC ordered divestiture remedy was too extensive, determining that the FTC did not abuse its broad discretion when it required divestiture of a plant in Austria even though the market at issue was North America. The appellate court agreed with the FTC that since Microporous had used its foreign plant to supply the North American market and protect against shortfalls in supplies generally, divesting that plant, regardless of its geographic location, would restore competition in North America that had been eliminated by the acquisition.

Polypore International, Inc. v. Federal Trade Commission, No. 11-10375 (11th Cir. July 11, 2012).

EXECUTIVE COMPENSATION AND ERISA

DOL Issues Direct Final Rule Related to Service Provider Disclosures

The United States Department of Labor (DOL) released a direct final rule on July 13, that amended the procedures retirement plan fiduciaries are to use for reporting a covered service provider’s (CSP’s) failure to furnish the newly required disclosures related to the CSP’s compensation and possible conflicts of interest.

In February of this year, the DOL issued a final rule under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), effective July 1, 2012, for both existing and new contracts and arrangements between covered plans and CSPs. The final rule requires CSPs to provide responsible plan fiduciaries with the information that they need to:

- Assess the reasonableness of total compensation received by the CSP, its affiliates and/or subcontractors;

- Identify potential conflicts of interest; and
- Satisfy reporting and disclosure requirements under Title I of ERISA.

Under the final rule, if a plan fiduciary does not receive these disclosures, the plan has engaged in a prohibited transaction under ERISA, and a related excise tax under Section 4975 of the Internal Revenue Code may apply. The final rule contained a class exemption from the prohibited transaction if the plan fiduciary notified the DOL of the CSP's failure to provide such disclosure.

The direct final rule issued on July 13 amends the regulations under Section 408(b)(2) of ERISA by revising the postal address to which the notification must be mailed, and by providing a website and related web-based submission procedures a plan fiduciary may use to electronically file such notice.

Under the direct final rule, effective September 14, 2012, the DOL will eliminate the previously available email address for notification submissions, and will instead provide a dedicated link on the DOL's website, where fiduciaries may electronically submit the notifications. The new dedicated link can be accessed here. The DOL stated that the web-based submissions will provide immediate confirmation to plan fiduciaries that their notice has been received.

Also, under the direct final rule, the DOL announced that a dedicated post office box address has been established by the DOL to receive mailed notifications. This new post office box is to replace the original mailing address set forth in the regulations. The new mailing address is:

U.S. Department of Labor, Employee Benefits Security Administration, Office of Enforcement
P.O. Box 75296
Washington, DC 20013

The DOL said the new direct final rule will become effective September 14, 2012, without any further action or notice, unless the DOL receives significant adverse comments by August 15, 2012. If the DOL receives significant adverse comments, the DOL will publish a timely withdrawal notice in the Federal Register.

A copy of the direct final rule can be found here.

BANKING

CFPB Issues Bulletin to Credit Card Issuers Re Add-On Products

On July 18, the Consumer Financial Protection Bureau (Bureau or CFPB), in connection with the settlement of its enforcement action for allegedly deceptive acts against a major U.S. financial institution, issued guidance in the form of a bulletin to credit card issuers with respect to certain "add-on" products marketed in connection with the issuance of credit cards. In this respect, the Bureau noted that "credit card issuers market various "add-on" products to card users, including debt protection, identity theft protection, credit score tracking, and other products that are supplementary to the credit provided by the card itself." Citing a need for the guidance, the Bureau noted that "CFPB supervisory experience indicates that some credit card issuers have employed deceptive promotional practices when marketing the products, including failing to adequately disclose important product terms and conditions. In addition, some consumers have been enrolled in programs without their affirmative consent, or without realizing that they have been enrolled or are required to pay for the programs. Others have been billed for services that were not performed or activated. Consumer complaints received by the CFPB also indicate that consumers have been misled by the marketing and sales practices associated with credit card add-on products."

Importantly, the Bureau indicated, albeit in a footnote, that "although this bulletin focuses on credit card add- on products, institutions should take the guidance that it provides into consideration when they offer similar products in connection with other forms of credit or deposit services." The bulletin notes that deceptive practices could violate the Dodd-Frank Wall Street Reform and Consumer Protection Act's prohibition against deceptive acts and practices, the Truth-in-Lending Act, and the Equal Credit Opportunity Act. The Bureau also listed its expectations in connection with add-on products, including ensuring that:

- Marketing materials, including direct mail promotions, telemarketing scripts, internet and print ads, radio recordings, and television commercials, reflect the actual terms and conditions of the product and are not deceptive or misleading to consumers;

- Employee incentive or compensation programs tied to the sale and marketing of add-on products require adherence to institution-specific program guidelines and do not create incentives for employees to provide inaccurate information about the products;

- Scripts and manuals used by the institution's telemarketing and customer service centers:

    - Direct the telemarketers and customer service representatives to accurately state the terms and conditions of the various products, including material limitations on eligibility for benefits;

    - Prohibit enrolling consumers in programs without clear affirmative consent to purchase the add-on product, obtained after the consumer has been informed of the terms and conditions;

    - Provide clear guidance as to the wording and appropriate use of rebuttal language and any limits on the number of times that the telemarketer or customer service representative may attempt to rebut the consumer's request for additional information or to decline the product; and

    - Where applicable, make clear to consumers that the purchase of add-on products is not required as a condition of obtaining credit, unless there is such a requirement.

- To the maximum extent practicable, telemarketers and customer service representatives do not deviate from approved scripts;

- Applicants are not required on a prohibited basis to purchase add-on products as a condition of obtaining credit; and

- Cancellation requests are handled in a manner that is consistent with the product's actual terms and conditions and that does not mislead the consumer.

In addition, institutions that offer credit card add-on products should employ compliance management programs that include:

- Written policies and procedures governing credit card add-on products designed to ensure compliance with prohibitions against deceptive acts and practices, Truth-in-Lending Act, Equal Credit Opportunity Act, and any other applicable Federal and state consumer financial protection laws and regulations;

- A system of periodic Quality Assurance reviews, the scope of which includes, but is not limited to, reviews of training materials and scripts, as well as real-time monitoring and recording of telemarketing and customer service calls in their entirety, consistent with applicable laws;

- Independent audits of the credit card add-on programs, which address the items listed above and consider whether these programs present elevated risk of harming consumers;

- Oversight of any affiliates or third-party service providers that perform marketing or other functions related to credit card add-on product so that these third-parties are held to the same standard, including audits, quality assurance reviews, training, and compensation structure;

- An appropriate channel for receiving, investigating, and properly resolving consumer complaints related to add-on products; and

- A comprehensive training program for employees involved in the marketing, sale, and operation of credit card add-on products.

For more information, click here.

Federal Reserve Reiterates Risk Management Standards on Fedwire and Fedwire Securities Services

The Board of Governors of the Federal Reserve System (Board) on July 19 reaffirmed its long-standing policy of applying relevant international risk-management standards to the Federal Reserve Banks' Fedwire funds and Fedwire securities services. These services play a critical role in the financial system and in facilitating the safe and efficient settlement of private-sector financial market utilities. The Board's announcement follows the Financial Stability Oversight Council's (FSOC) final designation of eight financial market utilities (FMUs) as systemically important for purposes of implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act. The four factors that FSOC uses to determine its designations are (1) the aggregate monetary value of transactions processed by the FMU; (2) the aggregate exposure of the FMU to its counterparties; (3) the relationship, interdependencies, or other interactions of the FMU with other FMUs or payment, clearing, or settlement activities; and (4) the effect that the failure of or a disruption to the FMU would have on critical markets, financial institutions, or the broader financial system. (See second link below.)

Under the Federal Reserve Act, the Board has supervisory authority over the Reserve Banks, including the Reserve Banks' provision of payment and settlement services. The Board stated that it "is committed to the strong and effective supervision of the Reserve Banks and recognizes that critical Reserve Bank payment and settlement services should be subject to rigorous and comprehensive supervision that is comparable to or exceeds the supervision of similar private-sector payment and settlement arrangements."

The Board explained that its examination framework for Fedwire "is consistent with the framework that will be used by the Federal Reserve for FMUs designated as systemically important by the FSOC and supervised by the Board. In addition, the Board is ensuring that the Reserve Banks are held to procedural requirements with respect to Board review of proposed material changes to Fedwire rules, procedures, and operations that are the same as, or higher than, the requirements for designated financial market utilities."

For more information, click here and here.

UK DEVELOPMENTS

Parliamentary Commission on Banking Standards Established

On July 17, the establishment of a Parliamentary Commission on Banking Standards was announced. The Commission, which will be chaired by Andrew Tyrie MP, Chairman of the House of Commons Treasury Select Committee is a 10 member commission jointly appointed by both the House of Commons and the House of Lords with 5 members drawn from each House. Its mandate is to report on:

- professional standards and culture of the UK banking sector, taking account of regulatory and competition investigations into the LIBOR rate-setting process; and
- lessons to be learned about corporate governance, transparency and conflicts of interest, and their implications for regulation and for government policy.

The Commission will make recommendations for legislative and other action by December 18- so that its recommendations can be reflected in the Banking Reform Bill (the legislation will implement ring-fencing and other requirements recommended by the Independent Commission on Banking; see the June 15, 2012 edition of *Corporate and Financial Weekly Digest*) and on other matters as soon as possible thereafter.

For more information, click here.

Changes to Money Laundering Regulations Announced

In July 2012, HM Treasury announced proposed changes to the Money Laundering Regulations 2007 (SI 2007/2157) and published the government's response to its June 2011 consultation on the Regulations.

The government stated that its proposed changes were aimed at reducing the regulatory burden imposed by the Regulations, strengthening the overall anti-money laundering (AML) regime and making the UK's AML regime more effective and proportionate.

Among the specific changes which will be introduced with effect from October 1, 2012 are the following:

- Extending the types of firms that can be relied on to conduct customer due diligence by removing the current distinction between bodies listed in Parts 1 and 2 of the Regulations for customer due diligence reliance purposes.
- Permitting debt purchasers to rely on customer due diligence carried out by consumer credit financial institutions.
- Strengthening and clarifying the powers of the the Office of Fair Trading and HM Revenue and Customs.
- Introducing an information-sharing “gateway” for supervisors (including the Financial Services Authority and the Office of Fair Trading).
- Formally appointing the Financial Servises Authority as the recognised AML supervisor for recognised investment exchanges.

Following the consultation process, the government has decided not to introduce a *de minimis* exclusion for small businesses and has also decided not to decriminalize certain AML breaches by making them subject only to a civil penalty regime.

Certain further changes are subject to proposed revisions to the European Union Third Money Laundering Directive (2005/60/EC) (MLD3). The government will provide an update on the revisions to MLD3, together with resulting proposed changes to the Regulations “in due course”

For more information, click here.

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

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
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		
Emily Stern	212.940.8515	emily.stern@kattenlaw.com
Dean N. Razavi	212.940.6743	dean.razavi@kattenlaw.com
BANKING		
Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com
EXECUTIVE COMPENSATION AND ERISA		
Ann M. Kim	312.902.5589	ann.kim@kattenlaw.com
Christopher K. Buch	312.902.5509	christopher.buch@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

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.