Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

December 5, 2014 Volume IX, Issue 47

SEC/CORPORATE

SEC Sets October 2015 Target Date for Certain Dodd-Frank and JOBS Act Rulemaking

The Securities and Exchange Commission recently published its agenda with respect to upcoming rulemaking, including rulemaking contemplated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and the Jumpstart Our Business Startups Act (JOBS Act). In setting its agenda, the SEC established target dates for taking various rulemaking actions, including setting an October 2015 target for taking the following measures to implement portions of the Dodd-Frank Act and the JOBS Act:

- adopting final rules regarding disclosure of CEO and employee pay ratios (the proposed rules for which were discussed previously in the *Corporate Financial Weekly Digest* edition of September 20, 2013);
- adopting final rules regarding the offer and sale of securities through crowdfunding;
- adopting final rules regarding amendments to Regulation D and Form D relating to Rule 506 offerings, including offerings in which issuers engage in general solicitation and general advertising under Rule 506(c);
- adopting final rules regarding small and additional issues exemptions under Section 3(b) of the Securities Act of 1933 (referred to as Regulation A+);
- proposing rules regarding incentive-based compensation clawbacks;
- proposing rules regarding disclosure of executive pay-for-performance; and
- proposing rules regarding disclosure of hedging transactions.

Historically, the SEC has not always met the target dates included in its rulemaking agenda, so the October 2015 target should be considered as a guideline rather than an absolute deadline. In that regard, some of the SEC's rulemaking, including the rulemaking with respect to pay ratios, crowdfunding and Regulation A+, had previously been expected to be finalized this year.

Read more.

BROKER-DEALER

FINRA Issues Notice on TRACE Trade Reporting Obligations

On November 21, the Financial Industry Regulatory Authority released Regulatory Notice 14-53 to remind FINRA member firms of their Trade Reporting and Compliance Engine (TRACE) trade reporting obligations for transactions in TRACE-eligible securities occurring on or through an Alternative Trading System (ATS).

Specifically, the notice highlights FINRA Rule 6730's requirement that each FINRA member firm that is a "party to a transaction" in a TRACE-eligible security report the transaction to TRACE within the prescribed period of time (generally within 15 minutes). The notice emphasizes the importance of having all applicable parties (including ATSs and their member subscribers) report the transaction in a consistent, complete, accurate and timely manner. The notice also provides examples of how the reporting requirements ought to be followed for transactions executed on or through an ATS.

Click here to read FINRA Regulatory Notice 14-53.

CFTC

NFA Issues Guidance on Exempt and Excluded CPOs and CTAs

On December 3, National Futures Association (NFA) issued guidance reminding firms that are relying on certain exemptions or exclusions from registration as commodity pool operators (CPOs) or commodity trading advisors (CTAs) of their obligation to reaffirm those exemptions and exclusions. Commodity Futures Trading Commission regulations require any person that has claimed an exemption or exclusion from CPO registration pursuant to CFTC Regulations 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3) or 4.13(a)(5), or an exemption from CTA registration pursuant to CFTC Regulation 4.14(a)(8), to affirm within 60 days of each calendar year-end the relevant notice of exemption or exclusion. Failure to affirm the exemption or exclusion by the end of the 60-day grace period, i.e., March 2, 2015, will result in an automatic withdrawal of the exemption or exclusion on that date. The reaffirmation process can be completed by accessing NFA's Electronic Exemption System.

The NFA notice also includes certain frequently asked questions for exempt and excluded firms and market participants who may deal with such firms. The NFA notice, including information on NFA's Exemption System and frequently asked questions, is available here.

NFA Proposes Amendment to NFA Compliance Rule 2-4

On December 1, National Futures Association (NFA) filed with the Commodity Futures Trading Commission for review and approval a proposed amendment to NFA Compliance Rule 2-4 to include swaps-related activities. Compliance Rule 2-4 currently requires NFA members and their associates to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their commodity futures business. The proposed amendment would expand the reach of the rule to include swaps. Under the proposed amendment, swap dealers and major swap participants would be required to observe the ethical standards of Compliance Rule 2-4. In addition, the inclusion of swaps business in Compliance Rule 2-4 would impose ethical obligations on all NFA members—including futures commission merchants, introducing brokers, commodity pool operators and commodity trading advisors—engaging in swaps activities.

The proposed amendment to NFA Compliance Rule 2-4 is available here.

DIGITAL ASSETS AND VIRTUAL CURRENCIES

NYS DFS Publishes All BitLicense Comments; California Considers Regulation

On December 3, the New York State Department of Financial Services (DFS) published all 3,746 public comments it received on the proposed "BitLicense" regulatory framework that would cover businesses participating in "virtual currency business activities." Through his Twitter account announcing the comments, DFS Superintendent Benjamin Lawsky stated that a revised BitLicense proposal should be produced later in the month.

Among the comments received by DFS were those from Manhattan District Attorney Cyrus Vance Jr. (expressing concern that an entity with a BitLicense would not be subject to New York State Banking Law, and thereby the penalties for violation of Banking Law), financial services provider Western Union (providing comment on anti-money laundering requirements and the application of the BitLicense to entities already licensed as money transmitters) and national retailers Walmart and Amazon (expressing concern that the BitLicense could be read broadly to cover gift card, electronic credit and other more traditional retail product offerings). All comments received in the public comment period may be retrieved at the Department of Financial Services website.

On December 4, a California Business Oversight Department spokesman told *Businessweek* that the department believes that California could regulate virtual currency business under current state law, with consumer protection as the core concern. The text of the related *Businessweek* article is available here.

LITIGATION

SEC Issues Third-Annual Dodd-Frank Whistleblower Program Report

On November 17, the Securities and Exchange Commission released its third annual Dodd-Frank Whistleblower Program Report.

The Dodd-Frank Wall Street Reform and Consumer Protection Act provided for the creation of a whistleblower program designed to encourage the submission of information to aid the SEC's Division of Enforcement in discovering and prosecuting violations of federal securities laws. According to the report, there were a total of 10,193 whistleblower reports since the program commenced in 2011, with 3,620 whistleblowers during the 2014 fiscal year alone, an increase of 10 percent over 2013.

A total of 14 whistleblower awards have been authorized since the inception of the program. The Report found that the number of awards was slowly increasing; for example, there were more awards in the 2014 fiscal year (nine total) than in all of the other years of the program combined.

Click here to read the Report.

Expedited Proceedings Denied Where Harm Is Only Speculative

The Delaware Chancery Court recently denied a shareholder's motion to expedite proceedings to enjoin a company buyout, finding that the shareholder failed to show that any threatened harm from the buyout was imminent, irreparable and non-speculative.

Plaintiff, a shareholder of VitalSpring Technologies, Inc., filed a shareholder derivative suit against defendant Sreedhar Potarazu, VitalSpring's chief executive officer and only director, in connection with the alleged impending sale of VitalSpring. In September 2014, defendant emailed VitalSpring's shareholders informing them that VitalSpring had reached an agreement to be sold, and that the buyout would be completed in mid-October 2014 pending approval by the Federal Trade Commission. On October 20, 2014, defendant informed shareholders that the buyout would be further delayed. Plaintiff, who expressed doubt as to whether a buyer actually existed and alleged that defendant had a history of misleading shareholders, filed suit to enjoin the buyout until VitalSpring released audited financial statements and held an annual shareholder meeting.

Plaintiff filed a motion to expedite proceedings, arguing that the buyout could potentially close at any time. The court denied the motion, finding that "Plaintiff's suspicion – a not unreasonable apprehension – that Defendant is engaging in nefarious activities does not establish an imminent, irreparable, and non-speculative harm."

Smollar v. Potarazu, No. 10287-VCN (Del. Ch. Nov. 19, 2014).

SEC Charges Company Executives With Issuing False Press Releases to Inflate Stock Price

The Securities and Exchange Commission recently charged two executives at a penny stock company with issuing false and misleading press releases while secretly selling thousands of their own stock shares into the market. The executives agreed to pay nearly $325,000 and accept officer-and-director bars to settle the SEC charges.

Defendant Conolog Corporation, a publicly traded company involved in the manufacture of communications equipment, issued three consecutive press releases in early 2010 that mischaracterized testing done on a new product and overstated customer orders. According to the complaint, defendant Robert Benou, Conolog's Chairman-CEO-CFO, was principally responsible for the contents of the press releases with his son, defendant Marc Benou, Conolog's President-COO. Conolog also hired a public relations firm to promote its stock using the statements from the releases. The public relations efforts resulted in a significant increase in the company's stock price and trading volume, the SEC alleged. Both defendants sold Conolog stock at inflated prices during this period.

The SEC charged defendants with violating the antifraud provisions of the federal securities law, including Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5, Section 16(a) of the Exchange Act and Rule 16a-3, and Section 13(d) of the Exchange Act and Rules 13d-1 and 13d-2. The executives then settled the charges.

SEC v. Benou, et al., No. 3:14-cv-07284 (D.N.J. Nov. 21, 2014).

BANKING

OCC's Curry Advocates Regulatory Reduction for Smaller Banks and Thrifts

Speaking on December 2 at an Interagency Outreach Meeting on the Economic Growth and Regulatory Reduction Act (EGRPRA), Comptroller of the Currency Thomas J. Curry indicated his desire to roll back regulatory burdens on smaller banks and thrifts. Comptroller Curry stated as follows:

> First, as Toney Bland, our head of Midsize and Community Bank Supervision program, said in Senate testimony this fall, we think a greater number of healthy, well-managed community institutions ought to qualify for the 18-month examination cycle. By raising the asset threshold from $500 million to $750 million, 300 additional banks and thrifts would qualify…. Another idea that we think is ripe for congressional action is a community bank exemption from the Volcker Rule, as Federal Reserve Board Governor Daniel Tarullo suggested at a Congressional hearing this year. We don't believe it is necessary to include smaller institutions under the Volcker Rule in order to realize Congressional intent, and we recommend exempting banks and thrifts with less than $10 billion in assets.

Mr. Curry also suggested increased flexibility for banks and thrifts: "We recommend authorizing a basic set of powers that both federal savings associations and national banks can exercise, regardless of their charter."

EGRPRA requires that regulations prescribed by the Federal Financial Institutions Examination Council, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and Board of Governors of the Federal Reserve System be reviewed by the agencies at least once every 10 years. The purpose of this review is to identify outdated, unnecessary or unduly burdensome regulations and consider how to reduce regulatory burden on insured depository institutions while, at the same time, ensuring their safety and soundness and the safety and soundness of the financial system.

Read more.

FFIEC Releases Revised *BSA/AML Examination Manual*

On November 26, the Federal Financial Institutions Examination Council (FFIEC) released the revised *Bank Secrecy Act/Anti-Money Laundering (BSA/AML) Examination Manual*. The manual reflects revised risk-based policies and procedures for institutions supervised by the Office of the Comptroller of the Currency (OCC), and provides current guidance on risk-based policies, procedures and processes for banking organizations to comply with the Bank Secrecy Act and safeguard operations from money laundering and terrorist financing. The 2014 version further clarifies supervisory expectations and regulatory changes since the last update of the manual in 2010. Banking organizations "should familiarize themselves with these revisions and make the necessary updates to their BSA compliance programs."

The Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency and State Liaison Committee (Agencies) revised the manual in collaboration with the Financial Crimes Enforcement Network (FinCEN), the administrator of the BSA and the Office of Foreign Assets Control (OFAC).

Significant updates include:

- Suspicious Activity Reporting (SAR) – Incorporated new SAR e-filing requirements, guidance on the extension of SAR filing for continuing activity, clarification of prohibitions on disclosing a SAR and guidance on sharing SARs with affiliates.

- Currency Transaction Reporting (CTR) – Revised to incorporate new CTR e-filing requirements and new guidance issued by FinCEN since 2010 related to currency transaction aggregation for businesses and exemptions.
- Foreign Correspondent Account Recordkeeping – Included regulations relating to the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010.
- Foreign Bank and Financial Accounts (FBAR) – Incorporated new FBAR filing requirements.
- International Transportation of Currency or Monetary Instruments Reporting (CMIR) – Clarified monitoring and reporting obligations under the BSA for international transportation of currency or monetary instruments.
- Correspondent Accounts (Foreign) – Included additional guidance in the section on risk mitigation.
- Bulk Shipments of Currency – Revised to incorporate FinCEN's CMIR guidance for common carriers of currency, including armored car services (August 1, 2014), and clarify monitoring and reporting obligations under the BSA.
- Automated Clearing House Transactions (ACH) – Incorporated National Automated Clearing House Association (NACHA) - The Electronic Payments Association modifications related to international ACH transactions and further defined third-party service providers.
- Prepaid Access – Replaced Electronic Cash section and included an expanded discussion of risk factors and risk mitigation related to prepaid access.
- Third-Party Payment Processors – Updated to reflect interagency guidance issued since 2010.
- Embassy, Foreign Consulate and Foreign Mission Accounts – Updated to incorporate the interagency guidance on accepting accounts from foreign embassies, consulates and missions.
- Nonbank Financial Institutions – Incorporated new FinCEN regulations for Money Services Businesses (MSBs) related to certain foreign-located persons engaging in MSB activities, new regulations related to prepaid access programs and guidance regarding virtual currency administrators and exchangers.

Read more.

EU DEVELOPMENTS

New European Data Protection Guidelines Published

On November 25, the European Data Protection Supervisor (EDPS) issued new data protection guidelines (Guidelines) to European Union policymakers and legislators in the area of financial services regulation. The EDPS's stated aim of the Guidelines is to ensure that EU institutions are aware of data protection requirements and that they integrate high standards of data protection in all new legislation. The Guidelines are part of a "policy toolkit" for EU institutions which the EDPS is developing to facilitate policymaking which respects the fundamental rights and freedoms of EU citizens and their rights to privacy and to the protection of "personal data" (meaning any information relating to an identified or identifiable natural (living) person; examples include names, dates of birth, photographs, e-mail addresses and telephone numbers, as well as other details such as health data, data used for evaluation purposes and traffic data on the use of telephone, email or Internet are also considered personal data). The Guidelines are intended as a practical, step-by-step companion to EU policymakers and provide a useful summary and detailed analysis of the rights of EU citizens under EU law in the financial services context. The EDPS will issue further guidelines for other sectors in the coming months.

Although the Guidelines have been prepared for EU policymakers, they are useful for other participants in the EU financial services markets (particularly EU firms who have been designated under EU law as "data processors") as they assess the distinctions between data protection and privacy (distinct rights under EU law, in both their nature and operation). They also provide 10 recommended steps for the responsible handling of personal information and assess the interaction of data protection rules with other EU financial services legislation in areas such as the EU Market Abuse Regulation, insider dealing insider lists, data retention requirements and whistleblowing.

The Guidelines are available here.

The EDPS press release is available here.

AIFM Directive – Latvia, Poland and Spain Warned by European Commission for Failing to Fully Implement New Investment Fund Rules

On November 26, the European Commission (Commission) issued a press release stating that it has sent formal requests to Latvia, Poland and Spain to provide it with notification of the measures each country has taken to fully comply with the Alternative Investment Fund Managers Directive (AIFM Directive). The AIFM Directive sets out a comprehensive regulatory and supervisory framework for managers of alternative investment funds and should have been implemented into national law before July 22, 2013. As yet, Poland and Spain have failed to fully implement the AIFM Directive into their national law and the Commission has noted that Latvia has only partially enacted the AIFM Directive. Each of these three countries have been given two months to inform the Commission as to what measures they have taken to fully comply with the AIFM Directive. Failure to provide notification of adequate measures could lead the Commission to refer each country to the EU Court of Justice, which would likely result in significant fines.

EU directives are passed in Brussels by the European Council of Ministers and the European Parliament and are required to be implemented in the national law of all 28 member states of the European Union so as to ensure that there is a fully functioning single market. The failures in Poland, Spain and Latvia will therefore mean that any alternative investment fund manager attempting to conduct business in those countries will be at a competitive disadvantage and adds complexity and uncertainty to the process of marketing or managing funds in those jurisdictions until the AIFM Directive is adequately transposed into national law.

The Commission's press release of November 26 (covering the foregoing and other issues) is available here.

For more information, contact:

SEC/CORPORATE

Mark J. Reyes	+1.312.902.5612	mark.reyes@kattenlaw.com
Mark D. Wood	+1.312.902.5493	mark.wood@kattenlaw.com
Austin G. Leach	+1.212.940.6552	austin.leach@kattenlaw.com

FINANCIAL SERVICES

Janet M. Angstadt	+1.312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	+1.212.940.6615	henry.bregstein@kattenlaw.com
Kimberly L. Broder	+1.212.940.6342	kimberly.broder@kattenlaw.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@kattenlaw.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	+1.212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	+1.312.902.5241	arthur.hahn@kattenlaw.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Kathleen H. Moriarty	+1.212.940.6304	kathleen.moriarty@kattenlaw.com
Ross Pazzol	+1.312.902.5554	ross.pazzol@kattenlaw.com
Kenneth M. Rosenzweig	+1.312.902.5381	kenneth.rosenzweig@kattenlaw.com
Fred M. Santo	+1.212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@kattenlaw.com
Peter J. Shea	+1.212.940.6447	peter.shea@kattenlaw.com
James Van De Graaff	+1.312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	+1.212.940.8584	robert.weiss@kattenlaw.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@kattenlaw.com

DIGITAL ASSETS AND VIRTUAL CURRENCIES

Evan L. Greebel	+1.212.940.6383	evan.greebel@kattenlaw.com
Kathleen H. Moriarty	+1.212.940.6304	kathleen.moriarty@kattenlaw.com
Claudia Callaway	+1.212.625.3590	claudia.callaway@kattenlaw.com
Gregory E. Xethalis	+1.212.940.8587	gregory.xethalis@kattenlaw.com

LITIGATION

Bruce M. Sabados	+1.212.940.6369	bruce.sabados@kattenlaw.com
Ashley H. Jones	+1.212.940.6791	ashley.jones@kattenlaw.com

BANKING

Jeff Werthan	+1.202.625.3569	jeff.werthan@kattenlaw.com

UK DEVELOPMENTS

Neil Robson	+44.20.7776.7666	neil.robson@kattenlaw.co.uk

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

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | HOUSTON | IRVING | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | 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: Katten Muchin Rosenman UK LLP.