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SEC/CORPORATE

SEC Finalizes Rule on Pay Ratio Disclosure

On August 5, the Securities and Exchange Commission adopted the final rule regarding pay ratio disclosure that amends Item 402 of Regulation S-K to implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The final rule is generally consistent with the September 2013 proposed rule, which was highlighted in the *Corporate & Financial Weekly Digest* edition of September 20, 2013, and requires an issuer to disclose the ratio of the compensation of its chief executive officer (CEO) to the median compensation of all of its employees. The pay ratio disclosure will be required in an issuer's annual reports on Form 10-K, registration statements and proxy and information statements to the extent that such filings require the disclosure of a summary compensation table pursuant to Item 402(c) of Regulation S-K.

To identify the median employee, the rule allows an issuer to use its total employee population, a statistical sampling of that population or any other reasonable method. An issuer may further use, for example, annual total compensation under existing executive compensation rules or any consistently applied compensation measure from amounts reported in the issuer's payroll or tax records. The rule requires an issuer to calculate "annual total compensation" for its median employee in the same manner as its CEO's compensation, pursuant to existing executive compensation rules. The rule also requires an issuer to describe the methodology used to identify the median employee and any material assumptions, adjustments or estimates used in its calculations.

In light of the many comment letters the SEC received with respect to the proposed rule, including specific suggestions on mitigating compliance costs and practical difficulties associated with the proposed rule's disclosure requirements, the SEC adopted a number of revisions to the proposal in the final rule. In particular, the final rule provides that:

- In determining its median employee, although an issuer must include US and non-US, full-time, part-time, temporary and seasonal employees of the issuer and its consolidated subsidiaries, it may exclude (1) non-US employees employed in jurisdictions with data privacy laws that would make the issuer's compliance with the pay ratio disclosure violate such laws and (2) up to 5 percent of its non-US employees, including any employees already excluded under the data privacy exception.
- Whereas the proposed rule defined "employee" as an individual employed on the last day of the issuer's last completed fiscal year, the final rule permits issuers to use any date within the three months preceding the last day of its last completed fiscal year.
- Issuers may identify the median employee every three years, instead of every year, unless there has been a change in its employee population or employee compensation arrangements that the issuer reasonably believes would result in a significant change in the pay ratio disclosure.

The pay ratio disclosure requirements will be effective with respect to compensation paid in fiscal years beginning on or after January 1, 2017 (which would be, for calendar year end issuers, an issuer's proxy statement for its 2018 annual meeting of stockholders), and apply to all issuers except smaller reporting companies, emerging growth companies, foreign private issuers, multijurisdictional disclosure system filers and registered investment companies.

To view the complete text of the final rule, click here.

Proxy Access—the Devil Is in the Details

Proxy access, meaning the ability of stockholders to put their nominees on management's proxy card and create a proxy contest without having to file their own proxy statement, was the marquee issue of the 2015 proxy season. The 2015 push for proxy access was largely spearheaded by the New York City comptroller through his Boardroom Accountability Project. The comptroller, whose goal is to make proxy access universal at US companies, submitted 75 proxy access bylaw proposals to well-known companies with the following parameters: ownership of at least 3 percent of a company's stock for at least three years and the right to nominate up to 25 percent of a company's board. These parameters are largely based upon the proxy access rule adopted by the Securities and Exchange Commission in 2010, which was subsequently struck down by a federal court.

According to Institutional Shareholder Services, a total of 57 companies have adopted or announced an intent to adopt proxy access, including 42 in 2015. The total includes approximately five percent of the S&P 500.

While there appears to be an emerging consensus granting proxy access to 3 percent of shareholders who have held their shares for at least three years, limited to 25 percent of the board, other details of the provisions have not widely been debated. The Council of Institutional Investors (CII), a group of public, union and corporate employee benefit plans, endowments and foundations with combined assets exceeding $3 billion, issued *Proxy Access: Best Practices* on August 5.CII is sometimes characterized as a governance activist, and its policies and recommendations are not automatically followed by corporate America, although they are typically considered by companies. *Best Practices* highlights clauses in proxy access bylaws and charter provisions (as described below) that CII believes "could significantly impair shareowners' ability to use proxy access, or even render access unworkable."

- Ownership Threshold – CII supports a 3 percent threshold, and objects to a 5 percent ownership threshold.
- Number of Candidates – CII opposes provisions that would prevent stockholders from nominating fewer than two board candidates on the theory that stockholder "nominees [must] have meaningful representation on the board and that one director is insufficient to achieve that goal."
- Aggregating Ownership – proxy access provisions typically limit the number of stockholders whose ownership may be aggregated to achieve the ownership threshold. The most typical limit is 20, although some companies have set a lower limit. CII opposes limits, arguing that "even if the 20 largest public pension funds were able to aggregate their shares they would not meet the 3 percent criteria at most of the companies examined."
- Excluding Loaned Shares – many institutional investors earn income from share lending. Typically, the right to vote such shares goes to the borrower. CII argues that shares on loan should be counted toward the ownership threshold, provided that the lending investor represents that it (1) has the legal right to recall those shares and intends to vote the shares at the stockholders meeting; and (2) will hold the securities through the date of the annual meeting.
- Requiring Ownership of Shares After the Annual Meeting – CII opposes requiring that a nominating stockholder provide a statement of its intent to continue to hold the threshold number of shares after the annual meeting.
- Restrictions on Renominations – CII opposes restrictions on renominating proxy access director candidates who failed to receive a specific percentage of votes, noting that such restrictions do not apply to management candidates.
- Limitations on Director Compensation From Third Parties – CII opposes prohibiting proxy access candidates from receiving third-party compensation for their service as directors, maintaining that such prohibitions will limit the pool of prospective candidates. CII does, however, support disclosure about compensation arrangements with third parties.

Institutional Shareholder Services also is exploring the language in proxy access bylaws, as reflected in its annual policy survey launched on August 4. The survey asks about restrictions in board-implemented proxy access rights, different from those requested in a majority supported shareholder proposal, that investors "would find problematic enough to potentially warrant an 'against' or 'withhold' vote" for directors.

Read *Proxy Access: Best Practices* here.

The Institutional Shareholder Services' annual policy survey is available here.

BROKER-DEALER

BATS Proposes Rule to Expedite Action Against Manipulative Behavior

On July 30, BATS Exchange, Inc. filed a rule proposal with the Securities and Exchange Commission to expressly prohibit certain manipulative trading activity and to permit BATS to take prompt action against market participants that it believes are engaged in such activity. Specifically, proposed BATS Rule 12.15 defines and prohibits layering and spoofing activity by exchange members. Under a proposed interpretation, layering is described as a trading pattern in which: (1) a market participant enters multiple limit orders on one side of the market at various price levels (layering orders); (2) following the entry of the layering orders, the level of supply and demand for the security changes; (3) the market participant enters one or more orders on the opposite side of the market of the layering orders (contra-side orders) that are subsequently executed; and (4) following the execution of the contra-side orders, the market participant cancels the layering orders.

Another interpretation under the proposed rule describes spoofing as a trading pattern in which: (1) a market participant narrows the spread for a security by placing an order inside the national best bid or offer (spoofing order); and (2) the market participant thereafter submits an order on the opposite side of the market (contra-side order) that executes against another market participant that joined the new inside market established by the spoofing order.

Proposed BATS Rule 8.17 establishes procedures for issuing suspension orders; these orders would immediately prohibit an exchange member from engaging in layering and spoofing activity prohibited under proposed BATS Rule 12.15. Proposed BATS Rule 8.17 also would authorize BATS to order an exchange member to cease and desist from providing exchange access to a customer if such exchange member engaged in layering or spoofing activity prohibited under proposed BATS Rule 12.15.

Interested parties will be able to comment on the rule proposal for 21 days after publication in the *Federal Register*. The text of the proposed rule change is available here.

FINRA Proposes Rule Governing Personal Securities Transactions of Associated Persons

On July 31, the Financial Industry Regulatory Authority filed a proposed rule change with the Securities and Exchange Commission to adopt FINRA Rule 3210 (Accounts At Other Broker-Dealers and Financial Institutions) in the consolidated FINRA rulebook. The proposed rule, which combines and streamlines certain provisions of National Association of Securities Dealers (NASD) Rule 3050 and New York Stock Exchange (NYSE) Rules 407 and 407A, seeks to promote more effective oversight of the personal trading activities of associated persons of member firms.

Among other things, the proposed rule: (1) requires an associated person to obtain written consent of his or her employer (employer member) before opening certain accounts at another member firm (executing member) or other financial institution; (2) places an obligation on an associated person, prior to opening or otherwise establishing certain accounts, to notify in writing the executing member or other financial institution of his or her association with the employer member; and (3) requires an executing member, upon written request by the employer member, to transmit duplicate copies of confirmations and statements, or the transactional data contained therein, for certain accounts. The proposed rule also deletes a number of requirements in NASD Rule 3050 and NYSE Rules 407 and 407A that would be rendered outdated by the new rule or otherwise addressed elsewhere by FINRA rules.

Pending SEC approval, FINRA will announce the implementation date of the proposed rule change in a regulatory notice. Proposed FINRA Rule 3210 is available here.

FINANCIAL MARKETS

See "ESMA Confirms Renewal of Short Selling Ban by Greek HCMC and Market Making Exemption" in the EU Developments section.

DERIVATIVES

SEC Adopts Registration Rules for Security-Based Swap Dealers and Major Security-Based Swap Participants

On August 5, the Securities and Exchange Commission adopted new registration rules for security-based swap dealers and major security-based swap participants (SBS entities). In general, an SBS entity would register by filing the appropriate forms and certifications with the SEC through the EDGAR system. If the filing is complete, the SBS entity will be conditionally registered as a security-based swap dealer or major security-based swap participant with the SEC. The registration rules do not set a deadline by which the SEC must grant full registration or deny registration to an applicant.

Under the new rules, the registration application of an SBS entity must include two separate certifications by senior officers supported by appropriate due diligence. The first certification requires a senior officer of the applicant to certify that, after due inquiry, he or she has reasonably determined that the applicant has developed and implemented written policies and procedures reasonably designed to prevent violations of the federal securities laws and the rules thereunder and that he or she has documented the process by which he or she reached such determination.

The second certification requires the chief compliance officer (CCO), or his or her designee, to certify that he or she neither knows nor in the exercise of reasonable care should have known that any person associated with the SBS entity who effects or is involved in effecting security-based swaps on its behalf is subject to statutory disqualification, unless otherwise specifically provided by rule, regulation or order of the SEC. The second certification also requires the CCO, or his or her designee, to review and sign the questionnaire or application for employment executed by associated persons who are natural persons and who effect or are involved in effecting securities-based swaps on behalf of the SBS entity.

The registration rules also include two new defined dates (Compliance Date and Counting Date) that help to clarify how the final roll-out of the SEC's full regime for security-based swaps will proceed. The Compliance Date for the new rules is defined as the later of: (1) six months after the date of publication in the *Federal Register* of a final rule release adopting rules establishing capital, margin and segregation requirements for SBS entities; (2) the compliance date of final rules establishing recordkeeping and reporting requirements for SBS entities; (3) the compliance date of final rules establishing business conduct requirements under Exchange Act Sections 15F(h) and 15F(k); or (4) the compliance date for final rules establishing a process for a registered SBS entity to make an application to the SEC to allow an associated person who is subject to statutory disqualification to effect or be involved in effecting security-based swaps on the SBS Entity's behalf. (Although the drafting is ambiguous, it seems likely that the SEC intends to have the Compliance Date be six months after the latest date in the litany.) The new term Counting Date provides the welcome news that, for purposes of determining when registration is required, prospective SBS entities do not have to begin calculating whether their activities meet or exceed the thresholds established in Exchange Act Rules 3a71-2, 3a67-3, and 3a67-5 until two months prior to the Compliance Date.

Separately, the SEC proposed a new comprehensive rule—known as Rule of Practice 194—to create a process for SBS entities to seek permission from the SEC to continue effecting security-based swaps activities through associated persons that have been subject to certain adverse legal actions. Interested parties may comment on the proposed rule for 60 days after publication in the *Federal Register*.

The SEC's registration rules for SBS entities are available here. The SEC's proposed Rule of Practice 194 is available here.

European Commission Publishes Delegated Regulation on Mandatory Clearing for OTC Interest Rate Derivatives

On August 6, the European Commission (EC) adopted new rules in the form of a delegated regulation (Delegated Regulation) requiring the mandatory clearing of certain over-the-counter (OTC) interest rate derivatives contracts (IRDs) through central counterparties (CCPs) pursuant to the European Market Infrastructure Regulation (EMIR).

The Delegated Regulation covers the following classes of IRDs that must settle in a single settlement currency in either EUR, GPB or USD, which is detailed in Annex 1 to the Delegated Regulation:

- fixed-to-float (IRS), referencing either EURIBOR or LIBOR, with a maturity of 28 days to 50 years (this category also includes IRS settling in JPY);
- float-to-float swaps (basis swaps), referencing either EURIBOR or LIBOR, with a maturity of 28 days to 50 years (this category also includes IRS settling in JPY);
- forward rate agreements (FRAs), referencing either EURIBOR or LIBOR, with a maturity of three days to three years; and
- overnight index swaps (OIS), referencing the Euro OverNight Index Average, FedFunds or the Sterling OverNight Index Average, with a maturity of seven days to three years (collectively, Covered IRDs).

Article 1 of the Delegated Regulation, however, provides an exemption from the mandatory clearing obligation for those Covered IRDs that are concluded with covered bond issuers or with cover pools for covered bonds, which satisfy all of the certain conditions. These conditions include usage, registration and recording obligations, insolvency provisions, credit ranking, and collateralization requirements.

Articles 2 and 3 of the Delegated Regulation specify which types of counterparties are subject to the mandatory clearing obligation and the applicable timing. These four categories and applicable compliance dates are:

- Category 1 – clearing members of a recognized or authorized CCP of at least one of the classes of Covered IRDs – six months after the Delegated Regulation is entered into force;
- Category 2 – financial counterparties (FCs) (as defined under EMIR) and alternative investment funds (AIFs) (as defined under the Alternative Investment Fund Managers Directive) that are non-financial counterparties (NFCs), which belong to a group whose aggregate month-end average of outstanding gross notional amount of non-centrally cleared derivatives is above EUR 8 billion (Threshold) – 12 months after the Delegated Regulation is entered into force;
- Category 3 – FCs and AIFs whose aggregate month-end average of outstanding gross notional amount of non-centrally cleared derivatives is below the EUR 8 billion Threshold – 18 months after the Delegated Regulation is entered into force; and
- Category 4 – all remaining NFCs – three years after the Delegated Regulation is entered into force.

For purposes of determining the Threshold, all of a group's non-centrally cleared derivatives, including foreign exchange forwards, swaps and currency swaps, must be included. When an applicable counterparty is either an AIF or an undertaking for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC (UCITS), the Threshold applies individually at the fund level. When a Covered IRD is transacted between counterparties in different categories, the date from which the clearing obligation takes effect for that contract will be the later date.

The Delegated Regulation, subject to certain conditions, provides time-limited relief for the clearing of intra-group Covered IRDs, which is dependent upon whether or not an equivalence decision has been adopted for the third country pursuant to EMIR (Equivalence Decision) in which the EU group counterparty is established. If an Equivalence Decision has not been determined, clearing will be required three years after the Delegated Regulation is entered into force. If an Equivalence Decision has been determined, clearing will be required from the later of 60 days after an Equivalence Decision has been made and the applicable timing for Categories 1, 2 and 3.

Article 4 of the Delegated Regulation specifies such minimum maturities applicable to the frontloading requirement under EMIR (i.e., the mandatory clearing of all swaps entered into between March 18, 2014, the date of the first authorization of a CCP, and the date on which the clearing obligation actually takes effect). The minimum

maturities range from six months to 50 years and frontloading will be required with an effective date of either two or five months after the entry into force of the Delegated Regulation.

Before the Delegated Regulation can be entered into force, it must be reviewed by the European Parliament and the European Council, which can take up to three months. Once the Delegated Regulation is published in the *Official Journal of the European Union*, it will enter into force 20 days after such publication. Because the review period for the European Parliament will not commence until after the summer recess has ended in September 2015, the earliest the Draft Regulation could be entered into force would be October 2016, with mandatory clearing of the Covered IRDs commencing in April 2016 for Category 1 counterparties; October 2016, for Category 2 counterparties; April 2017 for Category 3 counterparties; and October 2019, for Category 4 counterparties.

The text of the Delegated Regulation can be found here. The text of Annex 1 to the Delegated Regulation can be found here.

See "ESMA Confirms Renewal of Short Selling Ban by Greek HCMC and Market Making Exemption" in the EU section.

CFTC

CFTC Extends Comment Period on ICE Futures Rule Certification

The Division of Market Oversight of the Commodity Futures Trading Commission, at the request of ICE Futures U.S., has granted a 45-day extension of the public comment period with respect to its proposed amendments to certain position limit rules. Under the proposed amendments, which ICE Futures had certified to the CFTC, the exchange is seeking to base the position limits for eight of its NYISO Zone G electric power futures contracts on a new estimation for deliverable supply.

Comments may be submitted on or before September 21. More information is available here.

NFA Grants Form PR Reporting Relief to Certain CTAs

National Futures Association (NFA) has notified its member commodity trading advisors (CTAs) that do not direct trading of commodity interest accounts that they are no longer required to file NFA Form PR under NFA Compliance Rule 2-46. This relief, which is consistent with recent no-action relief issued by staff of the Commodity Futures Trading Commission in CFTC Letter No. 15-47, is effective immediately and applies to the June 30 Form PR filing.

Any qualifying CTA that intends to rely upon this relief must update its CTA Annual Questionnaire by August 13 to indicate that the firm does not direct any trading of commodity interest accounts. Firms that do not do so will continue to receive calls for the June 30 Form PR filing (and future Form PR filings).

More information is available here.

UK DEVELOPMENTS

UK Partnerships – Proposed Collective Investment Scheme Legislation Amendments

On July 23, as part of the proposals announced in the Summer Budget by the Right Honourable George Osborne MP, UK Chancellor of the Exchequer, Her Majesty's Treasury published a paper (Consultation Paper) in which certain proposed changes to UK partnership legislation were outlined for consultation (Consultation) as it applies to collective investment schemes (as defined in the Financial Services and Markets Act 2000), which are not authorized by the Financial Conduct Authority (Private Funds). The Consultation forms part of the *UK Investment Management Strategy*—a strategy that was initially launched as part of the UK budget in 2013—to implement certain technical changes to UK partnership law with a view to removing unnecessary legal complexity and administrative burdens when applied to Private Funds that do not apply to similar vehicles in other jurisdictions. This strategy mitigates possible jurisdictional arbitrage and ensures that the use of UK limited partnerships remains the market standard for European private equity and venture capital fund structures (as well as other

types of private funds in an increasingly competitive global market), while furthermore highlighting the United Kingdom's position as a leading center in Europe (and more generally) for asset management.

The Consultation focuses on proposed amendments to the Limited Partnerships Act 1907 ((LPA 1907) and to a lesser degree the Partnership Act 1890 (PA 1890) (together, Legislation)) as they apply to Private Funds; this legislation was introduced more than 100 years ago and has largely remained unchanged since then. The specific amendments proposed to the Legislation in the Consultation include:

- Limited Partner Activity "White List" – a non-exhaustive list of activities that a limited partner (LP) in a Private Fund may undertake without being considered as taking part in the management of the business (and therefore without losing their limited liability).
- Capital Contributions – the removal of the need for LPs to make a capital contribution upon becoming an LP and maintain such contribution for the life of the partnership (thereby removing the need for the current funding commitment to be split between a nominal capital contribution (to satisfy the current legislative requirements as set out in the Legislation) together with a contractual undertaking to fund the balance of its commitment by way of interest free loans).
- Winding up a Limited Partnership – the removal of the need for LPs to have to apply for a court order to dissolve a Private Fund under the supervision of the court in the event that the general partner has been removed (and instead allow LPs to agree among themselves who should wind up the limited partnership without a court order).

In addition to the above, the Consultation also includes certain proposed administrative changes to the Legislation with respect to: (1) Private Fund registration with the Registrar of Companies in the United Kingdom, (2) the requirement to publish certain matters concerning the admission of LPs or the transfer of interests in the *London* (or *Edinburgh* or *Belfast*) *Gazette*, and (3) the exemption of LPs from certain statutory duties contained in PA 1890 concerning the duty of partners to render accounts (Section 28, PA 1890) and the duty of partners to account for profits made in competing businesses (Section 30, PA 1890).

Any proposed amendments based on the findings from the Consultation will be effected by way of a Legislative Reform Order—a statutory instrument that permits primary legislation to be amended to remove or reduce burdens contained within such legislation. The Consultation closes on October 5. Further information on the Consultation (together with the draft legislation implementing the changes proposed can be found here. The original LPA 1907 and PA 1890 can be found here and here, respectively.

EU DEVELOPMENTS

ESMA Confirms Renewal of Short Selling Ban by Greek HCMC and Market Making Exemption

On August 3, the European Securities and Markets Authority (ESMA) issued an official opinion (Opinion), agreeing to renew for a further four weeks the emergency short selling prohibition originally imposed by the Hellenic Capital Market Commission (HCMC) on June 29. The original ban was imposed under Regulation (EU) No 236/2012 of the European Parliament and Council on short selling and certain aspects of credit default swaps. The ban was renewed by ESMA on the 6th, 13th, 20th and 27th of July. The renewed ban took effect on August 4, and will close at 12:00 a.m. CET on August 31. The original and renewed bans place a temporary prohibition on transactions in any financial instrument that creates, or increases, a net short position on any of the shares admitted to trading on the Athens Exchange and the Multilateral Trading Facility of EN.A (Alternative Market of the Athens Exchange). The original and renewed bans apply to any person, regardless of their country of residence.

Also on August 2, the HCMC reopened the ATHEX regulated market, the Multilateral Trading Facility of EN.A, the Electronic Secondary Market (HDAT) for government bonds and restarted settlement operations of the Hellenic Central Securities Depository of securities traded in Greek regulated markets.

The current renewal of the short selling ban differs from the previous restrictions as it includes an exemption for market making activities, provided that any short positions are entered into for hedging purposes. ESMA justified the addition of the exemption in the Opinion, noting that because the Greek financial markets are now open, market making activities provide important liquidity for the Greek shares and for any warrants, derivatives, index derivatives and ETF related to Greek shares.

ESMA stated in the Opinion that they had further renewed the ban because adverse developments continue to exist that can threaten the confidence in the Greek market. ESMA further stated that such ban is an appropriate and proportionate action.

A copy of the Opinion issued by ESMA can be found here.

A discussion of the first renewal of the ban on July 6, reported in the *Corporate & Financial Weekly Digest* edition of July 10, can be found here.

See "European Commission Publishes Delegated Regulation on Mandatory Clearing for OTC Interest Rate Derivatives" in the Derivatives section.

For more information, contact:

SEC/CORPORATE

Claudia H. Allen	+1.312.902.5432	claudia.allen@kattenlaw.com
Mark J. Reyes	+1.312.902.5612	mark.reyes@kattenlaw.com
Mark D. Wood	+1.312.902.5493	mark.wood@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
Christian B. Hennion	+1.312.902.5521	christian.hennion@kattenlaw.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Ross Pazzol	+1.312.902.5554	ross.pazzol@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

UK and EU DEVELOPMENTS

David A. Brennand	+44.20 7776 7643	david.brennand@kattenlaw.co.uk
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk

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London: Katten Muchin Rosenman UK LLP.