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CORPORATE & FINANCIAL
WEEKLY DIGEST

November 7, 2014 Volume IX, Issue 44

SEC/CORPORATE

SEC Sanctions 10 Companies for Disclosure Failures Surrounding Financing Deals and Stock Dilution

On November 5, the Securities and Exchange Commission announced enforcement actions against 10 companies for failing to make the required disclosures about financing deals and other unregistered sales that diluted their stock.

A public company is required to file a Form 8-K to inform investors when shares of its common stock are sold in transactions that are not registered with the SEC under the federal securities laws and constitute at least one percent of the last reported number of outstanding shares (five percent in the case of a "smaller reporting company"). A company also must report on Form 8-K when it has entered into a material definitive agreement, including a financing agreement not made in the ordinary course of business. These disclosures enable investors to be aware that stock dilution has occurred as a company issues additional shares in a financing transaction or other unregistered sales that have the effect of reducing the earnings per share and an investor's percentage of ownership in the company.

SEC investigations found that each of the 10 companies failed to make the required 8-K disclosure for a stock dilution scenario. Three of the companies additionally failed to report accurate numbers when later disclosing the outstanding shares of their common stock in quarterly or annual reports. The companies all agreed to settle the SEC's charges, and the SEC assessed a total of $350,000 in penalties.

Delaware Court of Chancery Rejects Entire Fairness Review in Absence of Conflicted Transaction

On October 24, the Delaware Court of Chancery dismissed a lawsuit filed by certain minority stockholders of Crimson Exploration, Inc. in *In re: Crimson Exploration Inc. Stockholder Litigation*, C.A. No. 8541-VCP (Del. Ch. Oct 24, 2014), which challenged a stock-for-stock merger (the "**Merger**") of Crimson and Contango Oil & Gas Co. The plaintiffs alleged that a group of affiliated defendants, including Oaktree Capital Management, L.P., constituted controlling stockholders of Crimson that breached their fiduciary duties by selling Crimson below market value for self-serving reasons.

In dismissing the plaintiffs' claims, Vice Chancellor Parsons concluded that (a) the plaintiffs failed to allege sufficient facts to support that (i) Oaktree, alone or with others, occupied a controller position owing fiduciary duties to stockholders and (ii) that a majority of Crimson's board of directors ("**Board**") was not disinterested and did not lack independence, and (b) therefore, the business judgment rule must be applied rather than the stricter entire fairness standard. In many respects, this decision echoes the opinion issued by the Court on October 24 in *In re KKR Financial Holdings LLC Shareholder Litigation*, C.A. No. 9210 (summarized here), in which the court dismissed a shareholder derivative suit also claiming a breach of fiduciary duties by an alleged controlling stockholder in a stock-for-stock merger.

Under the business judgment rule, there is a strong presumption in favor of actions taken by directors, and so long as the decision making process is reasonable, the court will defer to a board's decisions. In contrast, the entire fairness standard—the highest standard of review in corporate law—shifts the burden to defendants to prove a transaction's entire fairness, in respect of fair dealing and fair price. Vice Chancellor Parsons explained that, in

order to apply the entire fairness standard to Oaktree and its alleged affiliates, the plaintiffs must have demonstrated that (1) not only is Oaktree a controlling stockholder but also (2) the Merger was a conflicted transaction due to the controller (a) standing on both sides of such transaction or (b) competing with the common stockholders for consideration by receiving disparate consideration, having a continuing stake in the surviving entity or receiving a unique benefit.

The court was skeptical of plaintiffs' allegations that Oaktree was a controller given that (1) the alleged members of Oaktree's control group were not connected in a legally significant way (e.g., by contract, common ownership, agreement or other arrangement, to work together toward a shared goal); and (2) Oaktree is an outside investment fund and the lead negotiators of the Merger were not employed by Oaktree. Furthermore, the court, even assuming that Oaktree did control Crimson, did not find the Merger to be conflicted—the other required element for the application of entire fairness—because (a) Oaktree had no pre-Merger relation to Contango, and thus did not stand on both sides of the transaction; and (b) any arguably disparate consideration to Oaktree by way of Contango's prepayment fee of one percent on a second lien loan (the "**Prepayment**"), a significant portion of which was held by an Oaktree affiliate, or unique benefit received by Oaktree pursuant to a registration rights agreement, which Oaktree entered into with Contango ("**RRA**"), could not be considered Merger consideration given that the Prepayment and RRA were neither conditions to the Merger nor approved by the Crimson Board and were, in any event, insignificant.

The *In re: Crimson* opinion also describes another method by which a plaintiff could rebut the business judgment rule and instead have the entire fairness standard applied, namely, by showing the board was interested in the challenged transaction or lacked independence. Vice Chancellor Parsons found this method also to be inapplicable to the case at hand, given that Oaktree was not conflicted and did not appoint a majority of the Board, and a majority of the Board was independent and disinterested in approving the Merger.

The full opinion can be found here.

BROKER-DEALER

FINRA Adds a Category of Persons to Serve on Disciplinary Hearings

The Financial Industry Regulatory Authority amended FINRA Rules 9231 and 9232 to add a category of persons eligible to serve as panelists in a disciplinary proceeding, which includes persons who currently serve or previously served on any FINRA-appointed or FINRA-approved committee, enlarging the number of FINRA committees from which panelists can be chosen. In FINRA's disciplinary process, its Department of Enforcement or Department of Market Regulation first files a complaint with the Office of Hearing Officers. The chief hearing officer appoints a hearing officer to preside over and panelists to sit on FINRA's Hearing Panel or Extended Hearing Panel to carry out the disciplinary proceeding, in which evidence is presented and a written decision is issued. The decision can be appealed to FINRA's National Adjudicatory Council (NAC). Currently, panelists must (1) currently serve or have previously served on a District Committee, (2) have previously served on NAC, (3) have previously served on NAC's (or its predecessor's) disciplinary subcommittee, (4) have previously served (but does not currently serve) as a director or governor, or (5) currently serve or have previously served on FINRA's Market Regulation Committee. FINRA amended the rules to expand the categories of eligible panelists to include persons who currently serve or previously served on any committee appointed by or approved by the FINRA Board, including the FINRA Advisory Committees (e.g., Compliance Advisory Committee, Corporate Financing Committee and Fixed Income Committee, among others).

Click here to read more about the rule changes.

CFTC

CFTC Interprets Obligations to Send Initial Margin Segregation Notices and Reports

On October 31, the Commodity Futures Trading Commission issued a staff interpretation concerning its rules that oblige swaps dealers and major swap participants to send notices to their swap counterparties informing them of their right to request segregation of initial margin (IM) (but not variation margin (VM)) with an independent custodian. The interpretation covers three main points:

1. A swap dealer or major swap participant is not required to send either (a) the annual IM segregation notice described in CFTC Regulation 23.701 (each, a "Notice"), or (b) the quarterly report described in CFTC Regulation 23.704, to a counterparty unless that counterparty is required by contract or regulation to post IM.

2. A Notice must be sent each year to a counterparty who is required to post IM even if the counterparty has already elected IM segregation in response to a prior Notice.

3. A swap dealer or major swap participant may treat the lack of a response to a Notice as an election to forego IM segregation "provided that the notice under Regulation 23.701(a) includes a prominent and unambiguous statement that failure to respond within a reasonable time period will be deemed by the SD or MSP as confirmation of receipt of the notice and an election by the counterparty not to require segregation of initial margin."

The full text of CFTC Staff Interpretation 14-132 can be found here.

CFTC Proposes to Revise Residual Interest Deadline for FCMs

In 2013, the Commodity Futures Trading Commission amended CFTC Regulation 1.22 to require a futures commission merchant (FCM) to maintain its own funds (i.e., residual interest) in customer segregated accounts in an amount equal to or greater than its customers' aggregate undermargined amounts. If its customer segregated accounts are undermargined, the FCM must deposit its residual interest prior to a specified residual interest deadline. Under the current regulation, the residual interest deadline is subject to a phase-in period. Beginning November 14, the deadline will be 6:00 p.m. (ET) on the date of settlement. Absent any action by the CFTC, the phase-in period will expire on December 31, 2018, at which point the residual interest deadline will change to the time of settlement on the settlement date.

The CFTC has proposed to remove the termination date for the phase-in period. Under the proposed amendments to CFTC Regulation 1.22, any changes to the 6:00 p.m. residual interest deadline must be enacted through a final rule published in the Federal Register.

The text of the proposed rulemaking is available here.

CFTC Proposes to Amend Recordkeeping Requirements

The Commodity Futures Trading Commission has proposed to amend the recordkeeping requirements set forth in CFTC Regulation 1.35(a). The proposed amendments to CFTC Regulation 1.35(a) would clarify that records must be searchable and be kept in a form and manner that allows for identification of a particular transaction, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media. The requirement that records be searchable does not apply to oral and written communications concerning quotes, solicitations, bids, offers, instructions, trading and prices, but only those that lead to the execution of a transaction.

The proposed amendments also would exempt members of a designated contract market or swap execution facility that are not registered in any capacity with the CFTC from maintaining records in a searchable format that allows for identification by transaction. These non-registered members would also be exempt from maintaining records of text messages.

The proposed amendments would additionally exempt commodity trading advisors from the oral recordkeeping requirement.

The text of the proposed rulemaking is available here.

CFTC Grants Relief to IB Entering Into Give-Up Arrangements

The Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) granted no-action relief from the proviso in CFTC Regulation 1.57(a)(1), which requires an introducing broker (IB) that has entered into a guarantee agreement with a futures commission merchant (FCM) to open and carry each customer account solely with its guarantor FCM on a fully disclosed basis.

As provided in the no-action letter, an entity intending to register as an IB will enter into a guarantee agreement with an FCM, and will additionally enter into arrangements to "give up" transactions for certain customers to various other FCMs. Subject to certain representations in the no-action letter, DSIO has granted relief to the entity intending to register as an IB from the proviso in CFTC Regulation 1.57(a)(1), thereby allowing it to enter into the "give-up" arrangements.

The no-action letter is available here.

NFA Changes Public Display of FCM Financial Information on BASIC

Beginning November 25, the National Futures Association (NFA) will display additional information on each futures commission merchant's (FCM's) BASIC page, including the amount of customer funds held at clearing organizations and brokers, the amount of customer-owned securities that are on deposit as margin collateral, and certain information on repurchase transactions involving customer funds or securities. This information will be displayed as percentages on each FCM's Customer Segregated Funds, Customer Secured Amount Funds and/or Cleared Swaps Customer Collateral reports.

More information is available here.

JAC Maintains Current Restrictions on Trading While Undermargined and Publishes Summary of Residual Interest Requirements

The Joint Audit Committee (JAC) has announced that it will maintain its current restrictions on trading while undermargined. As background, the JAC Margins Handbook provides that if an account is undermargined for an unreasonable time, a futures commission merchant may only accept orders that reduce the risk of existing positions in the account. For these purposes, "reasonable time" is defined as less than five business days for customers and less than four business days for noncustomers and omnibus accounts. The JAC has determined to maintain this reasonable time definition.

JAC Regulatory Alert 14-07 is available here.

The JAC also has published a helpful summary of the Commodity Futures Trading Commission's residual interest requirements. JAC Regulatory Alert 14-06 is available here.

DIGITAL ASSETS AND VIRTUAL CURRENCIES

UK Treasury Calls for Information on Digital Currencies

On November 3, the UK Treasury issued a call for information on digital currencies, including Bitcoin. Views are being solicited from the public, the financial services industry, regulators, and law enforcement agencies. Commenters are asked to provide their views on how digital currencies can improve customer payments as well as encourage financial innovation. Commenters are also requested to address whether virtual currencies present any risks to users or to financial stability. The call for information closes on December 3.

The UK Treasury follows the UK Chancellor's announcement on August 6 that the government was starting a program to address the regulation of virtual currencies.

A link to the UK Treasury's announcement can be found here, and the UK Chancellor's announcement can be found here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Approves New Exchange Traded Mutual Fund Structure

The Securities and Exchange Commission has noticed Eaton Vance Corp.'s exemptive order application (Eaton Vance Notice) to offer a novel form of mutual fund that includes certain elements of an exchange-traded fund (ETF) to be called an "exchange traded mutual fund" or "ETMF." Like all mutual funds, ETMFs will not publish

daily disclosures of their portfolio holdings, and their shares will be sold at a price directly linked to their next-determined net asset value (NAV). Like all ETFs, ETMFs will list and trade on a national securities exchange and issue and redeem their shares only in Creation Units at NAV, primarily by exchanging portfolio holdings "in-kind" with authorized participants.

However, unlike the shares of ETFs that trade intra-day on an exchange at current market prices, shares of ETMFs will trade at end-of-day NAV, plus or minus a premium/discount that may vary throughout during the trading day, and which will be quoted by market makers at a price relative to the ETMF's end-of-day NAV (e.g., NAV+$0.20/share, NAV-$0.30/share) (see SEC Release 812-31333). Therefore, ETMF investors purchasing or selling shares during the trading day will not be able to do so at current market prices, nor will they know the NAV at the time their orders are placed, but they will know the level of premium/discount that will be fully transparent.

One interesting aspect of the ETMF structure is that the NAV-based Trading method will preserve portfolio confidentiality, but will not raise the SEC's concerns stated in its recent denial of the active "non-transparent" ETF structure proposed by Precidian Funds LLC (see: SEC Release 812-14116). Those concerns, especially relating to unjust price discrimination among purchasers, do not occur because all ETMF purchasers will receive a price tied to NAV, plus or minus a disclosed premium or discount. The denial of Precidian Funds LLC's proposed structure was discussed in *Corporate & Financial Weekly Digest* dated October 24.

An intriguing aspect of the Eaton Vance Notice is that the SEC intends to provide relief to future ETMFs, something almost never granted for novel structures; typically the SEC wants to review the actual operation of a novel product before agreeing to permit additional products using the same structure. The future relief was requested, and will be granted, because the *sui generis* "NAV-based Trading" method will not provide an absolute dollar amount per share until NAV is calculated at the end of the day and, consequently, exchanges and brokers will be required to install new trading systems to facilitate the purchase and sale of ETMF shares.

SEC Investment Management Director Speech Focuses on Alternative Mutual Fund Disclosures

On October 29, Norm Champ, the director of the Securities and Exchange Commission's Division of Investment Management, spoke before the SIFMA Complex Products Forum in New York. In the speech, Mr. Champ discussed SEC staff concerns regarding the adequacy and accuracy of alternative mutual fund disclosures to investors. The speech was the third since June that Mr. Champ has given to outline staff concerns with alternative mutual funds. On June 30, Mr. Champ spoke before the Practicing Law Institute (PLI) on the heightened risks faced by alternative mutual funds with respect to valuation, liquidity and leverage, and the role that fund boards play in the oversight and compliance programs of alternative mutual funds. On September 11, he spoke before a PLI Hedge Fund Management Seminar about the importance of a focus on compliance and the interests of investors for advisers launching alternative mutual funds.

In his October 29th remarks, Mr. Champ focused on the challenges of appropriately disclosing the actual strategies utilized by, and the heightened risks of, alternative mutual funds to retail investors. According to Mr. Champ, the SEC staff generally believes that all alternative investment strategy mutual funds (including Exchange Traded Funds) should regularly assess—in conjunction with each annual registration statement update—the accuracy and completeness of their strategy and risk disclosures.

Mr. Champ said that disclosure of principal investment strategies needs to be tailored to how a fund expects to be managed, and should address those strategies that the fund expects to be the most important means of achieving its objectives and that it anticipates will have a significant effect on its performance. The degree of economic exposure the alternative investment strategy creates, in addition to the amount invested in that strategy, is an important disclosure point.

Finally, Mr. Champ noted that the Division of Investment Management staff generally believes that an alternative mutual fund should assess on an ongoing basis the completeness and accuracy of alternative investments-related disclosures in its registration statement in light of its actual operations. Mr. Champ noted, "The staff has been reviewing data to compare the actual use of alternative investment strategies with what has been disclosed in fund disclosure documents."

The October 29th speech also addressed the Division's enhanced risk monitoring efforts in the asset management industry. The full text of Mr. Champ's October 29th speech can be found here.

LITIGATION

Raj Rajaratnam Appeals $92 Million Civil Fine to Second Circuit Court of Appeals

Convicted investment fund founder Raj Rajaratnam filed an appeal of his Securities and Exchange Commission case in the United States Court of Appeals for the Second Circuit, arguing that the district court improperly sought to impoverish him by imposing a $92.8 million civil fine.

Rajaratnam, who founded Galleon Group, had faced both criminal and civil charges for insider trading. After an eight-week jury trial, he was convicted in his criminal case of nine counts of securities fraud and related conspiracy counts, and was subsequently sentenced to 11 years of incarceration and was ordered to forfeit more than $50 million dollars. Following his criminal conviction, the SEC moved for summary judgment in their civil case where the arguments centered around the amount of a civil penalty. Rajaratnam argued to Judge Rakoff that no civil penalty was warranted due to the punishment already doled out in the criminal case or, alternatively, that the punishment should be calculated from the amount Rajaratnam stood to gain personally, a sum approximating $4.7 million. The district court ultimately determined that it was inappropriate to separate out what Rajaratnam gained personally from what third parties may have gained from his conduct. Instead, it found that the total profit from the scheme was $30.9 million, and trebled this number using a statutory calculation to arrive at civil fine of $92.8 million. According to the brief submitted by Rajaratnam, Judge Rakoff had alluded at oral argument as to the aspiration of leaving insider traders “worthless, homeless, and maybe clothesless”—“the point being, [to] take everything they have.”

Rajartnam filed an appeal of the civil judgment arguing that the district court erred by improperly calculating the civil fine by applying the gains by third parties rather than by the defendant himself. He argued that this resulted in an inflated penalty by more than $65 million. Rajaratnam also argued that the district court abused its discretion in imposing the fine, both by concluding that criminal penalties and civil penalties serve different purposes and by basing the fine on “an irrelevant and improper factor—the bare desire to deprive a defendant of wealth acquired independently of any wrongdoing.” The appeal is currently pending.

SEC v. Galleon Mgmt LP et al., No. 11-5124 (2d Cir. Oct. 31, 2014).

SEC Charges Former Pharmaceutical Executive and Close Friend With Insider Trading

The Securities and Exchange Commission recently charged a former pharmaceutical company executive and his longtime friend with insider trading, alleging that the friend generated more than $1 million in illicit profits by trading on tips from the former executive.

Defendant Saran Sabrdaran was the former director of Drug Safety Risk Management at InterMune Inc., a public pharmaceutical company headquartered in California. According to the complaint, Sabrdaran was part of a small group of employees charged with shepherding InterMune’s drug Esbriet through the regulatory process for marketing the drug in the European Union. In this role, Sabrdaran became privy to material non-public information about the drug’s progress in the regulatory process, and allegedly tipped this information to his close friend, Defendant Farhang Afsarpour. Before a public announcement about the drug’s approval, Afsarpour allegedly bought InterMune common stock and urged other friends to buy additional InterMune securities. Following the public announcement, InterMune’s stock prices soared, resulting in more than $1 million in illicit profits for Afsarpour.

The SEC’s complaint charged Sabrdaran and Afsarpour with violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The SEC seeks disgorgement, prejudgment interest, financial penalties and injunctions. Additionally, the SEC seeks an officer-and-director bar against Sabrdaran.

SEC v. Sabrdaran and Afsarpour, No. 3:14-cv-4825 (N.D. Cal. Oct. 30, 2014).

UK DEVELOPMENTS

Restrictions on the Retail Distribution of CoCos and Other Regulatory Capital Instruments

Earlier this year, the UK Financial Conduct Authority (FCA) used its new consumer protection powers for the first time when it introduced temporary product intervention rules (Temporary Rules) that restricted the distribution of contingent convertible instruments (CoCos) to retail investors. These Temporary Rules came into force on October 1 and last for a period of 12 months. As reported previously (see here), the Temporary Rules restrict all authorized persons from selling, promoting or intermediating transactions in CoCos (specifically those that are eligible as Additional Tier 1 or Tier 2 capital under Regulation (EU) No. 575/2013—the Capital Requirements Regulation), where such transactions result in ordinary retail investors owning the CoCos. The Temporary Rules do not impact the distribution of CoCos to professional or institutional clients or to exempt persons.

In accordance with its stated intention when implementing the Temporary Rules, on October 29, the FCA published a consultation paper (Consultation Paper) in which it outlined proposed permanent rules with respect to restrictions on the retail distribution of CoCos (to replace the Temporary Rules upon their expiration on October 1, 2015), as well as requirements to be imposed when certain regulatory share capital instruments issued by mutual societies, including core capital deferred shares (RegCap. Instruments), are distributed in the retail markets. The Consultation Paper can be accessed here.

The FCA makes it is clear in the Consultation Paper that it continues to view CoCos as highly complex instruments presenting investment risks that are exceptionally challenging to evaluate, model and price, and, which, as a consequence, are unsuitable investments for ordinary retail investors. The FCA has therefore proposed in the Consultation Paper to make permanent the approach taken in the Temporary Rules, so as to continue to restrict authorized firms from distributing CoCos in the retail market without first checking that the prospective client meets certain criteria concerning their net worth or investment sophistication. The FCA also has included proposals in the Consultation Paper that restrict the retail distribution of certain pooled investments that invest wholly or predominantly in CoCos.

As with CoCos, the FCA also outlines in the Consultation Paper a number of concerns it has in relation to retail investment in RegCap. Instruments issued by mutual societies, which present investment risks similar in profile to those connected to CoCos. Nevertheless, while acknowledging those risks, the FCA also stresses its recognition that mutual societies may have little or no access to institutional markets to raise regulatory capital and (as a consequence of their structure and ownership), some consumers may genuinely wish to support mutual societies of which they are members by providing core capital. On this basis, unlike with respect to CoCos, the FCA has proposed in the Consultation Paper not to restrict distributions of RegCap. Instruments to ordinary retail investors in their entirety, but rather to impose certain requirements on their distribution, including highlighting specific risk warnings and limiting the size of investment permitted to be made in this type of security by ordinary retail investors, which the FCA has proposed be set at five percent of their net investable assets. The FCA also has proposed that these requirements apply only to the primary issuance and not to secondary market dealings in relevant securities. However, the FCA has stated that it may reconsider this position if it becomes apparent that firms are using secondary market sales as a way of getting around the requirements referred to above.

Responses to the Consultation Paper are to be submitted to the FCA by January 29, 2015, following which the FCA will consider feedback and publish final rules in a policy statement prior to the expiration of the Temporary Rules in October 2015.

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

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

LITIGATION

Michael M. Rosensaft	+1.212.940.6631	michael.rosensaft@kattenlaw.com
Ashley H. Jones	+1.212.940.6791	ashley.jones@kattenlaw.com

UK DEVELOPMENTS

Barry E. Breen	+44.20.7776.7635	barry.breen@kattenlaw.co.uk
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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