Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

April 15, 2011

SEC/CORPORATE

SEC Delays Planned Rulemaking Schedule to Implement Provisions of Dodd-Frank Act

On April 8, the Securities and Exchange Commission updated its planned schedule for adopting rules and taking other actions to implement the corporate governance and disclosure provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. As reported in the September 24, 2010, edition of *Corporate and Financial Weekly Digest*, the SEC had previously announced its planned rulemaking schedule to implement provisions of the Dodd-Frank Act. The updated schedule delays implementation of some of these provisions by as much as six months. Below are updated time periods set forth in the SEC's revised rulemaking schedule for governance and disclosure rules to be adopted during such time periods, as well as certain related actions. Section references are to the Dodd-Frank Act.

The following rules will be implemented in April 2011:

- Implement a Whistleblower Incentives & Protection Program (Section 922)
- Disclosure by institutional investment managers of votes on executive compensation (Section 951)

The following rule will be implemented in May–July 2011:

- Revision to the "accredited investor" standard (Section 413)

The following rules will be implemented in August–December 2011:

- Disclosure of, and prohibitions of certain, executive compensation structures and arrangements (Section 956)
- Exchange listing standards regarding compensation committee independence and factors affecting compensation adviser independence; compensation consultant conflicts (Section 952)
- Disclosure related to "conflict minerals" and mine safety information; disclosure by resource extraction issuers (Sections 1502-1504)
- Disclosure of pay-for-performance, pay ratios and hedging by employees and directors (Sections 953 and 955)
- Clawback of executive compensation (Section 954)

The following action will be taken in July–December 2012:

- Report to Congress on study and review of use of compensation consultants and effects of such use (Section 952)

The following rule will be issued at a date to be determined:

- Definition of "other significant matters" for purposes of exchange standards regarding broker voting of uninstructed shares (Section 957)

Click here for the SEC's complete updated rulemaking schedule for the Dodd-Frank Act.

CFTC

CFTC Publishes Thirteenth Series of Dodd-Frank Rules

The Commodity Futures Trading Commission has published its thirteenth series of proposed rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposals relate to the establishment of initial and variation margin requirements for uncleared swaps and to recordkeeping and reporting requirements for existing swaps.

Margin Requirements for Uncleared Swaps

The CFTC has proposed rules to implement Section 731 of the Dodd-Frank Act, which requires the CFTC to adopt rules imposing initial and variation margin requirements on all swaps that are not cleared by a derivatives clearing organization (DCO). The margin requirements would apply to uncleared swaps entered into after the effective date of the rules.

The proposed rules would apply to swap dealers (SDs) and major swap participants (MSPs) that are not subject to oversight by a regulator other than the CFTC. Margin requirements would vary by counterparty, depending on whether the counterparty is a "financial entity," as defined under Section 2(h)(7)(C) of the Commodity Exchange Act. The proposed rules would require initial and variation margin to be paid on all uncleared swaps that are entered into between an SD or MSP with an SD or MSP. Initial margin posted for swaps between SDs and MSPs would have to be deposited with a third-party custodian and could not be rehypothecated.

The rules also would require that an SD or MSP collect, but not pay, initial and variation margin on uncleared swaps that are entered into with a financial entity, subject to certain thresholds, but would not require an SD or MSP to pay or collect initial or variation margin from counterparties that are not financial entities, including commercial entities, provided that it has entered into credit support arrangements with such counterparties.

Initial margin required under the proposed rules could be calculated using any model approved by the CFTC that is either (1) used by a DCO for clearing swaps, (2) used by any entity subject to oversight by a prudential regulator for clearing swaps, or (3) made available for licensing to any market participant. If no model meeting these requirements is available, initial margin would be calculated by selecting a comparable cleared swap or futures contract and applying a multiplier to the initial margin required thereunder as set forth in the proposed rules. Initial margin would in all cases be required to cover 99% of price moves over a 10-day liquidation period.

Variation margin required under the proposed rules would be calculated to cover current exposure arising from market moves since the execution of the swap or the previous time the swap was marked-to-market for variation margin calculation purposes.

SDs, MSPs and financial entities would be permitted to meet margin requirements with only specified assets, subject to haircuts set forth in the proposed rules. Non-financial entities would be permitted to post non-traditional forms of collateral in accordance with the credit support arrangements entered into with the SD or MSP counterparty. SDs and MSPs would also be required to offer non-SDs or MSPs the option to have any initial margin posted segregated.

The comment period will close 60 days after the proposed rules are published in the *Federal Register*. The proposing release for the proposed rules regarding margin requirements for uncleared swaps can be found here.

Swap Data Reporting and Recordkeeping

The CFTC has proposed rules to provide for the reporting of data relating to swaps entered into before the date of enactment of the Dodd-Frank Act and data relating to swaps entered into on or after the date of enactment of the Dodd-Frank Act and prior to the effective date of swap data reporting rules promulgated by the CFTC (collectively, historical swaps).

Among other things, the proposed rules would require that:

- Counterparties to swaps existing on or after the publication date of the proposed rule preserve records of specified minimum primary economic terms of the swap based on the underlying asset class as provided in appendices to the proposed rule. If a confirmation for the swap exists as of the publication date of the proposed rules, that confirmation would be required to be preserved as well.

- Counterparties to swaps that have expired prior to the publication date of the proposed rule preserve any records of the swap in their possession in the form they exist.

Records would be required to be preserved for the term of the historical swap and for five years following the termination or expiration thereof.

- The proposed rules would separately establish reporting requirements for historical swaps. In particular, at least one party to each historical swap existing on or after the publication date of the proposed rules would be required to provide (1) an initial data report to be filed on the effective date of the swap, and (2) ongoing reporting of data during the historical swap's remaining existence. The determination of which counterparty would be responsible for such reporting would be governed by the CFTC's previously proposed rules on swap data reporting. The initial data report would be required to include the minimum primary economic terms for the swap based on the underlying asset class as provided in an appendix to the proposed rules. Any confirmation terms of the swap existing on or after the publication date of the proposed rule and included in the automated reporting system of a counterparty would be required to be included in the initial report.

The proposed rules would permit the parties to a swap to contract with third-party service providers to satisfy reporting requirements, but the parties would ultimately be responsible for satisfying all reporting requirements.

A CFTC summary of the proposed rules regarding recordkeeping and reporting requirements for swaps can be found here.

CFTC and SEC to Hold Joint Public Roundtable Discussion Regarding Implementation of Rules under Dodd-Frank

The Commodity Futures Trading Commission and the Securities and Exchange Commission will jointly conduct a public roundtable discussion to address the schedule for implementing final rules for swaps and security-based swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act, including whether to phase in the implementation of the new requirements. The roundtable will take place on May 2 and 3 at the CFTC headquarters in Washington, D.C. Further information about the public roundtable, including how to submit advance comments to the CFTC and SEC, is available here.

CFTC and FTC Sign MOU Regarding Sharing of Non-Public Information

The Commodity Futures Trading Commission and the Federal Trade Commission (FTC) have signed a Memorandum of Understanding (MOU) to facilitate the sharing of non-public information between the agencies in connection with investigations into possible market manipulation. In its press release announcing the MOU, the CFTC focused on information sharing related to investigations into fraud-based manipulation of the oil and gasoline markets. The MOU states that "[u]nless applicable law requires otherwise, the [CFTC and the FTC] shall take all actions reasonably necessary to preserve, protect and maintain all privileges and claims of confidentiality related to all nonpublic information provided pursuant to this MOU."

The MOU is available here. The CFTC press release about the MOU can be found here.

NFA Amends Self-Examination Questionnaire

The National Futures Association (NFA) has amended the Self-Examination Questionnaire required to be reviewed annually by NFA members in order to identify and correct any supervisory deficiencies. Specifically, NFA has added a section to the Questionnaire for Forex Dealer Members (FDMs), updated other sections of the Questionnaire to assist non-FDM members in reviewing their forex operations, and made general updates to the Questionnaire.

In connection with the amendments to the Questionnaire, NFA has amended the related Interpretive Notice 9020 to require FDMs to complete the Questionnaire and to require non-FDM members who engage in forex transactions to use the Questionnaire to review their forex operations.

The amended Questionnaire can be found here.
NFA's letter to the Commodity Futures Trading Commission regarding the amendments to Interpretive Notice 9020 can be found here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

Court Dismisses Case Against Mutual Fund's Distributor and Trustees Concerning 12b-1 Fees

On March 30, in *Wiener v. Eaton Vance Distributors, Inc.*, the U.S. District Court for the District of Massachusetts dismissed an Eaton Vance Municipals Trust shareholder derivative suit involving Eaton Vance Distributors, Inc. and the Trust's nine trustees, alleging that the asset-based Rule 12b-1 fees paid by the Trust to Distributors and selling broker-dealers who distribute Trust mutual fund shares violated the Investment Advisers Act of 1940 since neither Distributors nor the selling broker-dealers were registered under the Advisers Act. The plaintiff sought, among other things, the rescission of the distribution agreement between the Trust and Distributors under Section 47(b) of the Investment Company Act of 1940 (1940 Act).

Section 47(b) creates a private right of action for a party to void a contract that involves a violation of the 1940 Act or any rules thereunder. The plaintiff argued that the alleged violations of the Advisers Act constitute violations of Section 36(a) of the 1940 Act (allowing the Securities and Exchange Commission to bring enforcement actions against, among others, fund trustees and principal underwriters for breaches of fiduciary duties) and SEC Rule 38a-1 (requiring investment companies to establish and maintain adequate compliance policies and procedures) as grounds to rescind the distribution agreement. The court rejected these arguments, stating that Section 47(b) covered violations of the 1940 Act, not of the Advisers Act, and declined to create a private right of action under Section 36(a). The court also stated that the complaint failed to allege a violation of Rule 38a-1 and declined to imply any general duties arising out of the rule.

The *Wiener* case dismissal follows the October 2010 dismissal of a virtually identical complaint filed in the U.S. District Court for the Northern District of California against Franklin/Templeton Distributors, Inc.

Click here to read the Massachusetts federal court's opinion dismissing the case.

LITIGATION

Ninth Circuit Upholds Facebook Settlement

The U.S. Court of Appeals for the Ninth Circuit upheld a lower court's approval of a settlement agreement entered into by The Facebook, Inc. and individual litigants, Cameron and Tyler Winklevoss and Divya Narendra (the Winklevosses), who claimed that the idea for the popular social networking site had been stolen from them. The Winklevosses and their own social networking site sued Facebook and its founder Mark Zuckerberg in Massachusetts and Facebook countersued in California. The California court eventually dismissed the Winklevosses for lack of personal jurisdiction and the parties were ordered to mediate.

During the course of the mediation, the parties signed a handwritten, one-and-a-third page term sheet and settlement agreement. However, after the agreement was signed, a dispute arose during negotiations over the final details, and Facebook moved for an order enforcing the handwritten settlement agreement. The lower court found the agreement enforceable and the Winklevosses appealed. Facebook also sought an order from the lower court requiring the Winklevosses to sign more than 130 pages of documents to effect the settlement, including a stock purchase agreement and other papers, which the court refused to grant.

The Winklevosses argued that the handwritten agreement was unenforceable because it lacked material terms, such as those in the 130 pages of deal documents the parties were negotiating after the agreement was signed. The Ninth Circuit disagreed, distinguishing between material terms that are necessary, "without which there can

be no contract," and terms that are "important" and that affect "the value of the bargain." A contract that omits the latter type of terms is "enforceable under California law, so long as the terms it does include are sufficiently definite for a court to determine whether a breach has occurred, order specific performance or award damages." Under this test, the handwritten settlement agreement easily passed muster, as it provided that Facebook would acquire the Winklevosses' site, the Winklevosses would get a cash payment and an interest in Facebook, and that both sides would cease litigation.

Moreover, the handwritten settlement agreement also specified that material terms would be determined later by Facebook "consistent with a stock and cash for stock acquisition." The court read this provision to mean that the parties intended to be bound by the handwritten agreement even though certain material aspects would be finalized later. The Ninth Circuit also rejected the Winklevosses' claim for rescission of the settlement agreement based on purported securities laws violations, finding that they had released all such claims when they signed the settlement agreement. (*The Facebook, Inc. v. Pacific Northwest Software, Inc.*, Nos. 08-16745; 08-16873, 09-15021, 2011 WL 1346951 (9th Cir. Apr. 11, 2011))

Delaware Court Authorizes New Theory of Tortious Interference with Contract

Deciding an issue of first impression, the Superior Court of Delaware recently authorized the assertion of claims based on a new theory of tortious interference with contract, but ruled that the plaintiff failed to state a claim under that theory. Allen Family Foods, Inc. operates a poultry processing facility and had contracted with Capital Carbonic Corporation to supply dry ice for the facility. In September 2010, Allen, believing that its contract with Carbonic had been terminated by its terms, entered into a contract with Praxair Distribution, Inc. to supply dry ice. Thereafter, Carbonic sent a letter to Praxair threatening litigation, after which Allen ceased performance of its contract with Praxair and, instead, continued to purchase dry ice pursuant to its previous agreement with Carbonic.

Allen then sued Carbonic, alleging that Carbonic tortiously interfered with its agreement with Praxair. Traditionally, to assert a tortious interference with contract claim, the plaintiff must allege that the defendant's conduct "induce[d] a third party to terminate a contract with the plaintiff unlawfully." Under the Restatement (Second) of Torts, there is an additional basis for a tortious interference claim where, rather than induce a third party to breach a contract, the alleged wrongdoer "intentionally and improperly interferes with the performance of a contract... between [the plaintiff] and a third person, by preventing the [plaintiff] from performing the contract or causing his performance to be more expensive or burdensome."

No Delaware court had reviewed this theory of tortious interference before, and the court examined opinions from other jurisdictions before holding that it was a valid expansion of the law of tortious interference of contract. In so holding, the court noted that "it seems irrational to recognize a cause of action for a party's conduct directed at a third party designed to prevent that third party from performing a contract with [the plaintiff] and not recognize a similar cause of action for [the plaintiff] where the actor's conduct is instead directed at the [plaintiff] to prevent them (sic) from performing."

Nevertheless, the court held that Allen failed to state a claim under the new theory because the letter that Carbonic sent that formed the basis for Allen's claims was directed to Praxair, not Allen. Moreover, the claim failed because Allen failed to allege that it was prevented from performing the agreement with Praxair or that its performance of that agreement was made more expensive by Carbonic's actions. Nor did Allen allege a breach of contract by Praxair, a requirement to state a claim under the traditional theory of tortious interference. Instead, Allen merely alleged that it was damaged because it continued to accept shipments of dry ice from Carbonic, an allegation that is insufficient to state a claim for tortious interference with contract under any theory. (*Allen Family Foods, Inc., v. Capital Carbonic Corp.*, No. N10C-10-313 (Sup. Ct. Del. Mar. 31, 2011))

BANKING

Banking Regulators Propose Margin and Capital Requirements for Covered Swap Entities

On April 12, federal banking regulators (Agencies) proposed regulations, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, requiring certain large participants in the OTC swaps market (“covered swaps entities”) to collect margin from other covered swaps entities. This proposed regulations would impose initial margin and variation margin requirements on covered swaps entities for uncleared swaps. This would

require covered swaps entities to calculate and collect initial margin and variation margin from all swap counterparties. The amount of margin that would be required would vary based on the relative risk of the counterparty and the swap. The proposed regulations would also impose existing regulatory capital rules on covered swaps entities. These initial margin, variation margin and capital standards are intended, according to the Agencies, to offset the risk to swap entities and the financial system arising from the use of swaps that are not cleared.

The proposed regulations would require commercial end users to comply with the margin requirements noted above only if their exposure is above a predefined level calculated by the seller of the swap; commercial end users of derivatives would not be required to post margin unless their activity exceeds the risk limits of the entity with which they are transacting. According to the Agencies, low-risk financial end users, including most community banks, would not be required to post margin unless their activity exceeds substantial thresholds or the risk limits of the entity with which they are transacting.

The proposal establishes minimum quality standards for acceptable margin collateral. It also establishes minimum safekeeping standards for collateral posted by covered swap entities to ensure that collateral is available to support the trades and not housed in a jurisdiction where it is not available if defaults occur.

Comments to these proposed rules are being solicited through June 24. New trades would not be subject to the proposed requirements until after the proposed effective date, which is currently planned for six months after the federal banking regulators issue the final version of these proposed requirements.

Read more.

UK DEVELOPMENTS

UK Independent Commission on Banking Consults on Reform of Banking System

On April 11, the Independent Commission on Banking (ICB), established by the UK Government in July 2010, published for consultation its interim report on potential reforms to the UK banking sector. Its proposals have the twin aims of financial stability and competition.

The ICB stresses that it has not yet reached any final conclusions. Its key interim proposals are:

1) As expected, the ICB has stopped short of realizing the banks' worst fears—recommending a British version of the repealed U.S. Glass-Steagall Act and forcing a separation of ownership between investment and commercial/retail banking. However, it is recommending a form of "Glass-Steagall light"; retail banking operations can be owned by a combined, or "universal", bank, but must be ring-fenced into a separate subsidiary of the investment or combined bank.
2) Systemically important banks should hold equity capital of at least 10% (up from the 7% recommended by new EU regulations). Investment and wholesale banking operations in the UK will only have to maintain capital reserves in accordance with international norms. The criteria for qualifying as a "systemically" important bank are not yet defined.
3) Universal banking groups would be able to move capital between their investment and retail banking subsidiaries provided that each subsidiary meets its distinct capital reserve requirements at all times.
4) The ICB does not at present recommend the adoption of a UK equivalent of the "Volcker Rule."
5) Banks should issue debt which suffers some of the loss if the bank gets into trouble; the report is sketchy on the detail here but the principle is that the bank's bondholders, as well as its equity, should suffer at least some of the pain if a bank runs into trouble. The report also floats the idea of bank depositors' money ranking ahead of other debt on bankruptcy (as is already the case in a number of countries).
6) The role of the proposed organizations which will replace the UK Financial Services Authority (FSA) in due course (see the June 18, 2010, and July 30, 2010, editions of *Corporate and Financial Weekly Digest*) is clarified. The Financial Conduct Authority, which will be responsible for prudential and conduct supervision of banks, investment firms and exchanges, is clarified. The other regulator replacing the FSA will be the Prudential Regulatory Authority, which will have primary responsibility for monitoring banks' balance sheets and financial soundness.

7) The UK retail banking market is perceived to suffer from a lack of competition. As it has over 30% of the UK retail market, ICB's preliminary recommendation is that Lloyds will almost certainly be ordered to sell off several hundred more branches. Other large retail banks may also be ordered to divest branches in order to promote competition.
8) The ICB notes with approval proposals to standardize and clear OTC derivatives.

The consultation stage lasts until July 4. The ICB is due to issue its final report and recommendations to the UK Government in September 2011.

Read more.

For more information, contact:

SEC/CORPORATE		
Robert L. Kohl	212.940.6380	robert.kohl@kattenlaw.com
David A. Pentlow	212.940.6412	david.pentlow@kattenlaw.com
Robert J. Wild	312.902.5567	robert.wild@kattenlaw.com
James B. Anderson	312.902.5620	james.anderson1@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@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
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
Marybeth Sorady	202.625.3727	marybeth.sorady@kattenlaw.com
James Van De Graaff	312.902.5227	james.vandegraaff@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		
Steven Shiffman	212.940.6785	steven.shiffman@kattenlaw.com
Brian Schmidt	212.940.8579	brian.schmidt@kattenlaw.com
BANKING		
Jeffrey M. Werthan	202.625.3569	jeff.werthan@kattenlaw.com
Christina Grigorian	202.625.3541	christina.grigorian@kattenlaw.com
UK DEVELOPMENTS		
Edward Black	44.20.7776.7624	edward.black@kattenlaw.co.uk
Andrew Turner	44.20.7776.7627	andrew.turner@kattenlaw.co.uk

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

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK 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.