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Corporate and Financial Weekly Digest

February 15, 2008

SEC/Corporate

SEC Votes to Propose All-Electronic Disclosure and Updated Test for Registration for Foreign Issuers

On February 13, the Securities and Exchange Commission unanimously voted to propose amendments to rules (i) governing disclosure requirements for foreign companies which would eliminate all paper submission requirements and (ii) exempting foreign private issuers from having to register a class of equity securities under the Securities Exchange Act of 1934 based on submission to the SEC of information published outside the United States.

The SEC's proposed amendments to rules governing disclosure requirements by foreign companies include:

- allowing foreign issuers to assess their eligibility to use the special forms and rules available to foreign private issuers once a year on the last day of their second fiscal quarter rather than the currently-required continuous basis;
- accelerating the reporting deadline for annual reports filed on Form 20-F for foreign private issuers from six months to 90 days after the issuer's fiscal year-end in the case of large accelerated filers and accelerated filers, and to 120 days after the issuer's fiscal year-end for all other foreign private issuers;
- amending Form 20-F by eliminating the instruction that permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements; and
- amending Exchange Act rules pertaining to going private transactions by reporting issuers or their affiliates to reference the recently adopted deregistration and termination of reporting rules applicable to foreign private issuers.

The SEC also proposed amending the Rule 12g3-2(b) exemption, which exempts a foreign private issuer from having to register a class of equity securities under Section 12(g) of the Exchange Act, by eliminating the Rule's paper submission requirements and automatically granting the exemption to a foreign private issuer that meets specified conditions unrelated to a count of such issuer's U.S. security holders. To claim the exemption as proposed, issuers must:

- not have any reporting obligations under Section 13(a) or 15(d) of the Exchange Act;

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For more information, contact:

Robert L. Kohl
212.940.6380
robert.kohl@kattenlaw.com

Mark A. Conley
310.788.4690
mark.conley@kattenlaw.com

David S. Kravitz
212.940.6354
david.kravitz@kattenlaw.com

- maintain a listing of the subject securities on one or more exchanges in one or two foreign jurisdictions comprising its primary trading market;
- have U.S. trading volume no greater than 20% of its worldwide trading volume for its most recently completed fiscal year unless it claims an exemption under the Exchange Act in connection with deregistration; and
- electronically publish in English specified non-U.S. disclosure documents required since the beginning of its most recently completed fiscal year on its website or via another electronic information delivery system generally available to the public in its primary trading market, unless it is claiming an exemption under the Exchange Act in connection with deregistration.

To remain eligible for this exemption, an issuer must continue to electronically publish non-U.S. disclosure documents in English for subsequent fiscal years, maintain its foreign listing, continue to meet its trading volume requirement and not otherwise incur any Exchange Act reporting obligations. Compliance with this proposed rule amendment, as SEC Senior Special Counsel Felicia H. Kung discussed in her remarks, will "improve the accessibility of the U.S. markets to foreign private issuers, and enhance the disclosures that these issuers provide to U.S. investors."

http://www.sec.gov/news/press/2008/2008-20.htm

http://www.sec.gov/news/speech/2008/spch021308ebs-fhk.htm

Broker Dealer

Exemption to NASD Rule Pertaining to Foreign Affiliates' Research Analysts

The Securities and Exchange Commission has approved rule changes proposed by the Financial Industry Regulatory Authority, Inc. (FINRA) to amend an exemption to NASD Rule 1050 and New York Stock Exchange Rule Interpretation 344/02 for certain research analysts employed by a member's foreign affiliate who contribute to the preparation of a member's research report. NASD Rule 1050 and NYSE 344 (Rules) currently require an associated person who functions as a research analyst to register as such with FINRA and pass a qualification examination (the Series 86/87). The proposed rule change would modify an existing exemption from the Series 86 examination, which relieves from the Series 86 examination requirement certain research analysts who are employed by a member's foreign affiliate and contribute to the preparation of a member's research report.

Current exemptive relief for foreign analysts requires compliance with other standards in foreign jurisdictions that are similar to the FINRA qualification standards and the conflict of interest rules. The proposed rule change would create a superseding exemption from the research analyst qualification requirements that would cover research analysts residing anywhere outside of the United States. Eligible research analysts that would qualify for this exemption would be subject to certain supervisory, disclosure and recordkeeping requirements.

In addition to having to comply with NASD Rule 2711 and NYSE Rule 472, as described in the following Broker Dealer entry, prior to publishing or otherwise distributing globally-branded research reports prepared by a foreign research analyst, a registered principal or supervisory analyst of the member would be required to review and approve the research prior to its distribution. In addition, a member would be required to prominently disclose on the research report (i) each affiliate contributing to the research report, (ii) the names of the foreign research analysts employed by each contributing affiliate, (iii) that such

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For more information, contact:

James D. Van De Graaff
312.902.5227
james.vandegraaff@kattenlaw.com

Daren R. Domina
212.940.6517
daren.domina@kattenlaw.com

Patricia L. Levy
312.902.5322
patricia.levy@kattenlaw.com

Morris N. Simkin
212.940.8654
morris.simkin@kattenlaw.com

Janet M. Angstadt
312.902.5494
janet.angstadt@kattenlaw.com

Lance A. Zinman
312.902.5212
lance.zinman@kattenlaw.com

research analysts are not registered/qualified as research analysts with FINRA, and (iv) that such research analysts may not be associated persons of the member and therefore may not be subject to the NASD Rule 2711 and NYSE Rule 472 restrictions on communications with a subject company, public appearances and trading securities held by a research analyst account. Finally, members would be required to establish and maintain records that identify those individuals who have availed themselves of the exemption, the basis for such exemption, and evidence of compliance with the conditions of the exemption.

http://www.sec.gov/rules/sro/finra/2008/34-57278.pdf

SEC Approves FINRA Rule Proposal to Amend NASD Rule 2711 and NYSE Rule 472

The Securities and Exchange Commission has approved rule changes proposed by the Financial Industry Regulatory Authority, Inc. (FINRA) concerning NASD Rule 2711, "Research Analysts and Research Reports" and NYSE Rule 472, "Communications with the Public." These rules concern a member's disclosure and supervisory review obligations when the member distributes or makes available third-party research reports. A member that distributes a third-party research report must accompany the report with certain disclosures as they pertain to the member. Furthermore, the above rules require principals and supervisory analysts to review the research reports in order to ensure that the disclosure requirements have been met and that no untrue or misleading statements are contained in the report.

The approved proposal defines a "third-party research report" as a research report that is produced by a person or entity other than the member. Moreover, the proposal created an additional subcategory of "independent third-party research" wherein the person or entity responsible for the report (i) has no affiliation or business relationship with the distributing member or the member's affiliates that is reasonably likely to inform the content of its research reports and (ii) makes independent content determinations without input from the distributing member. Such independent third-party research reports will not be subject to the content review requirements discussed above if the report is made available either (i) upon request, (ii) through a member-maintained web site, or (iii) where the report is made available by a member in connection with a solicited order where the soliciting representative informs the customer of the availability of the independent research on the solicited equity security and the customer requests such research.

The approved proposal will also allow a member to satisfy the disclosure requirements by directing customers to web sites containing the necessary third-party disclosures. Disclosure requirements also can be satisfied where the member establishes written supervisory policies and procedures reasonably designed to ensure the completeness and accuracy of all applicable disclosures.

http://www.sec.gov/rules/sro/finra/2008/34-57279.pdf

Investment Companies and Investment Advisors

Valuation a Leading Topic at SEC Speaks Conference – SEC Guidance Expected

Valuation issues were a consistent theme during the February 8 and 9 Securities and Exchange Commission staff presentations at "The SEC Speaks in 2008" conference in Washington, DC. During the Division of Investment Management panel, Chief Counsel and Associate Director Douglas Scheidt announced that the staff was about to propose to the full Commission new

INVESTMENT COMPANIES AND INVESTMENT ADVISORS

For more information, contact:

Marybeth Sorady
202.625.3727
marybeth.sorady@kattenlaw.com

Daren R. Domina
212.940.6517
daren.domina@kattenlaw.com

interpretative guidance on fair value requirements and valuation procedures. This guidance would then be made available for public comment before being finalized. The goal of this guidance, Scheidt said, is to update and modernize prior SEC guidance and consolidate all of the SEC's positions on valuation in one document.

During a later Investment Management Workshop session, the SEC staff highlighted the January 25 settlement the SEC reached with most of the remaining defendants in the *Heartland Advisors, Inc.* valuation case (Release Nos. 33-8884 & IC-28136). This case was said to illustrate the SEC's current concerns with fair valuation processes and the valuation of deteriorating securities positions. The case involved the "smoothing" of mutual fund value declines in the face of sharply deteriorated securities values. The staff stated that the fund manager's decision to ignore indications of interest in the portfolio securities from third parties because the manager viewed them as "vulture funds" was a "big flag" to all involved in the fund's valuation processes that there was something wrong with the portfolio's carrying prices. Scheidt stated that a lesson to be taken from the *Heartland* case is, if a fund is going to ignore a sales price in the market between unrelated parties because the fund manager believes that it's a distressed sale, there must be something more than the manager's opinion – some objective evidence – that it was a distressed sale.

During the Division of Markets and Trading panel, Director Erik Sirri noted that the sub-prime market disarray has prompted the Division to look more closely at the broker-dealer firm risk controls and the quality of internal pricing procedures and models being used when market pricing mechanisms have failed. The Accounting panel also highlighted fair valuation issues with Deputy Chief Accountant James Kroeker stressing that valuation is based on market participant expectations – "what can you get for [the security] today."

http://www.sec.gov/litigation/admin/2008/33-8884.pdf

SEC Proposes Major Form ADV Part II Amendments

On February 13, the Securities and Exchange Commission proposed to amend Form ADV Part II, which registered investment advisers use to describe their business. The Form ADV Part II and related rule amendments will require investment advisers to prepare and deliver to clients and prospective clients a narrative brochure written in plain English. The proposed brochure dispenses with the check-the-box format currently used and must be filed electronically and available to the public via the SEC-sponsored Investment Adviser Public Disclosure web site.

The narrative would publicly disclose to investors more detailed information about an investment adviser's business practices, services, fees, anticipated investor risks, conflicts of interest, and disciplinary history. Among the conflicts of interest proposed to be highlighted in the narrative are the use of affiliates to execute transactions, the use of client brokerage to obtain "soft dollars benefits," the adviser's interests in certain transactions, the side-by-side management of clients who pay performance fees (such as hedge funds) and those who do not, and an adviser's receipt of compensation from issuers of financial products the adviser recommends to clients. The narrative will also provide additional information about the qualifications of employees who give advice to clients.

http://www.sec.gov/news/press/2008/2008-19.htm

Peter J. Shea
704.444.2017
peter.shea@kattenlaw.com

Morris N. Simkin
212.940.8654
morris.simkin@kattenlaw.com

Kathleen H. Moriarty
212.940.6304
kathleen.moriarty@kattenlaw.com

New Guidance Under ERISA on Trustee's Duty to Collect Delinquent Contribution

In enforcing the Employee Retirement Income Security Act of 1974 (ERISA), the U.S. Department of Labor (DOL) has, for many years, focused considerable effort on recovering contributions that are due to an employee benefit plan, but which remain unpaid. The most common type of delinquent contribution is money withheld from 401(k) plan participants but not promptly credited to their accounts. A plan may also specify that contributions (such as matching contributions in a 401(k) plan, or required funding contributions to a pension plan) be made at a specified time.

In Field Assistance Bulletin 2008-01 (Bulletin), recently provided to its Regional Directors, the Employee Benefits Security Administration of the DOL made it clear that fiduciaries of plans subject to ERISA must identify who is responsible for the collection of delinquent contributions, and that such fiduciaries may be liable for plan losses which result from the failure to identify who is responsible.

Under ERISA, responsibility to control and manage the assets of a plan rests with the trustee or trustees of the plan, except to the extent the trustee is a "directed trustee" subject to the instructions of another plan fiduciary, or where an investment manager has been appointed to manage plan assets. The duty to manage and control plan assets includes the duty to collect contributions, because, according to the DOL, the failure to make a required contribution to the plan gives the plan a claim, which is itself a plan asset. The Bulletin indicates that the DOL has, in audits of plans, seen trust documents "which purport to relieve the financial institutions serving as plan trustees of any responsibility to monitor and collect delinquent contributions."

In the Bulletin, the DOL states its view that the fiduciary who has the authority to appoint the plan's trustee (this could be the employer, a plan committee or some other party, depending on the plan documents) must ensure that the duty to collect delinquent contributions is assigned to a trustee, a named fiduciary or an investment manager. Further, if this responsibility is not assigned, "the fiduciary with authority to hire the trustee may be liable for plan losses due to a failure to collect contributions." An example of such losses would be investment gains that would have been made of amounts had they been invested in the plan.

By highlighting this issue in the Bulletin, the DOL has signaled that its agents will be looking at this issue in field audits of plans. Further, in what it deemed appropriate circumstances, the DOL might take enforcement action or litigate against plan fiduciaries who had failed to address this issue and arguably caused plan losses.

Plan sponsors and internal fiduciaries should examine their plan and trust documents, and consider what action may be required to address the issue of collecting delinquent contributions. Financial services organizations which serve as trustees of plans subject to ERISA may wish to review their documentation concerning their obligations concerning plan contributions, and anticipate questions about those provisions.

http://www.dol.gov/ebsa/regs/fab2008-1.html.

ERISA

Gary W. Howell
312.902.5610
gary.howell@kattenlaw.com

Gregory K. Brown
312.902.5404
gregory.brown@kattenlaw.com

Kathleen S. Scheidt
312.902.5335
kathleen.scheidt@kattenlaw.com

Banking

FinCEN Releases Updated Issue of SAR Activity Review

On February 11, the US Treasury's Financial Crimes Enforcement Network (FinCEN) released its ninth issue of *SAR Activity Review – By the Numbers*. The report is a compilation of numerical data gathered from suspicious activity reports (SARs) filed between January 1 and June 30, 2007. The report is published by FinCEN twice yearly.

Some notable findings in the report include the following: (i) although the number of filings by depository institutions increased over the last five years, the rate of growth in such filings has slowed; (ii) suspicious activity characterized as "Mortgage Loan Fraud" increased 35% from the corresponding period in 2006 and was the third most prevalent type of suspicious activity reported, after "Bank Secrecy Act/Structuring/Money Laundering" and "Check Fraud"; (iii) SARs filed by money transmitters decreased in 2007 from the corresponding period in 2006; and (iv) securities and futures industry SARs during the first six months of 2007 increased 53% over the same period in 2006.

http://www.fincen.gov/sars/sar_by_numb_09.pdf

United Kingdom Developments

UK FSA Bans and Fines Broker for Dishonesty and Misleading Customers

On February 11, the UK Financial Services Authority (FSA) imposed a Prohibition Order on Mohammed Suba Miah, a former broker at Square Mile Securities Limited, and fined him £21,000 (US$ 41,000).

The FSA determined that Mr. Miah and the firm had failed to act with integrity (breach of Principle 1) and failed to act with due skill, care and diligence (breach of Principle 2). In particular, there was a failure to provide adequate risk warnings and to make adequate suitability determinations; inaccurate and potentially misleading statements were made to customers; and unacceptable sales methods and practices were employed resulting in high and undue pressure on customers to purchase securities which were improperly recommended.

An FSA review of Mr. Miah's transactions between December 2005 and May 2006 found that Mr. Miah had dishonestly recorded the purchase of shares by his customers without their knowledge or consent.

Mr. Miah accepted that his conduct was improper and co-operated with the FSA's investigation. Consequently, Mr. Miah's fine was reduced by 30% under the FSA's executive settlement scheme. The terms of the Prohibition Order are that Mr. Miah is prohibited from performing any function in relation to any regulated activity carried on by any authorized or exempt firm. That is a ban from working in the financial services industry.

The firm was fined £250,000 (US$ 492,000) for persistently using high pressure sales tactics and misleading information to sell customers shares they did not want or could not afford. This is the second fine on a firm resulting from a continuing FSA thematic project examining sales practices of smaller broking firms with respect to higher risk equity securities. This is part of the FSA's "treating customers fairly" initiative.

www.fsa.gov.uk/pubs/final/Suba_Miah.pdf

BANKING

For more information, contact:

Jeff Werthan
202.625.3569
jeff.werthan@kattenlaw.com

Christina J. Grigorian
202.625.3541
christina.grigorian@kattenlaw.com

Adam Bolter
202.625.3665
adam.bolter@kattenlaw.com

UK DEVELOPMENTS

For more information, contact:

Martin Cornish
44.20.7776. 7622
martin.cornish@kattenlaw.co.uk

Sam Tyfield
44.20.7776.7640
sam.tyfield@kattenlaw.co.uk

Edward Black
44.20.7776.7624
edward.black@kattenlaw.co.uk

Sean Donovan-Smith
44.20. 7776 7625
sean.donovan-smith@kattenlaw.co.uk

EU Developments

European Commission Publishes Research on UCITS Investment Policies

On February 12, the European Commission published new research on EU investment funds including analysis of their use of investment powers, investment outcomes and related risk features in both funds established under the EU Undertakings in Collective Investment in Transferable Securities (UCITS) Directive and non-UCITS funds.

The study surveys the investment outcomes (performance and related risks) of UCITS and non-UCITS funds over the five past years since the introduction of the "UCITS III" Directive in 2004 which allowed UCITS fund managers to invest in a much wider range of eligible assets. UCITS III introduced an expanded range of assets included derivatives for a wider range of permitted purposes. It also allowed fund managers to pursue new types of investment strategies such as index-based investing and fund of fund strategies within UCITS funds.

The study concluded that a large number of UCITS funds have started to invest in derivatives although the intensive use of derivatives is confined to a small subset of UCITS funds. Generally, UCITS funds tend to use derivatives more than non-UCITS fund managers who either do not use leverage, or have recourse to other methods to leverage fund performance such as borrowing or short selling.

The study examined the risks associated with the use of enlarged investment powers and concludes that fund managers develop strong risk management procedures before launching more complex products. As such, the study finds that UCITS funds making intensive use of derivatives do not exhibit a higher level of market risk in comparison with other surveyed funds.

ec.europa.eu/internal_market/investment/docs/other_docs/pwc-report_en.pdf

EU DEVELOPMENTS

For more information, contact:

Martin Cornish
44.20.7776. 7622
martin.cornish@kattenlaw.co.uk

Sam Tyfield
44.20.7776.7640
sam.tyfield@kattenlaw.co.uk

Edward Black
44.20.7776.7624
edward.black@kattenlaw.co.uk

Sean Donovan-Smith
44.20. 7776 7625
sean.donovan-smith@kattenlaw.co.uk

Litigation

Inference of Scienter at Least as Likely as Plausible Opposing Inference

A federal district court denied defendants' motion to dismiss plaintiff's securities fraud class action, which asserted claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Plaintiff alleged, among other things, that defendants knew or recklessly disregarded the fact that there were multiple accounting errors in the defendant-issuers financial statements and weaknesses in its internal controls. Defendants, the corporate issuer and its two top executives, moved to dismiss on the ground that, among other things, the complaint failed to adequately allege scienter.

In denying defendants' motion, the Court held that a plaintiff alleging fraud in a Section 10(b) action must plead facts rendering an inference of scienter *at least as likely* as any plausible opposing inference. Plaintiff argued that its allegations of (i) the sheer amount of the restatement, (ii) defendants' use of the allegedly inflated stock to support their push for massive growth through acquisitions, and (iii) defendants' "false rationalization" for the restatements (i.e., that the interpretation of accounting had changed when, in fact, they had not) sufficiently alleged scienter.

After noting the absence of any "smoking gun" evidence of scienter, including any allegations based on information from confidential witnesses or evidence of insider trading, the Court sustained the scienter allegations, ruling that "while it is *plausible* that defendants truly did not know that they were using inappropriate accounting methods and had a good faith basis to blindly pursue

LITIGATION

For more information, contact:

Alan Friedman
212.940.8516
alan.friedman@kattenlaw.com

Jean Chung
212.940.6338
jean.chung@kattenlaw.com

its ambitious acquisition strategy, it is equally *plausible* that defendants took great care *not* to 'know' that the stock was artificially inflated and that there were reasons to slow the [growth strategy] down." (*In Re PainCare Holdings Securities Litigation*, 2008 WL 348781 (M.D. Fla. Feb. 7, 2008)) (emphasis in original).

Defendant Fails to Win Summary Judgment Dismissal for Lack of Loss Causation

Plaintiffs sued defendant for, among other things, violating Rule 10b-5, by making material misrepresentations and omissions in connection with the sale of securities. Plaintiffs asserted that the defendant misrepresented and failed to disclose multiple facts that were material to whether the issuer had the ability to execute and operate its business plan. Defendant moved for summary judgment, asserting that plaintiffs had failed to present evidence of any causal connection between their alleged losses and defendant's alleged misrepresentations.

The Court first confirmed that a plaintiff must show that the defendant's alleged misrepresentations caused the loss for which the plaintiff seeks to recover in order to satisfy the loss causation element of a Rule 10b-5 claim. The Court then ruled that to defeat a Rule 10b-5 claim at the summary judgment stage for failure to establish "loss causation," the defendant must establish, as a matter of undisputed fact, that the decline in the value of the corporation's shares was not caused by the fraudulent conduct alleged in the complaint.

Applying these standards to the defendant's summary judgment motion, the Court concluded that a reasonable fact finder could determine that the defendant hid material facts from plaintiffs in soliciting their investments and that plaintiffs' losses were caused by the hidden facts. Accordingly, the Court denied defendant's motion, ruling that a trial of the loss causation issue was required. (*Calnin, et al. v. Hilliard*, 2008 WL 336892 (E.D. Wis. Feb. 5, 2008))

CFTC

CFTC Creates Energy Markets Advisory Committee

The Commodity Futures Trading Commission has announced the creation of an Energy Markets Advisory Committee to examine issues relating to the energy markets and CFTC regulation thereof. The new committee will be chaired by the Acting Chairman of the CFTC, Walter L. Lukken, and will include representatives from a cross-section of the industry, including exchanges, producers, market participants and end-users.

http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5455-08.html

CFTC and Chinese Securities Regulator Agree to Enhanced Cooperation

The Commodity Futures Trading Commission and the China Securities Regulatory Commission (CSRC) have signed an agreement to enhance cooperation and collaboration between the two agencies. Under the agreement, the CFTC and CSRC will hold regular meetings to deal with issues of mutual concern including investor protection, market integrity and the supervision of cross-border derivatives trading.

http://www.cftc.gov/newsroom/generalpressreleases/2008/pr5453-08.html

CFTC Adopts Rules for ECMs and Other Trading Facilities

The Commodity Futures Trading Commission has approved final amendments to several of its rules relating to the oversight of trading facilities, including

CFTC

For more information, contact:

Kenneth Rosenzweig
312.902.5381
kenneth.rosenzweig@kattenlaw.com

William Natbony
212.940.8930
william.natbony@kattenlaw.com

Fred M. Santo
212.940.8720
fred.santo@kattenlaw.com

Kevin Foley
312.902.5372
kevin.foley@kattenlaw.com

Lance A. Zinman
312.902.5212
lance.zinman@kattenlaw.com

exempt commercial markets (ECMs) such as the IntercontinentalExchange. Under the amended rules, the Director of the Division of Enforcement and his designees may issue "special calls" to an ECM for information. Although ECMs operate pursuant to a qualified exemption from the Commodity Exchange Act, the CFTC has authority to issue special calls to an ECM for information, including in connection with antifraud and antimanipulation investigations.

The CFTC also adopted several other rule changes applicable to registered trading facilities. These amendments clarify procedures for listing, clearing and/or implementing contracts and rules and clarify when a registered entity and its contracts and rules will be considered "dormant" under the CFTC's rules. The rule changes also expand the authority of a registered trading facility to implement emergency rules without action by its full governing board.

http://a257.g.akamaitech.net/7/257/2422/01jan20081800/edocket.access.gpo.gov/2008/E8-2580.htm

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Katten

Katten Muchin Rosenman LLP

www.kattenlaw.com

Charlotte
401 S. Tryon Street
Suite 2600
Charlotte, NC 28202-1935
704.444.2000 tel
704.444.2050 fax

Chicago
525 W. Monroe Street
Chicago, IL 60661-3693
312.902.5200 tel
312.902.1061 fax

Irving
5215 N. O'Connor Boulevard
Suite 200
Irving, TX 75039-3732
972.868.9058 tel
972.868.9068 fax

London
1-3 Frederick's Place
Old Jewry
London EC2R 8AE
+44.20.7776.7620 tel
+44.20.7776.7621 fax

Los Angeles
2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
310.788.4400 tel
310.788.4471 fax

New York
575 Madison Avenue
New York, NY 10022-2585
212.940.8800 tel
212.940.8776 fax

Palo Alto
260 Sheridan Avenue
Suite 450
Palo Alto, CA 94306-2047
650.330.3652 tel
650.321.4746 fax

Washington, DC
1025 Thomas Jefferson Street, NW
East Lobby, Suite 700
Washington, DC 20007-5201
202.625.3500 tel
202.298.7570 fax

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