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CORPORATE & FINANCIAL
WEEKLY DIGEST

February 3, 2012

SEC/CORPORATE

NYSE Restricts Broker Discretionary Voting

On January 25, the New York Stock Exchange (NYSE) issued Information Memo 12-4, which announced significant limitations on the ability of member brokers to vote customer shares without specific instructions from their clients. Previously, the NYSE permitted brokers to vote uninstructed shares with respect to certain corporate governance matters proposals when the proposal in question was supported by the issuer's management. Going forward, absent specific instructions from customers, brokers will no longer be allowed to vote customer shares with respect to various corporate governance proposals, including proposals to de-stagger the board of directors, regarding majority voting in the election of directors, eliminating supermajority voting requirements, providing for the use of consents, providing rights to call a special meeting, and certain types of anti-takeover provision overrides.

These limitations highlight an ongoing trend of curtailing broker discretionary voting. In 2010, the NYSE amended Rule 452 (which governs broker discretionary voting) to prohibit brokers from voting uninstructed shares in the election of directors. More recently, the Dodd-Frank Wall Street Reform and Consumer Protection Act, prohibited brokers from voting uninstructed shares on executive compensation matters.

As a result of these changes, absent placing a "routine" matter (such as ratification of auditors) on the agenda companies may face challenges establishing a quorum at stockholders' meetings or, even if a quorum is obtained, obtaining sufficient votes to approve corporate governance proposals once considered "routine". Since most brokers are NYSE member organizations, the changes will affect Nasdaq and NYSE listed issuers alike.

Click here to view the full text of Information Memo 12-4.

Delaware Chancery Court Provides Clarity on Default Fiduciary Duties Owed by a Manager of a Limited Liability Company

On January 27, the Court of Chancery of the State of Delaware found that a manager of a limited liability company owes traditional fiduciary duties of loyalty and care unless the limited liability company's operating agreement specifically modifies or eliminates such duties.

The case involved claims by the minority members of Peconic Bay, LLC that Peconic's manager breached its fiduciary duties in connection with the manager's purchase of Peconic and the process through which the manager established the price for such sale (which the court described as a "sham auction").

The court noted that the Delaware Limited Liability Company Act (the Act) does not explicitly provide that managers or members of a limited liability company owe fiduciary duties in such roles, but that Section 18-1104 of the Act specifically contemplated an overlay of equitable principles. Because of such application of equitable principles, together with the statutory authority given by Section 18-1101 of the Act to eliminate certain fiduciary duties in an operating agreement and the legislative history of the Act, the court held that traditional fiduciary duties apply to the manager of a limited liability company.

Because Peconic's operating agreement did not expressly modify or eliminate the duties of loyalty or care owed by Peconic's manager, the court held that the manager owed such duties to Peconic's minority members.

Auriga Capital Corporation v.Gatz Properties, LLC and William Gatz, No. 4390-CS (Del. Chanc. January 27, 3012).

Click here to read the Opinion.

CFTC

Joint Report to Congress on International Swap Regulation

On February 1, the Commodity Futures Trading Commission and the Securities and Exchange Commission (the Agencies) submitted to Congress a Joint Report of International Swap Regulations (Report). The Report, which Congress directed the Agencies to prepare under section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, describes the regulation of swaps and security-based swaps in the United States, Asia and Europe and identifies areas of regulation that are similar and other areas of regulation that can be harmonized. As required by section 719(c), the Report also identifies major dealers, exchanges, clearinghouses, clearing members, and regulators in each geographic area and lists the major contracts (including trading volumes, clearing volumes, and notional values), the methods for clearing swaps, and the systems used for setting margin in each geographic area.

A copy of the Report can be found here.

BROKER DEALER

Approval of Proposed Rule Change to Increase the Trading Activity Fee Rate for Transactions

The Securities and Exchange Commission has approved the Financial Industry Regulatory Authority's proposal to amend Section 1 of Schedule A to the FINRA By-Laws to adjust the rate of FINRA's Trading Activity Fee (TAF) for transactions in covered equity securities. Effective March 1, 2012, the TAF rate for sales of covered equity securities will increase from $0.000090 per share to $0.000095 per share. The per-transaction cap for covered equity securities will increase by $0.25, from $4.50 to $4.75. The new rate applies to any sale of a covered equity security subject to the TAF occurring on or after March 1, 2012. Please note that the rules governing the TAF also include a list of exempt transactions.

Click here to see Section 1 of Schedule A to the FINRA By-Laws.

Approval of Proposed Rule Change to Adopt FINRA Rule 3230 (Telemarketing) in the FINRA Consolidated Rulebook

On January 30, the Securities and Exchange Commission approved the Financial Industry Regulatory Authority's proposed rule change to adopt a telemarketing rule in the FINRA Consolidated Rulebook. The new rule adopts NASD Rule 2212 into the FINRA Consolidated Rulebook as FINRA Rule 3230 (Telemarketing). The new Telemarketing rule includes the following additional changes:

- Adopts similar caller identification information provisions contained in NYSE Rule 440A(h). (The new Telemarketing rule does not incorporate additional provisions in NYSE Rule 440A regarding pre-recorded messages and the use of telephone facsimile or computer advertisements.)

- Adopts a provision that is similar to NYSE Rule Interpretation 440A/01 as Supplementary Material. The provision reminds firms that the rule does not affect the obligation of members that engage in telemarketing to comply with relevant state and federal laws and rules, including the rules of the Federal Communications Commission relating to telemarketing practices and the rights of telephone consumers.

- Adopts provisions that are substantially similar to Federal Trade Commission rules that prohibit deceptive and other abusive telemarketing acts or practices.

FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following SEC approval. The implementation date will be no later than 180 days following SEC approval.

Click here to see SEC Order Approving a Proposed Rule Change to Adopt FINRA Rule 3230 (Telemarketing) in the FINRA Consolidated Rulebook.

PRIVATE INVESTMENT FUNDS

SEC Provides Guidance on Umbrella Registration of Investment Advisers

On January 18, the Securities and Exchange Commission issued a no-action letter (the 2012 Letter) in response to a number of questions relating to the registration requirements of certain entities that are affiliated with registered investment advisers.

First, the 2012 Letter reiterates the continued validity of the position taken in a 2005 no-action letter (the 2005 Letter) regarding the registration requirement of certain special purpose vehicles (SPVs) created by registered investment advisers to private funds. The 2005 Letter provided that an SPV need not separately register so long as (i) the registered adviser to the private funds establishes the SPV to act as the private funds' general partner or managing member; (ii) the SPV's formation documents designate the investment adviser to manage the private funds' assets; (iii) all of the investment advisory activities of the SPV are subject to the Investment Advisers Act and the rules thereunder, and the SPV is subject to examination by the SEC; and (iv) the registered adviser subjects the SPV, its employees and persons acting on its behalf to the registered adviser's supervision and control.

Second, the 2012 Letter makes clear that the position taken in the 2005 Letter was not intended to be limited to a registered adviser with a single SPV.

Third, the 2012 Letter provides that the position taken in the 2005 Letter would apply to SPVs with independent directors that the registered adviser does not supervise and control, so long as the only persons acting on an SPV's behalf that the registered adviser does not supervise and control are the SPV's independent directors.

Finally, the 2012 Letter provides that an investment adviser (a filing adviser) may file a single Form ADV on behalf of itself and each other adviser that is controlled by or under common control with the filing adviser (each, a relying adviser) where the filing adviser and each relying adviser collectively conduct a single advisory business, so long as the following conditions are met:

- The filing adviser and each relying adviser advise only private funds and separate account clients that are qualified clients and are otherwise eligible to invest in the private funds advised by the filing adviser or a relying adviser and whose accounts pursue investment objectives and strategies that are substantially similar or otherwise related to those private funds.
- Each relying adviser, its employees and the persons acting on its behalf are subject to the filing adviser's supervision and control.
- The filing adviser has its principal office and place of business in the United States.
- The advisory activities of each relying adviser are subject to the Investment Advisers Act and the rules thereunder, and each relying adviser is subject to examination by the SEC.
- The filing adviser and each relying adviser operate under a single code of ethics and a single set of written policies and procedures administered by a single chief compliance officer.
- The filing adviser discloses in its Form ADV that it and its relying advisers are together filing a single Form ADV and identifies each relying adviser.

To read the 2012 Letter, click here.
To read the 2005 Letter, click here.

LITIGATION

D.C. District Court Holds Plaintiff to a Demanding Standard and Denies Class Certification Based on Inability to Establish Common Damages

The plaintiff filed a class action suit in the District Court of the District of Columbia against the defendant, Whole Foods Market, Inc. (Whole Foods), alleging that Whole Foods had violated antitrust laws by purchasing one of its competitors, Wild Oats Markets. The class certification hearing focused on whether the plaintiff could demonstrate that the putative class of consumers of natural and organic foods had been adversely affected by the merger and their alleged damages could be proven with evidence common to the class. The plaintiff offered an expert witness, who proposed to create an econometric model to demonstrate that the merger caused prices of Whole Foods products to rise. Whole Foods disputed the proposed model, offering its own expert.

Relying on the Supreme Court's recent decision in *Wal-Mart Sores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the court probed the merits of the plaintiff's antitrust theory and the probative value of the evidence offered to conclude that the standards for certification had not been satisfied. Explaining that current precedent requires courts to "apply more scrutiny to experts at the class certification stage," the Court examined the methodology the plaintiff proffered and concluded that it failed to demonstrate that common issues predominated the evidence required to establish the fact of damages. The Court found the plaintiff's proposed general analysis of the prices of Whole Foods products insufficient. The methodology failed to take into account the offset caused by the fact that prices on some products were lower post-merger. In addition, the methodology did not adequately account for the fact that consumers buy different types and amounts of products from Whole Foods. As a result, the harm caused by any price increase required evidence of each individual customer's losses and could not be demonstrated via evidence common to all class members. The Court also found the plaintiff's expert methodology too vague to meet the strict evidentiary standards applicable at the class certification stage. In this respect, the Court observed that its failure to conduct a "careful and searching analysis" including "neglecting to resolve disputes between experts[,] 'amounts to a delegation of judicial power to the plaintiffs who can obtain class certification just by hiring a competent expert.'"

Kottaras v. Whole Foods Market, Inc., Civil Action No. 08-1832(JEB), 2012 WL 259862 (D.D.C. January 30, 2012).

New York District Court Applies a More Relaxed Standard and Certifies Two Classes in an Antitrust Class Action

Plaintiffs filed a class action suit in the District Court for the Eastern District of New York against Chinese manufacturers (the defendants) of vitamin C, alleging that the defendants violated antitrust laws by engaging in a cartel to fix prices and limit the output of vitamin C. In this long- pending litigation, class certification motions were addressed nearly seven years after the litigation was commenced. The plaintiffs moved to certify two classes, one that sought damages from the defendants, and another that sought injunctive relief. The defendants challenged the creation of both classes on a number of different grounds.

The defendants offered a host of arguments to defeat the plaintiff's class certification motions, but all failed. The Court, noting that the Second Circuit has emphasized that class certification requirements should be "given liberal rather than restrictive construction," allowed both classes to be certified. The Court held that the damages class could be certified with The Ranis Company (Ranis) acting as lead plaintiff. The defendants argued that since Ranis had its claim by virtue of an assignment from a direct vitamin C purchaser, it was not an appropriate class representative. The Court rejected that argument, citing *Cortes & Co. Fin. Servs, Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91 (2d. Cir. 2007) for the proposition that there are no particular dangers inherent in transferring class membership that do not arise in the context of claim assignment generally. The Court was similarly unmoved by the Defendants' arguments that Ranis had shown no meaningful commitment to the litigation and that class counsel was the true driver of the suit. The Court stressed that in the Second Circuit, a proposed representative need only show a willingness and ability to pursue the class litigation, and a basic understanding of the litigation. The Court acknowledged that many class actions, including the present case, were substantially driven by class counsel. The Court, however, reasoned that this practice facilitated what it considered to be a primary objective of Fed. R. Civ. P. 23 class actions: to bring claims that would not otherwise have been brought. Taken together, the Court's holdings on the requirements for class certification demonstrated a more permissive standard than the one employed by the court in *Kottaras*.

In re Vitamin C Antitrust Litigation, Nos. 06-MD-1738 (BMC)(JO), 05-CV-0453, 2012 WL 251909 (E.D.N.Y. January 26, 2012).

BANKING

CFPB Amends Complaint Manual; Banks Will Be Subject to Public Complaints on Credit Cards

The Consumer Financial Protection Bureau (CFPB), which has been taking complaints from consumers over its internet page, has updated its Complaint Systems Manual. The manual addresses how institutions should handle complaints received from consumers on credit cards and mortgages. (The CFPB plans on expanding the range of products about which consumers may complain.) In addition to more detail, the updated manual now allows an institution 15 days instead of 10 within which to give an initial response to a complaint, although the CFPB made it clear that this expected timeframe would not supersede any laws that require an earlier response. The CFPB also indicated it would be more likely to take enforcement action if an institution did not respond within 30 days of receiving the complaint, or if a response was "in progress' for more than 60 days.

Due to the business risk that the complaint process raises for non-compliant institutions, we are reprinting the proposed text of the "Policy Statement" that the CFPB issued last month for comment. The text of the proposed Policy Statement is as follows:

Purposes of Credit Card Complaint Data Disclosure

The CFPB receives credit card complaints from consumers. The CFPB intends to disclose certain information about credit card complaints in a public database and in the CFPB's own periodic reports. The purpose of this disclosure is to provide consumers with timely and understandable information about credit cards and to improve the functioning of the credit card market. By enabling more informed decisions about credit card use, the CFPB intends for its complaint data disclosures to improve the transparency and efficiency of the credit card market.

Public Access to Data Fields

After the effective date of this Policy Statement, the CFPB will provide public access to a database containing nonnarrative fields for each complete consumer credit card complaint and response within the scope of the CFPB's authority under section 1025 of the Consumer Financial Protection Act. The consumer defines the inputs to some of the fields when he or she (or an authorized representative) inputs a credit card complaint into the CFPB's system. These fields, therefore, represent the consumer's own characterization of his or her credit card complaint. The issuer's response will define other non-narrative fields. The database will cover non-narrative fields that do not contain confidential personal information, including but not limited to: The subject area or areas covered by the credit card complaint; the name of the card issuer; the zip code in which the consumer lives; the date of the complaint; and whether and how an issuer responded. In cases where an issuer represents to the CFPB that it has been wrongly identified as the issuer of a card, that issuer's name will not be disclosed pending a determination of the correct issuer. Once the CFPB identifies the correct issuer, the name of that issuer will be included. The public will have online access to the database. The database will enable user-defined searches. The fields for each complaint will be linked with a unique identifier, enabling reviewers to aggregate the data as they choose, including by complaint type, issuer, location, date, or any combination of these variables. Users also will be able to download the data so that they can carry out additional review. The CFPB will update the database on a regular basis. To provide an issuer sufficient time to establish that it did not issue the credit card listed in a particular complaint, the update will not take place until at least one month after submission. The public database will not include a consumer's name, credit card number, or address details. At least until the CFPB can conduct further study, it will exclude the consumer's narrative description of ''what happened'' and of ''fair resolution.'' It also will exclude an issuer's narrative response. These narrative fields may contain personally identifiable information or other information that could enable identification. The threat of such disclosure might also suppress complaints or reduce the specificity of complaint narratives, thereby undermining the effectiveness of the complaint process.

Regular CFPB Reporting on Complaints

At periodic intervals, the CFPB will publish reports about the consumer credit card complaints that it handles.

To view the CFPB Manual, click here.
For additional information, click here.

FDIC to Host Conference on "The Future of Community Banking"; Scheduled Speakers Include Bernanke, Gruenberg

The Federal Deposit Insurance Corporation (FDIC) announced on January 31 that it will host a national conference on "The Future of Community Banking" on February 16, 2012. The conference will provide a forum for community bank stakeholders to explore the unique role community banks play in the country's economy and the challenges and opportunities this segment of the banking industry faces. Conference panels will examine:

- The evolution and characteristics of community banks;
- Current challenges and opportunities for community banks;
- The perspectives of community bank customers; and
- Lessons learned from past financial crises and successful strategies for the community bank of the future.

Ben S. Bernanke, Chairman of the Board of Governors of the Federal Reserve System, and FDIC Director Thomas J. Curry are scheduled to deliver the keynote addresses at the conference. FDIC Acting Chairman Martin J. Gruenberg will also make remarks. Attendance at the conference is by invitation and will be open to credentialed members of the media. Reporters must RSVP in advance to attend the conference.

For more information, click here.

FDIC To Require Stress Tests For Institutions With Over $10 Billion in Assets

The Federal Deposit Insurance Corporation (FDIC) announced on February 3 that it is seeking comment on a Notice of Proposed Rulemaking (NPR) to implement requirements of Section 165 (i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Under this section of the Act, FDIC-insured state nonmember banks and FDIC-insured state-chartered savings associations with total consolidated assets of more than $10 billion are required to conduct annual stress tests under regulations prescribed by the FDIC. This NPR, which proposes regulations for state nonmember banks and state savings associations, is substantively similar to regulations already proposed by the Federal Reserve and the Office of the Comptroller of the Currency.

The proposed rule:

- Defines "stress test" as a process to assess the potential impact of economic and financial conditions on the earnings, losses, and capital of a covered bank over a nine- quarter planning horizon, taking into account the current condition of the bank and its risks, exposures, strategies, and activities.
- Requires covered state nonmember banks to conduct annual capital adequacy stress tests using financial data as of September 30, based on three scenarios to be identified annually by the FDIC.
- Requires covered banks to report the results of the stress tests to the FDIC by the January 5 following the September 30 as-of date, in a form to be developed in coordination with the other banking agencies that would be the subject of a future request for comment.
- Requires covered banks to publish a summary of the results within 90 days after the report to the FDIC.
- Requires the public summary to include projections of losses, pre-provision net revenue, loss reserves, net income, and pro forma capital levels and ratios over the planning horizon under each scenario, and a general description of the risks covered and stress testing methodologies used.
- States that the FDIC intends to coordinate with the other primary federal financial regulatory agencies on the development of the scenarios.
- Seeks comment on the feasibility of the proposed timelines and the challenges institutions may experience.

To view the proposed rule, click here.

ANTITRUST

FTC Announces New Filing Thresholds for Hart Scott Rodino Notifications

The Federal Trade Commission has announced new notification thresholds for Premerger Notification Reports that must be filed under the Hart Scott Rodino Antitrust Improvements Act (HSR). The notification thresholds are adjusted every year for inflation. The new thresholds go into effect on February 27, 2012.

Under the HSR Act, acquisitions of voting securities, interests in unincorporated entities such as LLCs, and assets must be notified to both the FTC and the Department of Justice if certain tests concerning the size of the transaction and the size of the parties to the transaction are met.

Under the new notification thresholds, the “size of transaction test” will increase from $66 million to $68.2 million. Thus, no HSR filing will be required if, as a result of the acquisition, the acquired person will hold less than $68.2 million of voting stock, unincorporated entity interests and assets of the acquired person. Higher level notification thresholds, which require HSR notification where acquiring persons will hold larger amounts of the acquired entity's stock, ownership units, or assets have increased as well.

For transactions valued at less than $272.8 million, the HSR Act does not apply unless a "size of person test" is met as well. Under the new thresholds for the size of person test, there will be no HSR notification obligation unless one of the parties to the transaction has net sales or total assets of at least $13.6 million and the other has net sales or total assets of at least $136.4 million.

Click here to read the announcement.

EXECUTIVE COMPENSATION AND ERISA

DOL Expects to Focus on Health Care and Fiduciary Issues in Coming Months

On January 20, the United States Department of Labor (DOL) made its semiannual regulatory agenda and regulatory plan statement available on its website. The regulatory agenda is the DOL’s list of regulations it expects to have under active consideration for promulgation, proposal, or review during the next six to 12 months. The Employee Benefits Security Administration (EBSA) is the DOL agency that is responsible for administering and enforcing much of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

During the next six to 12 months, EBSA expects to continue to issue guidance to assist in implementing the health reform provisions of the Affordable Care Act in order to both minimize disruptions to existing plans and practices, and to make as smooth as possible the implementation of the legislation’s market reforms. Much of the regulations and guidance issued by EBSA in this regard is expected to be in the form of joint rulemakings with the Departments of Health and Human Services and the Treasury.

EBSA is also expecting to re-propose regulations to clarify circumstances under which a person will be considered a “fiduciary” when such person is providing investment advice to employee benefit plans and their participants and beneficiaries. The DOL previously withdrew its proposed regulations on this topic in late 2011 in response to the number of public comments it received with respect to such proposed regulations. The re-proposed regulations are expected to take into account the current practices of investment advisers as well as the expectations of both plan officials and the participants that receive the investment advice.

EBSA is also working on a proposed rule that would require that account statements prepared for participants in defined contribution plans (such as a 401(k) plan) express the account balance as a lifetime income stream of payments, in addition to presenting the total current value of the account. This proposed rule stems from a 2010 request for information published by EBSA seeking input concerning the steps it may take to encourage the offering of lifetime annuities or benefit distribution options for participants and beneficiaries of defined contribution plans.

Finally, EBSA intends to revise the regulations regarding abandoned plans to include plans of businesses in liquidation proceedings. Such revision is needed to reflect recent changes in the U.S. Bankruptcy Code. The DOL hopes that the changes will allow for a more efficient process, allowing bankruptcy trustees to use a streamlined termination process, in order to allow the bankruptcy trustee to better discharge its obligations under the law.

The DOL's regulatory agenda can be found here

DOL Issues Final Service Provider Disclosures Regulation

On February 2, 2012, the Employee Benefits Security Administration (EBSA) of the United States Department of Labor (DOL) issued its final rule under the Employee Retirement Income Security Act of 1974, as amended (ERISA) Section 408(b)(2) relating to service provider disclosures.

The final rule establishes specific disclosure obligations for plan services providers to ensure that the responsible plan fiduciaries are provided with the information they need to make decisions when selecting and monitoring the service providers for their plans. The final rule applies to ERISA-covered defined benefit and defined contribution pension plans. It does not apply to individual retirement accounts, simplified employee pension plans, SIMPLE retirement accounts, certain annuity contracts and custodial accounts described in Internal Revenue Code Section 403(b), or employee welfare benefit plans.

Under the final rule, covered service providers (CSPs) who expect at least $1,000 in compensation to be received from services to a covered plan are required to provide responsible fiduciaries of the plan with the information they need to assess the reasonableness of direct and indirect compensation received by the CSP, its affiliates, and/or subcontractors; identify potential conflicts of interest; and satisfy reporting and disclosure requirements under title I of ERISA. Failure to provide such information could cause the plan's continued retention of the CSP to be a prohibited transaction under ERISA. CSPs include:

- ERISA fiduciary service providers to a covered plan or to a "plan asset" vehicle in which such plan invests;
- Investment advisers (State or Federally registered);
- Record-keepers or brokers who make designated investment alternatives available to a covered plan; and
- Providers of additional services such as consulting, investment advisory, securities brokerage, or valuation services to a covered plan who also receive "indirect compensation."

The final rule includes a number of changes from the interim final rule, issued in July 2010. Among these changes are:

- Expansion of information that must be disclosed concerning a CSP's receipt of indirect income;
- Conformance of investment-related disclosures for covered plan's designated investment alternatives to the requirements of the participant-level disclosure regulations; and
- A separate provision for the disclosure of changes to investment-related information, which must be updated annually.

The final regulation is effective for both new and existing contracts and arrangements between covered plans and CSPs as of July 1, 2012. This is an extension from the previous April 1, 2012 deadline. As a result, the deadline for plans to provide participant-level disclosures was also extended to August 30, 2012 for calendar year plans.

The link to the final regulation can be found here.

UK DEVELOPMENTS

FSA Issues Guidance on Reviews of Counterparty Credit Risk Management by CCPs

On January 31. the UK Financial Services Authority (FSA) issued guidance FG12/03 with respect to certain aspects of counterparty credit risk management by central counterparties (CCPs). The guidance focuses on risk models and associated governance, processes and procedures. The FSA notes that other aspects related to counterparty credit risk management, such as participant entry criteria, while viewed by the FSA as equally important, are being discussed in other regulatory fora.

This guidance explains the FSA's review process undertaken when considering CCPs' counterparty credit risk management. The FSA points out that its guidance is designed to be consistent with the Principles for Financial Market Infrastructure, of the Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions and may be revised when these principles are finalized. It will also be revised to be consistent with the Technical Standards for CCP Requirements to be issued by the relevant European supervisory authorities after the EU regulations on OTC derivatives, central counterparties and trade repositories are finalized.

The FSA guidance focuses on eight "high level areas": risk management governance and counterparty credit risk control framework, initial margin models, variation margin calculation, default fund, stress testing, wrong way risk and concentration risk, collateral, and validation and back-testing

For more information, click here.

FSA Fines Compliance Officer And Trader in Connection With Market Abuse Case

Following on from the disciplinary actions against David Einhorn and Greenlight Capital as reported in the January 27, 2012 edition of *Corporate and Financial Weekly Digest*, the UK Financial Servcies Authority (FSA) published final notices against two more individuals: Alexander Ten-Holter (a trader and former compliance officer at Greenlight Capital (UK) LLP) and Caspar Agnew (a trading desk director at JP Morgan Cazenove).

The FSA found that Mr. Ten-Holter took no steps to satisfy himself that a Greenlight order to sell shares in Punch Taverns plc (Punch) was not based on inside information "despite the clear risk that it was." He simply executed the order, instructing Mr Agnew to sell Punch shares on behalf of Greenlight after the Greenlight analyst who gave the sell order told him certain facts that should have alerted him to the risk that Greenlight may have been in receipt of inside information.

The FSA found that Mr. Ten-Holter breached Statement of Principle 6 of the FSA's Statements of Principle and Code of Practice for Approved Persons (APER). He failed to exercise due skill, care and diligence, despite his knowledge of the suspicious circumstances surrounding the transaction. Mr Ten-Halter was fined £130,000 (approx $205,400) and prohibited from performing the compliance oversight (CF10) and money laundering reporting (CF11) significant influence functions.

With respect to Mr. Agnew, the FSA finding was that he breached Statement of Principle 2 of APER because, having been instructed by Mr. Ten-Holter to sell Punch shares he should have to recognized that there were reasonable grounds to suspect that the transaction constituted insider dealing or market abuse. As a consequence, he failed to inform his compliance department of the possibility that the transactions were suspicious. This meant that no suspicious transaction report (STR) relating to the transactions was filed with the FSA. Mr. Agnew was fined £65,000 (approx $102,700).

Tracey McDermott, FSA's acting Director of Enforcement and Financial Crime, said: "Ten-Holter's approach to compliance oversight was wholly inadequate. Serious compliance failures of this nature can have a dramatic effect on the orderliness and integrity of the markets. Agnew was an experienced trader, so should have been suspicious of this transaction and aware of his responsibilities to report it. Tackling market abuse and insider dealing is not just an issue for the regulator. Compliance professionals and staff on sales and trading desks play a key role in assisting the FSA in detecting and preventing market abuse. Approved persons should be in no doubt as to their responsibilities in this area and the FSA will not hesitate to take tough action where they fall down on these."

To review the final notice against Alexander Ten-Holter, click here.
To review the final notice against Caspar Agnew, click here.

EU DEVELOPMENTS

ESMA Consults on Guidelines for ETFs and Other UCITS Issues

On January 30 the European Securities and Markets Authority (ESMA) released a consultation paper on guidelines for ETFs (exchange traded funds) and other UCITS (undertakings for collective investment in securities) issues (ESMA/2012/44).

In the consultation paper (the comment period for which closes on March 30) ESMA invites comments on proposed guidelines on retailization of complex products, disclosure issues for index-tracking UCITS and index-tracking leveraged UCITS, draft guidelines for UCITS ETFs, rights of secondary market investors in ETFs, guidelines for the use of efficient portfolio management techniques by UCITS, rules applicable to the use of total return swaps by UCITS and guidelines for UCITS exposure to strategy indices.

Final guidelines are expected to be adopted during the second quarter of 2012. Click here for more information.

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
Diane E. Bell	312.902.5512	diane.bell@kattenlaw.com
Jonathan D. Weiner	212.940.6349	jonathan.weiner@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Wendy E. Cohen	212.940.3846	wendy.cohen@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
Carolyn H. Jackson	44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Raymond Mouhadeb	212.940.6762	raymond.mouhadeb@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		
Emily Stern	212.940.8515	emily.stern@kattenlaw.com
Joseph E. Gallo	212.940.6549	joseph.gallo@kattenlaw.com
BANKING		
Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com
ANTITRUST		
James J. Calder	212.940.6460	james.calder@kattenlaw.com
EXECUTIVE COMPENSATION AND ERISA		
Gary W. Howell	312.902.5610	gary.howell@kattenlaw.com
Daniel B. Lange	312.902.5624	daniel.lange@kattenlaw.com
Christopher K. Buch	312.902.5509	christopher.buch@kattenlaw.com
UK DEVELOPMENTS		
Edward Black	44.20.7776.7624	edward.black@kattenlaw.co.uk

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CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND SHANGHAI WASHINGTON, DC

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