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CORPORATE & FINANCIAL
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SEC/CORPORATE

SEC Schedules Open Meeting to Discuss Say-on-Pay Proposed Rules and Changes to Accredited Investor Definition

On January 25, the Securities and Exchange Commission will hold an open meeting to discuss, among other matters, whether to adopt rules to implement Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (adding Section 14A to the Securities Exchange Act of 1934), which requires shareholder advisory votes (1) to approve the compensation of executives, a so-called "say-on-pay" vote and (2) as to the frequency of shareholder say-on-pay votes. Also required are expanded, tabular format disclosure of executive compensation in connection with mergers or similar transactions (golden parachutes) and a related separate advisory vote on golden parachutes in merger proxy statements. These requirements are effective for annual or special shareholder meetings occurring on or after January 21. The SEC had proposed rules under Section 14A on October 18, 2010.

The SEC will also consider whether to propose rule amendments that would implement Section 413(a) of the Dodd-Frank Act regarding the definition of "accredited investor" for private placement purposes. Section 413(a) of the Dodd-Frank Act excludes the value of a person's primary residence from the calculation of net worth when determining an "accredited investor" under Rules 215 and 501(a)(5) of the Securities Act of 1933. On July 23, 2010, the SEC's Division of Corporation Finance issued Compliance and Disclosure Interpretation (C&DI) 179.01 (as well as C&DI 255.47, which is identical), which confirmed that the exclusion was effective upon enactment of the Dodd-Frank Act and that the SEC would amend its rules to conform them to the adjusted net worth standard in the Dodd-Frank Act.

Read more.

SEC Division of Corporation Finance Issues 10 New C&DIs Regarding Change in Accountants

On January 14, the Securities and Exchange Commission's Division of Corporation Finance issued Compliance and Disclosure Interpretations (C&DIs) with respect to Regulation S-K, Item 304 – Changes in and Disagreements with Accountants on Accounting and Financial Disclosure; and Form 8-K, Item 4.01 – Changes in Registrant's Certifying Accountant.

C&DI 111.01 defines "subsequent interim period" under Items 304(a)(1)(iv) and (v) of Regulation S-K as the period from the end of a registrant's most recent fiscal year through the date of the former principal accountant's resignation, declination to stand for re-election or dismissal. This period is not limited to the end of the most recent fiscal quarterly period. The "subsequent interim period" referred to in Item 304(a)(2) of Regulation S-K, which requires disclosure of the engagement of a new principal accountant, is the period from the end of the registrant's most recent fiscal year through the date on which the new principal accountant is engaged.

C&DI 111.02 states that while Item 304(a)(1)(iv) of Regulation S-K requires affirmative disclosure by a registrant if there are no disagreements, a registrant is not, in addition, required to disclose that it has no reportable events under that Item if there are no such reportable events.

C&DI 111.03 states that a registrant is required to disclose pursuant to Item 304(a)(1)(v)(A) of Regulation S-K that during the registrant's two most recent fiscal years and subsequent interim period the registrant's former principal accountant advised it that the internal controls necessary for the registrant to develop reliable financial statements did not exist, even if the remediation of the internal control deficiency or deficiencies occurred before the end of the subsequent interim period.

C&DI 111.04 states that a registrant has a reportable event under Item 304(a)(1)(v)(A) of Regulation S-K if a former principal accountant advised a registrant during its two most recent fiscal years and any subsequent interim period that there was a material weakness because it is the equivalent of advising the registrant that the "internal controls necessary for the registrant to develop reliable financial statements do not exist." C&DI 111.04 further states that a registrant does not have a reportable event under Item 304(a)(1)(v)(A) of Regulation S-K if a former principal accountant advised the registrant that one or more significant deficiencies in internal control over financial reporting existed, but did not also advise that there was a material weakness. However, the factors that led to a significant deficiency could result in the conclusion that there are other reportable events that require disclosure by the registrant.

C&DI 111.05 states that a registrant has a reportable event under Item 304(a)(1)(ii) of Regulation S-K if the registrant's principal accountant issued an audit report on the registrant's financial statements in the last two fiscal years containing an explanatory paragraph regarding the registrant's ability to continue as a going concern because the explanatory paragraph represents a modification of the principal accountant's audit report for an uncertainty.

C&DI 111.06 states that a registrant does not have a reportable event under Item 304(a)(1)(ii) of Regulation S-K if a registrant's principal accountant issued a report on the registrant's internal control over financial reporting in the last two fiscal years containing an explanatory paragraph, adverse opinion or a disclaimer of opinion, as Item 304(a)(1)(ii) refers only to the principal accountant's "report on the financial statements." Registrants can voluntarily disclose information about reports on internal control over financial reporting; however, a registrant has a reportable event under Item 304(a)(1)(v)(A) of Regulation S-K if such reports contain an adverse opinion with respect to the effectiveness of internal control over financial reporting.

C&DI 111.07 and C&DI 114.01 state that if a registrant's principal accountant resigns, declines to stand for re-election or is dismissed because its registration with the Public Company Accounting Oversight Board (PCAOB) has been revoked, the registrant must disclose this fact under Item 4.01 of Form 8-K to clarify the reason why the principal accountant resigned, declined to stand for re-election or was dismissed.

C&DI 114.02 states that disclosure is required pursuant to Item 4.01 of Form 8-K if a registrant engages a new principal accountant that is related in some manner to the former principal accountant (e.g., the firms are affiliates or are member firms of the same network), and the new principal accountant is a separate legal entity and is separately registered with the PCAOB.

C&DI 114.03 states that disclosure may be required under Item 4.01 of Form 8-K when a registrant's principal accountant enters into a business combination with another accounting firm, depending on the structure of the business combination and other facts and circumstances.

Click here to read C&DI 111.
Click here to read C&DI 114.

PRIVATE INVESTMENT FUNDS

Please see "FSOC Issues Two Studies and One Proposed Rule" in **Banking** below.

CFTC

CFTC Publishes Ninth Series of Dodd-Frank Rules

The Commodity Futures Trading Commission has published its ninth series of proposed rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The ninth series of CFTC rule proposals relates to the

swap trading relationship documentation requirements for swap dealers (SDs) and major swap participants (MSPs) and the imposition of position limits on certain derivatives (which will be discussed in a forthcoming client advisory).

- **Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants:** Section 731 of the Dodd-Frank Act directs the CFTC to "adopt rules governing documentation standards" for SDs and MSPs. Accordingly, the CFTC is proposing rules that would require each SD and MSP, before entering into a swap transaction with a counterparty, to agree in writing to all terms of the trading relationship with the counterparty, and to establish policies and procedures designed to ensure that such a written agreement (the trading relationship documentation) is effected prior to the SD's or MSP's entering into a swap with a counterparty. In connection with this proposed requirement, SDs and MSPs would also be obligated to:

    1) ensure that the agreed-to trading relationship documentation includes the methods, procedures, rules and inputs for valuing each swap at any time during the course of the transaction (as well as complete alternative methods for determining the swap's value in the event that the primary method cannot be utilized);
    2) agree with its counterparty in the trading relationship documentation that, if either party is subject to insolvency proceedings under a special resolution regime in which positions may be transferred to a performing third party, the other party will not exercise any right to terminate, liquidate or net a swap solely by reason of its counterparty's insolvency until the close of the next business day following the insolvency-related default;
    3) upon submitting a swap transaction for clearing to a registered derivatives clearing organization (DCO), make a record of certain information related to such transaction, including a statement that, in accordance with the DCO's rules, the original swap is extinguished and replaced by equal and opposite swaps between clearing members and the DCO; and
    4) submit to an annual audit of the trading relationship documentation.

    Finally, under the proposed rules, SDs and MSPs would be required to obtain documentation from any counterparty that intends to claim the end user exemption from mandatory clearing. Such information must be sufficient to afford the SD or MSP a reasonable basis for believing that such counterparty meets the statutory qualifications for such an exemption.

The ninth series of rule proposals have not yet been published in the *Federal Register*. The comment period for the proposed rules will expire 60 days from the dates of their publication. Information regarding these CFTC proposals, including the *Federal Register* release of the position limits proposal, the CFTC release of the trading relationship documentation proposal, and fact sheets and Q&As for each of the CFTC proposals, is available here.

Amendments to NFA Financial Requirements for Forex Dealer Members

The National Futures Association (NFA) has amended NFA Financial Requirements (FR) Sections 11(b), 14(c) and 14(d), effective February 1. Under FR Section 11, a Forex Dealer Member is prohibited from including assets held at an "unregulated person" in its determination of current assets for purposes of calculating its adjusted net capital. The amendments will revise the list of persons that are "unregulated" by (1) deleting "a financial institution regulated by a U.S. banking regulator" and "an insurance company regulated by any U.S. state"; (2) adding "a bank or trust company regulated by a U.S. banking regulator"; and (3) adding foreign banks and trust companies "regulated in a money center country" that maintain regulatory capital of more than $1 billion. NFA may still, on a case-by-case basis, approve the use of certain foreign equivalent entities that are appropriately regulated and capitalized.

FR Section 14 defines foreign institutions that are qualified to hold assets covering liabilities to retail Forex customers. Amendments to this section include (1) removal of foreign equivalent broker-dealers and foreign equivalent futures commission merchants as "qualifying institutions"; and (2) deletion of banks or trust companies regulated in the money center country whose, or whose holding company's, "commercial paper or long-term debt instrument... is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization" from the list of "qualifying institutions."

NFA's submission letter to the Commodity Futures Trading Commission, dated December 6, 2010, can be found here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Releases Study on Investment Adviser Examinations

As required by Section 914 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Securities and Exchange Commission has released a study conducted by the staff of the Division of Investment Management reviewing and analyzing the need for enhanced examination and enforcement resources for investment advisers. The study finds that the number and frequency of examinations of investment advisers have declined over the past six years. The staff expects that the frequency of examinations could increase following the effective date of amendments to the Advisers Act under the Dodd-Frank Act as a result of a substantial decrease in the number of registered investment advisers, many of whom will transition from federal to state registration. The amount of any potential increase in examinations, however, may be offset by the need to divert examination resources to fulfill new examination obligations that the SEC was given by the Dodd-Frank Act. In addition, the staff expects the number of registered investment advisers and the assets managed by them to grow in subsequent years, and finds that the SEC will face significant capacity challenges in examining registered investment advisers. The staff recommends that Congress consider the following three approaches to strengthen the SEC's investment adviser examination program: (1) authorize the SEC to impose user fees on SEC-registered investment advisers to fund their examinations; (2) authorize one or more self-regulatory organizations (SROs) to examine, subject to SEC oversight, all SEC-registered investment advisers; or (3) authorize the Financial Industry Regulatory Authority to examine dual registrants for compliance with the Advisers Act.

In a separate statement accompanying the study, SEC Commissioner Elisse Walter writes that although she voted to release the study, she is disappointed with the result. She emphasizes that the current resource problem is severe and advocates in favor of the SRO option.

FINRA released a statement commending the SEC's recognition that an SRO can augment government oversight programs through more frequent examinations. In prior comment letters to the SEC, FINRA has previously advocated establishing one or more investment adviser SROs.

In separate prior comment letters to the SEC, the Managed Funds Association (MFA), the Investment Adviser Association (IAA) and the Investment Company Institute (ICI) have each opposed establishing an investment adviser SRO.

To read the SEC's study, click here.
To read Commissioner Walter's statement, click here.
To read FINRA's statement, click here.

Click here to read a summary of prior letters of FINRA, the MFA, the IAA and the ICI advocating for and against establishing an investment adviser SRO in the November 12, 2010, edition of *Corporate and Financial Weekly Digest*.

LITIGATION

Fiduciary Duty Imputation Case Proceeds to Trial

The U.S. District Court for the District of New Jersey denied a motion for partial summary judgment, ruling that the contested issue, whether a conceded breach of fiduciary duty by two individual defendants could be imputed to corporate defendants, should go to trial.

The individual defendants, former employees of the plaintiff corporation, created two entities (the corporate defendants in this suit) without the plaintiff's knowledge and during their employment. One of the corporate defendants sold equipment at a profit to the plaintiff. One of the individual defendants was responsible for determining what equipment plaintiff purchased from both the corporate defendant and other companies. The other corporate defendant competed with the plaintiff directly.

The court ruled that based on the interactions between the corporate defendants and the plaintiff, the corporate defendants could not owe the plaintiff a fiduciary duty. However, under New Jersey law, the fiduciary duties owing

to the plaintiff by the individual defendants could be imputed to the corporate defendants. The court noted that a number of critical facts remained undeveloped, "including whether and how the individual defendants utilized the corporate veil to facilitate the breach of their duties." Accordingly, because the absence of these facts on the record signaled a genuine issue of material fact, summary judgment was precluded. (*Vibra-Tech Engineers, Inc. v. Kavalek*, No. 08-2646 (NLH), 2011 WL 111417 (D.N.J. Jan. 13, 2011))

Third Party "Alter Ego" Subpoena Quashed

The U.S. District Court for the District of Nevada quashed a third party subpoena on a bank because the subpoena was overbroad.

Plaintiffs sued a series of individuals and corporate entities for construction defects, fraud and conspiracy. Plaintiffs alleged that the defendants "converted property and misled them through incomplete repairs, non-disclosures, misinformation, inaccurate reserves and an inadequate budget, into purchasing" the subject properties. Plaintiffs later amended their complaint to add allegations that the various defendants were alter egos of each other, and issued a third party subpoena to a bank requesting "any and all banking records" concerning the defendants, including "but not limited to, any and all e-mails, correspondence, etc."

The court acknowledged that, to establish alter ego liability, plaintiffs can normally review the records of "corporate assets, transactions, management proceedings and other information relevant to piercing the corporate veil." However, such discovery is still limited to the relevance standard in the Federal Rules of Civil Procedure. The court found that the plaintiffs' subpoena, by seeking all banking information relating to the defendants, and not just information that might relate to the lawsuit, was overbroad. The court suggested that plaintiffs could depose certain defendants or direct specific interrogatories to them regarding their alter ego claim, which might assist the plaintiffs in creating a more targeted subpoena, and quashed the subpoena. (*Copper Sands Home Owners Assoc'n, Inc. v. Copper Sands Realty, LLC*, 10 Civ. 00510 (GMN)(LRL), 2011 WL 112146 (D. Nev. Jan. 13, 2011))

BANKING

FDIC Board Approves Interim Final Rule on New Liquidation Authority and Clarifies Treatment of Creditor Claims

The Board of Directors of the Federal Deposit Insurance Corporation (FDIC) voted on December 18 to approve an interim final rule clarifying how the agency will treat certain creditor claims under the new orderly liquidation authority established under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Title II of the Dodd-Frank Act provides a mechanism for appointing the FDIC as receiver for a financial company if the failure of the company and its liquidation under the Bankruptcy Code or other insolvency procedures would pose a significant risk to the financial stability of the United States. FDIC Chairman Sheila Bair said: "The orderly liquidation process established under Title II of the Dodd-Frank Act imposes the losses on shareholders and creditors, while also protecting the economy and taxpayer interests. The interim final rule provides needed guidance to the market and underlines the clear statutory intent that creditors bear the losses of any failure. Shareholders and unsecured creditors should understand that they, not taxpayers, are at risk...."

The interim final rule approved today differs from the notice of proposed rulemaking by clarifying the standard for valuation for collateral on secured claims and by clarifying the treatment of contingent claims. In addition, the agency clarified that short-term debt holders are highly unlikely to meet the criteria set forth in the statute for permitting payment of additional amounts. In virtually all cases, holders of shorter-term debt will receive the same *pro rata* share of their claim that is being provided to the long-term debt holders. Accordingly, "a potential credit provider to a company subject to the Dodd-Frank resolution process should have no expectation of treatment that differs depending upon whether it lends for a period of over 360 days or for a shorter term."

The final rule follows a notice of proposed rulemaking and 30-day comment period. According to the FDIC, a majority of comments related to matters beyond the scope of the notice of proposed rulemaking, indicating the need for additional rulemaking in the future. The interim final rule also addresses discrete issues:

1) the authority to continue operations by paying for services provided by employees and others (by clarifying the payment for services rendered under personal services contracts);
2) the treatment of creditors (by clarifying the measure of damages for contingent claims); and

3) the application of proceeds from the liquidation of subsidiaries (by reiterating the current treatment under corporate and insolvency law that remaining shareholder value is paid to the shareholders of any subsidiary).

Read more.

FDIC Issues Final IOLTA Rule

The Board of Directors of the Federal Deposit Insurance Corporation (FDIC) on December 18 approved a final rule to include Interest on Lawyer Trust Accounts (IOLTAs) in the temporary unlimited deposit coverage for noninterest-bearing transaction accounts. The Dodd-Frank Wall Street Reform and Consumer Protection Act provides temporary, unlimited deposit insurance for all noninterest-bearing transaction accounts. The FDIC's final rule implements the December 29 amendment to that Act by including IOLTAs within the definition of a "noninterest-bearing transaction account."

All funds held in IOLTA accounts, together with all other noninterest-bearing transaction account deposits, are fully insured, without limit, from December 31, 2010, through December 31, 2012. This coverage is separate from, and in addition to, the coverage provided to depositors for other accounts at an insured depository institution.

Read more.

FSOC Issues Two Studies and One Proposed Rule

On January 18, the Financial Stability Oversight Council (FSOC) took three actions to satisfy statutory obligations imposed on it under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

1. Study on Implementation of the Volcker Rule

FSOC released the study on how best to comprehensively implement the Volcker Rule in a manner that constrains risk-taking by, and promotes the safety and soundness of, banking entities that is required under Section 619 of the Dodd-Frank Act. The study included the following key recommendations by the FSOC that seek to identify and eliminate prohibited proprietary trading activities and investments in or sponsorships of hedge funds and private equity funds by banking entities:

- Prohibit banking entities from investing in or sponsoring any hedge fund or private equity fund, except with respect to bona fide trust, fiduciary or investment advisory customers
- Prohibit banking entities from engaging in transactions that would allow them to bail out a hedge fund or private equity fund
- Identify similar funds that should be brought within the scope of the Volcker Rule prohibitions in order to prevent evasion of the intent of the rule
- Require banking entities to publicly disclose permitted exposure to hedge funds and private equity funds
- Require banking entities to perform quantitative analysis to detect potentially impermissible proprietary trading without provisions for safe harbors
- Perform supervisory review of trading activity to distinguish permitted activities from impermissible proprietary trading
- Require divestiture of impermissible proprietary trading positions and impose penalties when warranted
- Require banking entities to sell or wind down all impermissible proprietary trading desks

The study emphasizes the creation of rules and a supervisory framework that can effectively prohibit proprietary trading activities throughout a banking entity and that appropriately distinguish prohibited proprietary trading from permitted activities (such as market making, hedging and underwriting) as an essential part of implementing the Volcker Rule.

To read the U.S. Treasury Department press release, click here.
To read the Volcker Rule study, click here.

2. Study on Concentration Limits

FSOC also released the study on concentration limits for large financial companies required by Section 622 of the Dodd-Frank Act. Section 622 generally prohibits a financial company from merging or consolidating with another company if the liabilities of the resulting company would exceed 10% of the aggregate consolidated liabilities of all financial companies. The study includes three recommendations for modifications to the statutory concentration limit that the council has determined would more effectively implement the intent of the limits, and the recommendations are open for comment for 30 days. The study notes in passing that the concentration limit "is likely to prohibit acquisitions by only a small number of financial companies."

To read the concentration limit study, click here.

3. Notice of Proposed Rulemaking on Designation of Systemically Important Nonbank Financial Companies

FSOC has proposed a new rule setting forth the standards and procedures that will govern the authority of the FSOC to determine when and if a nonbank financial company must be supervised by the Federal Reserve Board because the company could pose a threat to the financial stability of the United States. The rule does not add a great deal to the substance of Sections 111, 112 and 113 of the Dodd-Frank Act, but the accompanying release includes an extensive discussion of comments received as a result of the related Advance Notice of Proposed Rulemaking issued in October. Comments on the new rule will be due 30 days after it is published in the *Federal Register*.

To read the new rule, click here.

UK DEVELOPMENTS

FSA Fines and Bans Firm and Its Partners for Improperly Promoting Unregulated Funds

On January 19, the UK Financial Services Authority (FSA) published final disciplinary notices to Clark Rees LLP (CR) and its two partners, Ceri Rees and Paul Clark. Mr. Rees was fined £17,500 (approximately $27,800), and Mr. Clark was fined £10,500 (approximately $16,700). Both partners were banned for two years from performing customer functions in relation to unregulated collective investment schemes (a category of fund products which includes almost all private funds including all hedge funds other than those established within the EU Undertakings for Collective Investment in Transferable Securities framework), and both were permanently banned from carrying out senior management functions in a regulated firm. The FSA revoked CR's permission to carry on investment business.

The FSA found that both Mr. Clark and Mr. Rees had failed to educate themselves about the statutory and regulatory provisions relating to the marketing of unregulated collective investment schemes and in particular the limited circumstances in which they can be promoted to retail customers. Promotion of such funds is permitted only to retail investors when they met specific qualifying criteria primarily in relation to investment experience. Neither partner of CR was aware of these restrictions, and as a result, promoted and recommended unregulated collective investment schemes to ordinary retail investors.

This specific disciplinary action by the FSA follows from its general announcement on the sale of private investment funds, as reported in the August 13, 2010, edition of *Corporate and Financial Weekly Digest*.

To read Paul Clark's final notice, click here.
To read Ceri Rees's final notice, click here.
To read Clark Rees LLP's final notice, click here.

EU DEVELOPMENTS

ESMA Publishes Responses to CESR's Call for Evidence on AIFMD Implementing Measures

On January 18, the European Securities and Markets Authority (ESMA) published the responses to the Committee of Securities and Regulators' (CESR) December 2010 call for evidence on the Alternative Investment Fund Managers Directive (AIFMD) implementing measures. (ESMA replaced CESR on January 1, 2011.)

The call for evidence (see the December 10, 2010, edition of *Corporate and Financial Weekly Digest*) requested input regarding CESR's technical advice to the European Commission on the implementing measures for the EU AIFMD. This input will be taken into account by ESMA in the development of its draft advice on the content of the AIFMD implementing measures, which will be published for consultation in 2011. The published responses came from a variety of trade associations and individual firms.

To view the responses, click here.

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
Palash Pandya	212.940.6451	palash.pandya@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

Bruce M. Sabados	212.940.6369	bruce.sabados@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/EU DEVELOPMENTS

Martin Cornish	44.20.7776.7622	martin.cornish@kattenlaw.co.uk
Edward Black	44.20.7776.7624	edward.black@kattenlaw.co.uk

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CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK WASHINGTON, DC

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