Katten
Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

JUNE 26, 2009

SEC/CORPORATE

SEC to Act on Executive Compensation and Broker Discretionary Voting Next Week

The Securities and Exchange Commission announced on June 24 that at its open meeting on July 1 it will consider three important matters.

The first is whether to propose amendments to its proxy rules that will require public companies that have received financial assistance under the Troubled Asset Relief Program (TARP) to include in their proxy materials an advisory shareholder vote on executive compensation.

Second, the Commission will consider whether to propose rule amendments to "enhance the disclosures that registrants are required to make about compensation and other corporate governance matters, and to clarify certain of the rules governing proxy solicitations". In a June 10 press release, SEC Chairman Mary Shapiro had announced that the SEC was considering a package of proxy statement disclosure rules regarding (i) how a company and its board manage risks, (ii) a company's overall approach to compensation, (iii) potential compensation consultant conflicts of interests, and (iv) experience and qualifications of director nominees and the leadership structure. These will presumably be the subject of the rule proposals in this area.

Finally the Commission will consider whether to approve the New York Stock Exchange, Inc.'s proposed change to its Rule 452 to eliminate broker discretionary voting for the election of directors. This proposal has been considered particularly controversial because of concerns voiced, most frequently by smaller public reporting companies with a large proportion of individual holders, as to whether a quorum of shareholders will be achievable absent such broker discretionary voting.

The Commission's open meeting on July 1 will begin at 10:00 a.m.

Read more.

LITIGATION

Court Issues Rare Ruling Holding Forum Selection Clause Unenforceable

Plaintiffs, individuals living in the state of Washington, loaned money to defendant corporation for a real estate development project in return for regular periodic payments of interest. A year later, defendant notified plaintiffs that the developer, its subsidiary, was over budget and requested plaintiffs to authorize defendant to subordinate plaintiffs' interest to a new lender, which plaintiffs allowed. Shortly thereafter, defendant informed plaintiffs that the developer was in default and requested authorization from plaintiffs to loan additional money to the developer to protect the original investment, which plaintiffs again allowed. As part of this approval, plaintiffs signed an operating agreement, which contained a forum selection clause stating that all litigation in connection with the agreement must be brought in San Diego, California. When the developer declared bankruptcy, plaintiffs brought a lawsuit against defendant in federal court in the state of Washington. Defendant moved to dismiss based on the forum selection clause.

The court denied the motion to dismiss, finding the forum selection clause unenforceable. Citing the Supreme Court case *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972), the court stated that a forum selection clause is unreasonable if (i) the inclusion of the clause in the agreement was a product of fraud or overreaching, (ii) the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced, or (iii) enforcement would contravene a strong public policy of the forum in which the suit is brought. The court determined that on the facts of the case all three *Bremen* factors were satisfied. The court noted that the first factor was satisfied because plaintiffs had no true choice in signing the agreement, and therefore the agreement was unrelated to the underlying sale, for which plaintiffs sought rescission. The court decided the second factor was satisfied because it would be prohibitively expensive for plaintiffs to litigate in San Diego, California. Finally, the court found that the third *Bremen* factor was satisfied because Washington policy protects Washington's citizens by providing an adequate remedy for violations of Washington laws, which formed the basis of the plaintiffs' claims. (*Brown v. Scripps Investments & Loans*, 2009 WL 1649947 (W.D.Wash. June 11, 2009))

Court Denies Motion to Dismiss for Failure to Plead Fraud with Adequate Particularity

Plaintiffs alleged, among other things, that defendants violated the Securities and Exchange Act of 1934 by engaging in a scheme to defraud investors through the sale of unregistered securities and by making misrepresentations to induce plaintiffs to invest in defendant corporation. Defendants filed a motion to dismiss, arguing that plaintiffs failed to plead each element of fraud with particularity and therefore did not meet the pleading requirements of Federal Rule of Civil Procedure 9(b) (Rule 9(b)).

The court denied defendants' motion to dismiss. The court agreed with defendants that plaintiffs' claims had to be pled with particularity pursuant to Rule 9(b). As such, the court stated that the plaintiff must plead sufficient detail in terms of time, place and content of the fraud and the injury resulting from the fraud to allow the defendant to prepare a responsive pleading. The court held that plaintiffs adequately set forth the time of the fraudulent scheme by alleging, for example, that on December 12, 2001, defendants intentionally misrepresented the yields that would result from plaintiffs' investments with defendants. The court further determined that although the pleading did not explicitly allege the place of the fraudulent scheme, it implicitly identified the place by alleging that defendants induced the investment by plaintiffs at a place known by defendants and plaintiffs. The court also decided that plaintiffs sufficiently alleged the content of defendants' misrepresentations by alleging that defendants represented to plaintiffs that if they invested a certain amount of money in defendants' company, these funds would be invested into a pool of securities from which they would receive the return on their investment plus interest. Finally, the court stated that plaintiffs pled fraudulent intent sufficiently to meet the requirements of Rule 9(b) because Rule 9(b) allows a plaintiff to plead intent generally, and plaintiffs averred that defendants knowingly made material misrepresentations. (*Jennings v. Bodrick*, 2009 WL 1607711 (S.D. Ohio June 9, 2009))

BROKER DEALER

NYSE Regulation Reminds Members of Responsibilities When Handling Orders at or near the Close

On June 19, NYSE Regulation, Inc. (NYSE Regulation) issued Information Memo 09-29 to increase member awareness that certain orders and order entry practices can improperly dislocate the market in a security, raising regulatory concerns. Accordingly, NYSE Regulation is advising members to avoid holding back large interest for entry at or near the close, since otherwise members could face regulatory exposure for affecting the close inappropriately, and to review all firm policies and procedures regarding orders to be executed at or near the close with their order-entry personnel to ensure that such activity does not improperly affect the closing price.

Also on June 19, NYSE Regulation issued Information Memo 09-30 advising members and member organizations that, effective June 22, the Order Imbalance Information datafeed disseminated prior to closing transactions on the New York Stock Exchange, LLC and NYSE Amex LLC (Exchanges) will include, at 3:55 p.m., d-Quotes and all other pegging e-Quotes eligible for execution in the closing transaction. The Exchanges anticipate that including this additional information will provide transparency for customers and allow sufficient time for contra-side interest to develop.

Click here to read Information Memo 09-29.
Click here to read Information Memo 09-30.

ISE Issues FAQs on Rule Regarding Priority Customer Orders and Professional Orders

On June 23, the International Securities Exchange, LLC (ISE) issued Regulatory Information Circular 2009-179 answering frequently asked questions regarding SR-ISE-2006-26, which calls for the designation of certain orders as either "Priority Customer Orders" or "Professional Orders." The topics discussed include: counting specific order types, non-member customers with multiple beneficial accounts, aggregation of accounts and handling professional customers. The Information Circular clarifies that SR-ISE-2006-26 becomes effective on October 1, although firms will be given five business days from this date to make any necessary changes to properly identify Professional Orders.

Click here to read Regulatory Information Circular 2009-179.

PRIVATE INVESTMENT FUNDS

IOSCO Publishes Report on Hedge Funds Oversight

The International Organization of Securities Commissions' (IOSCO) Technical Committee has published *Hedge Funds Oversight: Final Report*, which proposes six high level principles relating to hedge fund regulation and systemic risk management. The six recommendations are that: (i) hedge funds and/or hedge fund managers/advisors should be subject to mandatory registration; (ii) hedge fund managers/advisors subject to registration should also be subject to ongoing regulatory requirements and disclosures; (iii) prime brokers and banks which provide funding to hedge funds should be subject to supervision and regulation of appropriate risk management systems; (iv) hedge fund managers/advisors and prime brokers should provide to regulators information for systematic risk purposes; (v) regulators should encourage and develop industry good practices; and (vi) regulators should have the authority to cooperate and share information to achieve efficient and effective global oversight.

To view the report click here.

CFTC

Senate Investigations Subcommittee Releases Report on Wheat Speculation

On June 24, the U.S. Senate Permanent Subcommittee on Investigations released its report on speculative trading in the wheat futures markets by commodity index traders. In its report, the Subcommittee concluded that large purchases of wheat futures over the last five years by index traders, who commonly trade futures contracts to offset their financial exposure to index products, "constituted excessive speculation" and were responsible for inflating futures prices, disrupting convergence between wheat futures and cash market prices and creating unwarranted cost and price risks for producers and end users. The report made several recommendations to lessen the impact of speculative trading on wheat markets, including phasing out existing position limit waivers previously granted to index traders and, if necessary, implementing reduced position limits for index traders.

The Subcommittee will hold a hearing on excessive speculation in the wheat market in July.

Click here for the press release on the Subcommittee's report, as well as a link to the full report.

INVESTMENT COMPANIES AND INVESTMENT ADVISORS

SEC Announces New Proposed Money Market Fund Regulations

On June 24, the Securities and Exchange Commission unanimously approved a rule proposal that seeks to tighten the regulation of money market funds. The proposal is in direct response to the aftermath of The Reserve Primary Fund announcement that its per share net asset value fell below $1.00 ("breaking the buck") in September 2008 and the subsequent temporary financial guarantees offered to money market funds by the U.S. Treasury Department to stabilize the financial markets. The SEC's proposal seeks "to strengthen the regulatory framework for money market funds to increase their resilience to economic stresses and reduce the risks of runs on the funds." Among other things, the SEC proposes to require money market funds to maintain a portion of their portfolios in highly liquid investments, reduce their exposure to long-term debt, and limit their investments to only the highest quality portfolio securities. In addition, the proposal would require the monthly reporting of portfolio holdings, and allow the suspension of redemptions if a fund "breaks the buck" to allow for the orderly liquidation of fund assets. The SEC is also seeking comment on other issues related to the regulation of money market funds, including whether money market funds should have "floating" rather than stabilized net asset values, whether funds should satisfy redemption requests in excess of a certain size through in-kind redemptions and whether there are alternatives to using credit rating agency ratings in money market fund regulation.

The rule proposal has not been published yet. Click here to read the press release announcing the SEC's action.

BANKING

Agencies Announce Notice of Proposed Rulemaking for Community Reinvestment Act

The federal bank and thrift regulatory agencies on June 24 proposed revisions to regulations implementing the Community Reinvestment Act (CRA) to require the agencies to consider low-cost education loans provided to low-income borrowers when assessing a financial institution's record of meeting community credit needs. This proposal, which is being proposed jointly by the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of Thrift Supervision, incorporates provisions of the recently enacted Higher Education Opportunity Act, which revised the CRA. The proposal also would incorporate into the CRA rules statutory language that allows the agencies, when assessing an institution's record, to consider capital investments, loan participations, and other ventures by nonminority- and nonwomen-owned financial institutions in cooperation with minority- and women-owned institutions and low-income credit unions. This language codifies guidance in the *Interagency Questions and Answers on Community Reinvestment,* published on January 6.

Although the agencies seek comment on all aspects of the proposal, they are focusing on the following questions:

- how “education loans” should be defined, including whether private loans not governmentally insured or guaranteed and loans for elementary and secondary education should be covered, as well as loans for education expenses associated with unaccredited institutions;
- whether the proposed definition of “low-cost” is appropriate; and
- whether “low-income” should be defined differently from the way it is currently defined in the CRA regulations, including how the agencies should treat the student’s family income or expected contribution.

Read more.

STRUCTURED FINANCE AND SECURITIZATION

TARP Head Testifies PPIP’s Legacy Securities Program to Begin “Very Soon”

On June 24, Herbert Allison, the newly confirmed Treasury Department Assistant Secretary for Financial Stability, testified to the Troubled Asset Relief Program (TARP) Congressional Oversight Panel that the Treasury expects to launch the Public-Private Investment Program (PPIP) “very soon”. Assistant Secretary Allison, who is the new head of the TARP program, said, “We’ve made a great deal of progress. It shouldn’t be long before we announce the first stage in that program.” During a discussion with Elizabeth Warren, the Congressional Oversight Panel’s chair, about whether distressed prices of troubled assets were mainly the result of a lack of liquidity or a reflection of underlying credit issues, Allison stated, “The answer may be provided in part by launching the PPIP program.”

Assistant Secretary Allison also clarified that his comments about the PPIP were meant to apply to the Legacy Securities Program, and not the Legacy Loans Program that was recently put on indefinite hold. When asked to comment on timing of the launch of the Legacy Loans Program, Allison demurred, stating that it would be “presumptuous” for him to speak for the chairperson of the Federal Deposit Insurance Corporation.

Read more.

New York Fed Releases Revisions to TALF Terms and Documents

On June 23, the Federal Reserve Bank of New York posted revised terms and conditions and documents related to its Term Asset-Backed Securities Loan Facility (TALF). Although many of the changes were clean-up clarifications, some were substantive. For instance, one change to the terms and conditions states that a commercial mortgage-backed security (CMBS) will not be eligible collateral for a particular TALF borrower if that borrower, or its affiliate, is a borrower under a mortgage loan backing the CMBS unless that loan, and each other mortgage loan in the CMBS mortgage pool made to an affiliate of the TALF borrower, together constitute no more than 5% of the aggregate principal balance of the mortgage loans in the pool as of the subscription date. This change would bar owners of commercial real estate properties who refinance their properties with loans backing TALF-eligible CMBS from also becoming TALF borrowers with respect to that CMBS, unless their properties constituted a small portion of the overall CMBS mortgage pool.

Read more.

ANTITRUST

Supreme Court Will Hear Antitrust Case Involving Class Arbitration

On June 15, the U.S. Supreme Court granted certiorari in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp*. The case involves an allegation that a group of shipping companies engaged in a "global conspiracy to restrain competition in the world market for parcel tanker shipping services in violation of federal antitrust laws." Based on clauses in the contracts between AnimalFeeds and the shipping companies, the case was sent to arbitration. However, the agreements were silent about a right to seek class relief via arbitration. The arbitration panel interpreted the agreements to permit class arbitration, a decision ultimately upheld by the United States Court of Appeals for the Second Circuit. The shipping companies then petitioned the Supreme Court for review.

The issue now to be decided by the Court is whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. A Supreme Court decision here will have significant implications with regards to antitrust and other class actions involving commercial contracts that contain arbitration clauses. (*Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008))

EXECUTIVE COMPENSATION

Deferred Compensation Funding Can Cause Tax Consequences

Internal Revenue Service officials recently reminded taxpayers that Section 409A of the Internal Revenue Code of 1986 limits when a company can fund its non-qualified deferred compensation benefits. In addition to restricting offshore funding and funding based on a change in the company's financial health, Section 409A provides that amounts transferred to a trust that funds the non-qualified deferred compensation benefits of covered executives (typically referred to as a "rabbi trust") are subject to immediate taxation, and a 20% additional tax, if those amounts are transferred when the company's qualified defined benefit pension plan is "at-risk."

Whether a defined benefit pension plan is "at-risk" should be determined by the plan's actuaries, but "at-risk" status can apply if the plan is sufficiently underfunded (usually less than 65%–80%, depending on the year). Such determination is made based on the preceding plan year. Given the significant downturn in the markets last year, it is possible that a large number of plans might currently be "at-risk."

If applicable, the Section 409A funding limitations for non-qualified deferred compensation would apply to amounts transferred to fund the benefits of the company's CEO (or the individual acting in a similar capacity). If the company is public, the limitation also would apply amounts transferred to fund the benefits of the named executive officers and the remaining Section 16 officers. The limitation also applies to amounts transferred to fund the benefits of former employees if they were the CEO or, if the company is public, a named executive officer or Section 16 officer at the time of employment termination.

Improper funding of non-qualified deferred compensation causes the employee to be subject to immediate income taxation on the amounts transferred, as well as an additional tax equal to 20% of such amounts. Interest earned on such amounts in subsequent years also is subject to accelerated taxation and the additional tax. If a funding error is discovered after the fact (on audit, for example), interest and penalties on past due amounts may also be assessed. These consequences are applied despite the fact that amounts in the non-qualified plan trust remain subject to the claims of the company's creditors.

Companies that sponsor defined benefit plans and are concerned about triggering adverse tax treatment for their executives under non-qualified deferred compensation arrangements should review their pension plan and non-qualified plan funding policies to ensure that inadvertent violations do not occur.

Click here to read the full text of Section 409A.

EU DEVELOPMENTS

European Council Adopts UCITS IV Directive

On June 22, the European Council formally adopted the UCITS IV Directive on Undertakings for Collective Investments in Transferable Securities (UCITS) (amending 85/611/ECC) (Directive).

Member States have until July 1, 2011, to implement the Directive into national legislation.

New provisions include:

i. UCITS Funds can in future be managed by a management company authorized and supervised in a Member State other than the home Member State of the Fund;
ii. a new unified regime for both cross-border and domestic mergers of UCITS Funds;
iii. for the first time UCITS to be able to be established as master-feeder funds;
iv. a "Key Investor Information" document will replace the current simplified prospectus; and
v. a simplified notification procedure/cross-border marketing process will be brought in.

Read more.

For more information, contact:

SEC/CORPORATE		
Robert L. Kohl	212.940.6380	robert.kohl@kattenlaw.com
Robert J. Wild	312.902.5567	robert.wild@kattenlaw.com
LITIGATION		
Anthony L. Paccione	212.940.8502	anthony.paccione@kattenlaw.com
Vikas Khanna	212.940.6427	vikas.khanna@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Gary N. Distell	212.940.6490	gary.distell@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
Patricia L. Levy	312.902.5322	patricia.levy@kattenlaw.com
Robert M. McLaughlin	212.940.8510	robert.mclaughlin@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
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
BANKING		
Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com
Terra K. Atkinson	704.344.3194	terra.atkinson@kattenlaw.com
Christina J. Grigorian	202.625.3541	christina.grigorian@kattenlaw.com
Adam Bolter	202.625.3665	adam.bolter@kattenlaw.com
STRUCTURED FINANCE AND SECURITIZATION		
Eric S. Adams	212.940.6783	eric.adams@kattenlaw.com
Hays Ellisen	212.940.6669	hays.ellisen@kattenlaw.com
Reid A. Mandel	312.902.5246	reid.mandel@kattenlaw.com
ANTITRUST		
James J. Calder	212.940.6460	james.calder@kattenlaw.com
Laura Keidan Martin	312.902.5487	laura.martin@kattenlaw.com
David J. Gonen	202.625.3745	david.gonen@kattenlaw.com
David S. Stoner	212.940.6493	david.stoner@kattenlaw.com
EXECUTIVE COMPENSATION		
Daniel B. Lange	312.902.5624	daniel.lange@kattenlaw.com
Kathleen Sheil Scheidt	312.902.5335	kathleen.scheidt@kattenlaw.com
EU DEVELOPMENTS		
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

* [Click here](#) to access the *Corporate and Financial Weekly Digest* archive.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK PALO ALTO WASHINGTON, DC

Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997).

London affiliate: Katten Muchin Rosenman Cornish LLP.