Katten
Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

June 6, 2008

SEC/Corporate

SEC Releases Proposed XBRL Rules

As reported in the May 16, 2008 edition of *Corporate and Financial Weekly Digest*, the Securities and Exchange Commission voted unanimously to propose rules requiring issuers to utilize interactive technology in their SEC reports. On May 30, the SEC released proposed rules detailing the introduction of eXtensible Business Reporting Language (XBRL).

Under the proposed rules, domestic and foreign SEC registrants that have U.S. GAAP financials and foreign private issuers that prepare their financials using International Financial Reporting Standards (IFRS) promulgated by the International Accounting Standards Board (IASB) would, in an exhibit to periodic reports and registration statements, be required to provide their financial statements, schedules and footnotes to the SEC and on their corporate websites in interactive data format using XBRL. Financial statement information could then be downloaded directly into spreadsheets, analyzed in a variety of ways using commercial off-the-shelf software, and used in analysts' investment models in other software formats.

To comply with proposed rules, filers would be required to convert their financial statements into interactive data files using the list of tags for U.S. GAAP reporting or the IFRS list of tags, in either case as approved by the SEC, and to include supporting files as prescribed by the EDGAR Filer Manual.

The proposal suggests that the interactive data would be subject to a bifurcated liability regime. The raw tagged data input would be "furnished" while the viewable interactive data as displayed through software available on the SEC's website would be "filed" and subject to the same liability under the federal securities laws as the corresponding portions of the traditional format filing. None of the proposed liability-related provisions for interactive data would affect the application of the anti-fraud provisions under the federal securities laws, whether as submitted to the SEC or posted on the SEC's or an issuer's website.

Domestic and foreign large accelerated filers using U.S. GAAP with worldwide public common equity float above $5 billion as of the end of their most recently completed second fiscal quarter would be subject to the proposed rules beginning with their Securities Act registration statements, periodic reports and transitional reports or Forms 20-F that contain financial statements for periods ending on or after December 15, 2008. Other large accelerated filers using U.S. GAAP would be subject to the proposed rules beginning with their Securities Act registration statements, periodic reports and transition reports or Forms 20-F that contain financial statements for periods ending on or after December 15, 2009. All remaining filers using U.S. GAAP and foreign private issuers with financial statements prepared in accordance with IFRS as

SEC/CORPORATE

For more information, contact:

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

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

Jarrod N. Weber
212.940.6317
jarrod.weber@kattenlaw.com

promulgated by the IASB would be subject to the proposed rules beginning with their Securities Act registration statements, periodic reports and transition reports or Forms 20-F that contain financial statements for periods ending on or after December 15, 2010.

Due to the potential for additional expense and burden, the SEC proposes a 30-day grace period for each filer's initial interactive data submission and a 30-day grace period in year two of each filer's interactive data reporting when its footnotes and schedules initially would be required to be tagged in an increased level of detail.

It is proposed that if the filer does not provide the required interactive data submission or post the interactive data on its website by the required due date, the filer would be unable to use short form registration statements on Form S-3, F-3 or S-8. During the period of disqualification, the filer would also be deemed not to have available adequate current public information for purposes of the resale exemption safe harbor provided by Rule 144. Once a filer complies with the interactive data submission and posting requirements—provided it previously filed its financial statement information in traditional format on a timely basis—it would be deemed to have timely filed all of its periodic reports.

The SEC's proposal also contains requests for information including:

- Is it appropriate to require public companies to provide interactive data using XBRL?
- What advantages are there to investors holding a company responsible for preparing financial information in interactive data format, as opposed to a model in which third parties independently prepare the information in interactive format and charge a fee for it?
- If rules requiring interactive data financial reporting are adopted, is the XBRL standard the one that should be used?
- Are vendors likely to develop and make commercially available software applications or Internet products that will be able to deliver the functionality of interactive data to retail investors?
- Should the first required interactive data submissions be delayed until the second half of 2009 or later?
- Is the proposed third-year phase-in sufficient for smaller reporting companies and foreign private issuers to allocate the necessary resources and meet the proposed requirements, or would a more delayed schedule be appropriate?

In a related development, on June 4, the SEC announced the list of panelists participating in the International Roundtable on Interactive Data for Public Financial Reporting scheduled for June 10. The roundtable will include discussion of the experience of countries already requiring financial reporting in interactive data. SEC Chairman Christopher Cox will open the discussions.

http://www.sec.gov/rules/proposed/2008/33-8924.pdf

Litigation

Section 20A Liability Must Be Based on Violation That Involves Insider Trading

A federal District Court granted a defendant's motion to dismiss a claim under Section 20A of the Securities Exchange Act of 1934, which provides a private right of action against persons engaged in insider trading. Under Section 20A, a plaintiff must show that (i) the defendant violated a provision of Title 15 of the United States Code (which includes the Securities Exchange Act) or a rule or regulation promulgated thereunder, and (ii) such violation occurred by purchasing or selling a security while in possession of material inside information.

The only claim asserted against the defendant in question, apart from the Section 20A claim, was a "control person" claim under Section 20(a) of the Securities Exchange Act with respect to alleged Section 10(b) and Rule 10b-5 violations committed by others. While the "control person" claim satisfied the first requirement of Section 20A, the Court ruled that the second requirement of Section 20A could not be satisfied because the alleged Section 10(b) and Rule 10b-5 violations did not allege insider trading. (*Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 2008 WL 2178150 (N.D. Ill. May 22, 2008))

Circuit Court Affirms Dismissal and Denial of Leave to Replead Securities Fraud Claim

The Eighth Circuit Court of Appeals affirmed a district court order dismissing with prejudice a putative shareholder class action asserting claims under Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5. Plaintiffs commenced their action following a series of setbacks relating to the defendant company's planned exploitation of its computer memory technology and a significant fall in the company's stock price. Plaintiffs alleged that defendants' prior misrepresentations about the development of the company's technology artificially inflated the company's stock price.

The District Court ruled that none of the alleged misrepresentations was actionable and that the complaint failed to meet the heightened pleading requirements for securities actions under the Private Securities Litigation Reform Act. The District Court also denied plaintiffs' request for permission to further amend their complaint. The Eighth Circuit affirmed the dismissal of the complaint without specifically identifying and analyzing the deficiencies in the plaintiffs' allegations. The Eighth Circuit then turned to the denial of plaintiffs' request to replead. While recognizing that the Federal Rules provide for amendment to be freely granted when justice requires, the Court affirmed the denial, finding that the plaintiffs "have not articulated any changes they wish to make, much less demonstrated how revision would address the numerous pleading deficiencies." (*In re NVE Corp. Sec. Litig.*, 2008 WL 2220428 (8th Cir. May 30, 2008))

Broker Dealer

NYSE Expands OpenBook Reporting to Include Order Imbalance Information

The Securities and Exchange Commission has approved effective May 30 a New York Stock Exchange proposal to include order imbalance information on its OpenBook reporting platform. This will allow Exchange systems to disseminate a data feed of real-time order imbalances that accumulate prior to the opening and closing of trading on the Exchange. OpenBook is a packaged suite of data feed products which includes access for users to NYSE quotations via NYSE BestQuote. BestQuote permits customers to see

LITIGATION

For more information, contact:

Alan R. Friedman
212.940.8516
alan.friedman@kattenlaw.com

Cameron Balahan
212.940.6437
cameron.balahan@kattenlaw.com

BROKER DEALER

For more information, contact:

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

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

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

additional market interest that is not displayed in the NYSE limit order book and that, therefore, is not available in NYSE OpenBook.

Dissemination prior to the open will occur every five minutes from 8:30 a.m. to 9:00 a.m., every minute between 9:00 a.m. and 9:20 a.m., and every fifteen seconds from 9:20 a.m. to 9:30 a.m. This information will include all interest eligible for execution in the opening transaction of the security in Exchange systems, and will indicate to market participants the number of shares that would be required to equalize buy and sell interest at the reference price. The previous day's closing price on the NYSE in the security, within certain parameters as set by the specialist, will be the reference price. Closing order imbalance in market on close and limit on close orders will be disseminated every fifteen seconds from 3:40 p.m. to 3:50 p.m., and every five seconds from 3:50 p.m. to 4:00 p.m. This information will include all the same information used in Exchange Rule 123C(5) which covers publication of market-on-close orders, and will use the last sale in the security on the NYSE prior to dissemination as its reference price to indicate the number of shares required to "close flat".

http://edocket.access.gpo.gov/2008/pdf/E8-12075.pdf

Schedule Announced for U.S.-Canadian Mutual Recognition

The Chairman of the Securities and Exchange Commission and the Chairmen of four Canadian securities regulators announced a schedule for a process agreement to open the way for discussion of a U.S.-Canadian mutual recognition arrangement to allow Canadian brokers and exchanges access to U.S. investors, and U.S. brokers and exchanges access to Canadian investors. The schedule contemplates the process agreement would be concluded by mid June 2008. The process agreement would be between the SEC and the Canadian Securities Administrators, a forum of the 13 securities administrators in Canada's provinces and territories. It would open the negotiation of a mutual recognition arrangement between the SEC and the 13 Canadian securities regulators.

http://www.sec.gov/news/press/2008/2008-98.htm

Investment Companies and Investment Advisors

Seventh Circuit Repudiates *Gartenberg* Standard for Analyzing Mutual Fund Fee Levels

The Court of Appeals for the Seventh Circuit has "disapproved" the factor-based analytical approach established for mutual fund board approval of advisory and sub-advisory agreements by a line of court cases originating with the 1982 decision in *Gartenberg v. Merrill Lynch Asset Management, Inc.* In the May 19 decision in *Jones v. Harris Associates L.P.*, the Court deepened the split among the Circuits on this issue and effectively made it more difficult for fund shareholders to challenge boards' fee deliberations.

Plaintiff mutual fund shareholders appealed the lower court's dismissal of their complaint under Section 36(b) of the Investment Company Act of 1940 against their fund's advisor for alleged breach of fiduciary duty in accepting an "excessive" fee from their fund. In the *Jones* opinion, Chief Judge Easterbrook decried judicial "rate regulation" of fund fees and asserted that the ultimate venue for determining reasonableness of fees must be the marketplace for mutual fund shares and not the courts. The *Jones* court found that fund costs are a basis for competition among mutual funds and that funds rarely fire their advisors, "but investors can and do 'fire' advisors cheaply and easily by moving their money elsewhere." Thus, "what is 'excessive' depends on the results available from other investment vehicles, rather than any absolute level of

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

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

Ross Pazzol
312.902.5554
ross.pazzol@kattenlaw.com

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

INVESTMENT COMPANIES AND INVESTMENT ADVISORS

Marybeth Sorady
202.625.3727
marybeth.sorady@kattenlaw.com

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

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

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

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

Gregory E. Xethalis
212.940.8587
gregory.xethalis@kattenlaw.com

compensation" set by a court.

The *Jones* decision represents a considerable departure from the fiduciary duty analysis established by the *Gartenberg* court. The Securities and Exchange Commission recently mandated disclosure of a fund board's analysis used for approving advisory contracts based largely on the *Gartenberg* factors. The *Jones* decision does not affect these SEC disclosure requirements but creates a stark split between the Seventh and Second Circuits on the ability of fund shareholders to prevail in court against fund advisors for excessive fees in the absence of evidence of deceit or less than full disclosure by the advisor.

http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=07-1624_014.pdf

CFTC

CFTC Announces Initiatives in Agricultural Futures Markets

On June 3, the Commodity Futures Trading Commission announced several initiatives in response to concerns raised at a recent CFTC roundtable regarding the agricultural futures markets. These initiatives include a proposal to require more information from index traders and swaps dealers about their futures positions and enhancement of the CFTC's Commitments of Traders report to break out index traders and swap market participants from the broader "commercial classification"; a review of the CFTC's regulations governing over-the-counter agricultural "trade options"; an exploration of the consequences of clearing agricultural swaps; an investigation of the recent price run-up in cotton futures; and coordination with agricultural banking authorities on financing and credit issues related to higher margins in the futures markets. The CFTC also announced that it was withdrawing earlier proposals that would have increased the Federal speculative position limits on certain agricultural futures contracts and would have codified a "risk management" exemption from speculative limits for index traders.

http://cftc.gov/newsroom/generalpressreleases/2008/pr5504-08.html

CFTC and SEC Approve Gold Futures and Options Trading

On June 3, the Commodity Futures Trading Commission and the Securities and Exchange Commission approved the trading and clearing of futures and option contracts, respectively, on shares of the SPDR Gold Trust, an exchange-traded fund. The approvals are expected to provide regulatory and legal certainty for users of the new products and are the first joint initiative of the CFTC and the SEC under the cooperation and information-sharing Memorandum of Understanding entered into by the two agencies on March 11.

http://cftc.gov/newsroom/generalpressreleases/2008/pr5505-08.html

Banking

Federal Banking Agencies Release List of Distressed or Underserved Nonmetropolitan Middle-Income Geographies

The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision (collectively, the "Banking Agencies") released on May 30 the 2008 list of distressed or underserved nonmetropolitan middle-income geographies where bank revitalization or stabilization activities will be deemed "community development" for purposes of the Community Reinvestment Act.

CFTC

For more information, contact:

Kenneth Rosenzweig
312.902.5381
kenneth.rosenzweig@kattenlaw.com

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

Kevin Foley
312.902.5372
kevin.foley@kattenlaw.com

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

BANKING

For more information, contact:

Jeff Werthan
202.625.3569
jeff.werthan@kattenlaw.com

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

Adam Bolter
202.625.3665
adam.bolter@kattenlaw.com

The list incorporates a one-year lag period for geographies that were designated as distressed or underserved in 2007 but were not designated as such in the 2008 release. Communities designated on the 2007 list that were not included in the new list remain eligible to receive consideration for community development activities for the 12 months following publication of the 2008 list.

http://www.occ.treas.gov/ftp/release/2008-60.htm

UK Developments

FSA Granted Limited Permission to Appeal Financial Promotion Decision

On May 29, the UK Financial Services and Markets Tribunal (FSMT) published the written reasons from its decision of April 23. The decision follows an application by the UK Financial Services Authority (FSA) for permission to appeal the FSMT judgments of September 2007 and March 2008 with respect to the UK law firm Fox Hayes and its approval of financial promotions.

The FSMT decision grants the FSA limited permission to appeal certain points of law to the Court of Appeal. These include the interpretation of what is "clear, fair and misleading" under the FSA Rules and the interpretation of conducting an investment business with “due skill, care and diligence.”

www.financeandtaxtribunals.gov.uk/Documents/decisions/FinancialServicesMarketsTribunal/058_FoxHayesPermissionToAppeal.pdf

FSA Launches Action to Close Down Illegal Landbanking Scheme

On June 4, the UK Financial Services Authority (FSA) announced that it has applied to the UK High Court for an order to wind up the UK’s largest “landbanking” company, UKLI Limited (UKLI), for operating as an illegal collective investment scheme, i.e. a fund, and denying its investors protection for their money.

The FSA has been granted an interim freezing and restraining order against UKLI to protect assets for creditors, including investors, and to prevent UKLI from continuing to operate as an illegal fund.

www.fsa.gov.uk/pages/Library/Communication/PR/2008/052.shtml

Update on the Thematic Review of Controls Over Inside Information

On June 5, the UK Financial Services Authority (FSA) published *Market Watch 27* as an update of the FSA’s thematic review of controls over inside information related to public takeovers.

In July 2007, the FSA highlighted in *Market Watch 21* areas to focus on to reduce leakage of inside information such as restricting the number of insiders, taking action when leaks occur, ensuring that there are robust IT controls, improving training and monitoring internal personal account dealing policies.

Market Watch 27 includes examples of good industry practice and sets out Principles of Good Practice for the handling of inside information drawn up by industry practitioners. The Principles are voluntary and address the issues raised by *Market Watch 21*.

www.fsa.gov.uk/pubs/newsletters/mw_newsletter27.pdf

UK DEVELOPMENTS

For more information, contact:

Martin Cornish
44.20.7776.7622
martin.cornish@kattenlaw.co.uk

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

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

Sean Donovan-Smith
44.20.7776.7625
sean.donovan-smith@kattenlaw.co.uk

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

Katten

Katten Muchin Rosenman LLP

www.kattenlaw.com

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

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

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

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

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

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

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

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

Katten Muchin Rosenman LLP is a Limited Liability Partnership including Professional Corporations. London Affiliate: Katten Muchin Rosenman Cornish LLP.