Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

March 1, 2013

SEC/CORPORATE

Recent SEC Speeches Focus on Investor Protection and Disclosure

Members of the Securities and Exchange Commission have recently given several speeches in which they expressed their views (sometimes inconsistent) as to investor protection and disclosure to investors in SEC filings.

Investor Protection

In a February 22 speech at The SEC Speaks in 2013, SEC Chairman Elisse Walter discussed investor protection. She stressed that regulation minimizing risks both to the larger financial system and to investors is necessary, but also noted that all investment involves risk inherent to the business in which the investment is made. Ms. Walter remarked that the SEC should work to give investors access to information and protect them from unnecessary risks such as fraud, market manipulation, insider trading and market structure failures, but should not discourage all risk-taking, in order to allow for continued growth in public offerings.

Click here to read the full text of the speech.

Disclosure to Investors

In a February 22 speech at The SEC Speaks in 2013, SEC Commissioner Troy A. Paredes discussed the philosophy behind disclosure regulation. He focused on the importance of disclosure and transparency in SEC filings in order to allow investors to appropriately evaluate the performance of companies and incentivize directors and officers to run businesses in a way that is beneficial to investors. However, he expressed concern that the increasing quantity of complex disclosure in SEC filings may result in “information overload,” which could cause investors to be unable to separate valuable information from information that is less useful. He suggested that shorter SEC filings with simpler presentation of information could be more useful to investors, and that it may be beneficial to allow some current disclosures to be more narrowly focused, scaled back or excluded and to limit the expansion of disclosure requirements so that companies are not required to include information that is not material to evaluating their businesses.

Click here to read the full text of the speech.

In a February 20 speech, SEC Commissioner Luis A. Aguilar encouraged companies to provide better and more comprehensive disclosure in their proxy statements. He focused primarily on disclosure provisions added or enhanced by the 2009 amendments to Regulation S-K. He suggested that companies include thoughtful and specific disclosure on items such as compensation policies and practices relating to risk management, the relationship between compensation and the company’s long-term performance, the board’s role in risk oversight and the effect of that on board leadership, and board nominating policies relating to diversity. He also expressed support for enhanced disclosure relating to political spending by companies, which some companies already provide voluntarily, and noted that a rulemaking petition was filed with the SEC seeking rules requiring such disclosure.

Click here to read the full text of the speech.

BROKER DEALER

SEC 2013 Examination Priorities

The Securities and Exchange Commission's National Examination Program (NEP) published its examination priorities for 2013. The examination priorities address market-wide issues as well as issues with respect to the following program areas: (i) investment advisers and investment companies, (ii) broker-dealers, (iii) market oversight and (iv) clearing and transfer agents.

The NEP identified the following as the most significant market-wide examination priorities:

- Identifying market participants engaged in fraudulent or unethical behavior;
- Understanding firms' approaches to enterprise risk management and how they govern and manage financial, legal, compliance, operational and reputational risks;
- Looking at overall risk governance frameworks regarding the management of conflicts of interest and the sufficiency of disclosures made to investors regarding conflicts of interest; and
- Conducting examinations on supervision of information technology systems with respect to operational capability, market access, information security, risks of system outages and data integrity compromises.

Click here for an outline of the focus of the Investment Adviser-Investment Company Exam Program, the Broker-Dealer Exam Program, the Market Oversight Exam Program and the Clearance and Settlement Exam Program.

Click here for the 2013 Examination Priorities.

CFTC

CFTC Revises Clearing Compliance Schedule for iTraxx CDS Indices

The Division of Clearing and Risk of the Commodity Futures Trading Commission has deferred for approximately six weeks the deadline for mandatory clearing of iTraxx Credit Default Swap (iTraxx CDS) indices. Swap dealers, security-based swap dealers, major swap participants, major security-based swap participants and active funds (Category 1 Entities) must comply with the clearing requirements for such iTraxx swaps by April 26, 2013. Commodity pools, private funds (other than active funds) and certain other persons primarily engaged in banking or financial activities (Category 2 Entities) must comply by July 25, 2013. All other entities (Category 3 Entities) must comply by October 23, 2013. The previously established schedule for all other swaps subject to the clearing requirement (CDX CDS indices and all four classes of interest rate swaps) remains unchanged: Category 1 Entities–March 11, 2013; Category 2 Entities–June 10, 2013; and Category 3 Entities–September 9, 2013.

More information is available here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Division of Trading and Markets Discusses Issues with Exchange-Traded Products

In a February 22 speech at The SEC Speaks in 2013, Associate Director of the Division of Trading and Markets of the Securities and Exchange Commission Heather Seidel discussed the evolution of exchange-traded products (ETPs) as seen from the perspective of her office's review of stock exchange applications for ETP listing rules under Rule 19b-4 of the Securities Exchange Act of 1934. Ms. Seidel has seen an increase in ETP listing rule applications over the last year with significant growth in rules sought for actively managed exchange-traded funds (ETFs), including such ETFs utilizing fixed income securities. She also noted an increased level of complexity of

ETPs that seek inverse and leveraged performance of various asset classes as well as of exchange-traded notes (ETNs).

In ETP listing rule applications, Ms. Seidel stated that the Division staff were seeking clarity as to what the ETP is, its structure, investment objective and compliance with listing standards. For ETPs that are not investment companies registered under the Investment Company Act of 1940, Ms. Seidel noted that the staff is particularly concerned with the transparency of what the ETP is tracking, the transparency of its investment objective and how the arbitrage mechanism, which reduces premiums or discounts of ETP share trading prices against the ETP's net asset value, will work for the ETP.

LITIGATION

Supreme Court Ruling Lowers Class Action Hurdle for Securities Fraud Cases

On February 27, the Supreme Court upheld a lower court's determination that proof of materiality is not required before certifying a securities fraud class action.

Connecticut Retirement Plans and Trust Funds sought class certification against Amgen Inc. alleging that Amgen made material misrepresentations about two of its flagship drugs, subsequently affecting Amgen's stock price. Amgen asserted that materiality must be proven before certifying the class under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires common questions of law or fact to predominate in class actions.

By a 6-3 vote, the Supreme Court held that challenges to materiality were not appropriate at the class certification stage. Justice Ginsberg, writing the opinion for the Court, noted: "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." Rather, the initial stages of a class action are designed to select the best method to litigate fairly and efficiently and Amgen's position would "put the cart before the horse." According to the Court, the "pivotal inquiry is whether proof of materiality is needed to ensure that the questions of law or fact common to the class will 'predominate over any questions affecting only individual members' as the litigation progresses." The Court reasoned that because materiality is judged according to an objective standard, it can be proven through evidence common to the class. In dissent, Justice Thomas criticized the majority for "all but eliminating materiality as one of the predicates of the fraud-on-the market theory…."

Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds, No. 11-1085 (2012).

Split Emerges on Customs Law after Eleventh Circuit Vacates Smuggling Convictions

On February 22, the US Court of Appeals for the Eleventh Circuit held that an indictment charging the unlawful importation of goods into the United States, in violation of 18 U.S.C. §§ 545 and 371, failed to state an offense because the unlawful act was based on a Federal Drug Administration (FDA) regulation as opposed to a congressional statute. The court therefore vacated all convictions and sentences. In doing so, the court set up a circuit split regarding the interpretation of what law must be violated for importation to be "contrary to law" under 18 U.S.C. § 545.

Appellants, the founders and officers of Naver Trading, Corp., were convicted of one count of conspiring to unlawfully import foods and six counts of smuggling goods into the United States relating to their importation of food into the United States in violation of FDA regulations. On appeal, the Eleventh Circuit *sua sponte* raised the question of whether the unlawful importation charge in violation of 18 U.S.C. § 525 sufficiently alleged a crime.

The court found that the US government prosecuted appellants for FDA violations that gave rise to civil remedies but did not reference any criminal statute or specify any criminal punishment. Applying the rule of lenity, the court held that "there is, at a minimum, great doubt as to whether violation of this regulation per se gives rise to criminal liability." In so doing, it expressly disagreed with the conclusion of the US Court of Appeals for the Fourth Circuit in finding the regulation not "grievously ambiguous."

The Eleventh Circuit also noted that the indictment did not adequately put the appellants on notice as to which statute they were alleged to have violated. As the court observed, "the passing mention of unlawful acts in [the indictment] is obscured by the vast majority of the indictment, which focuses on acts that are not criminal in nature." Accordingly, the court concluded, the "entire indictment did not adequately set forth a violation of criminal law."

U.S. v. Izurieta, No. 11-13585 (11th Cir. Feb. 22, 2013).

BANKING

FinCEN Issues Advisory to Financial Institutions: Update on Tax Refund Fraud and Related Identity Theft

On February 28, and in connection with the start of tax season, the Financial Crimes Enforcement Network (FinCEN) issued an advisory to remind financial institutions about tax refund fraud and the required reporting of such activity through the filing of a Suspicious Activity Report (SAR). According to FinCen, "identity theft can be a precursor to tax refund fraud because individual income tax returns filed in the United States are tracked and processed by Taxpayer Identification Numbers (TINs) and the individual taxpayer names associated with these numbers. Criminals can obtain TINs through various methods of identity theft, including phishing schemes and the establishment of fraudulent tax preparation businesses."

Financial institutions "are critical in identifying tax refund fraud because the methods for tax refund distribution - issuance of paper checks, and direct deposit into demand deposit or prepaid access card accounts - often involve various financial services providers. The number of tax refunds being distributed via direct deposit has increased significantly over the past several years and continues to increase annually."

To see the red flags listed by FinCEN to assist financial institutions to identify potential tax fraud, click here.

If a financial institution "knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution involves funds derived from illegal activity or an attempt to disguise funds derived from illegal activity, is designed to evade regulations promulgated under the Bank Secrecy Act (BSA), or lacks a business or apparent lawful purpose," the financial institution may well be required to file a SAR.

Read more.

EXECUTIVE COMPENSATION AND ERISA

New Fees Coming for Health Plan Sponsors

To help offset the costs associated with the implementation of the health care reform legislation, also known as the Patient Protection and Accordable Care Act of 2010 (PPACA), the law imposes certain fees on health insurers and sponsors of self-insured health plans.

PCORI FEE

One PPACA fee is intended to fund the Patient Centered Outcome Research Institute (PCORI), a research institute created under PPACA to advance research related to evidence-based medicine. The PCORI fee is effective for each plan year ending after October 1, 2012 and before October 1, 2019. The PCORI fee is $1.00 per covered life for the first plan year for which it is due, $2.00 per covered life for the second plan year for which it is due, and for years three through seven, the PCORI fee is adjusted by each year's health care inflation rate as determined by the US Department of Health and Human Services (HHS). The final rules issued on December 6, 2012, contain several methods for determining the number of covered lives under a health plan.

A sponsor of a self-insured health plan is responsible for payment of the PCORI fee. For insured plans, the insurance company is responsible for paying the PCORI (although it is expected that insurers will pass the PCORI fee and the TRP fee (discussed below) on to the employer purchasing the policy). The PCORI fee is due no later than July 31 of the calendar year following the calendar year in which the plan year ends. For calendar year plans, the first PCORI fee for the 2012 plan year is due by July 31, 2013. PCORI fees should be submitted to the IRS together with a properly completed IRS Form 720.

TRP FEE

A more substantial fee arising under PPACA is expected to be in effect for calendar years 2014, 2015 and 2016. The Transitional Reinsurance Program (TRP) was created under PPACA to help stabilize health insurance premiums once the requirements of PPACA become more fully effective in 2014. In addition, PPACA requires that the fee associated with TRP be increased so that the US Treasury receives a total of $5 billion over the three-year period that the TRP fee is expected to be in effect.

The TRP fee is calculated based on the revenue necessary to be collected. Specifically, PPACA provides that the aggregate amount of TRP fees to be collected for 2014 is approximately $12 billion. Accordingly (and based on recently issued proposed rules), the TRP fee per covered life for 2014 is expected to be approximately $5.25 per month (or $63.00 per year). However, the specific amount of the TRP fee for 2014 is not yet finalized.

In any case, the TRP fee is expected to be reduced for 2015 and 2016 because the aggregate fees due to be collected in those years are $8 billion and $5 billion, respectively. However, guidance indicates that the US Department of Health and Human Services (HHS) is considering a leveling mechanism that may reduce the 2014 TRP fee to some degree by raising the TRP fee that would be due in 2015 and 2016. Final guidance from HHS will determine the TRP fee for each year.

The actual TRP fee owed by an insurance company or sponsor of a self-insured health plan is determined based on the number of lives covered by the policy or plan. In each year (2014, 2015 and 2016), insurance companies and sponsors are to report to HHS the number of covered lives by November 15 (the guidance contains several methods for determining this number). HHS is then expected to notify the sponsor or insurer of its TRP fee within 30 days. The fee will then be due 30 days thereafter (i.e., the fee for 2014 will be payable in late December 2014 or early January 2015).

While the guidance related to the TRP fee is not yet final, it is recommended that sponsors and insurers keep both the TRP fee and the PCORI fee in mind when budgeting for health care costs.

The final regulations regarding the PCORI fee can be found here.

The proposed regulations regarding the TRP fee can be found here.

UK DEVELOPMENTS

One-Day Prohibition Imposed on Short Selling of Four Italian Shares

On February 27, the UK Financial Services Authority (FSA) announced that it had prohibited short selling of the shares of four named Italian financial institutions for the duration of the February 27 trading day. The prohibition applied to all UK trading venues on which the shares are traded. The FSA stated that it had imposed the prohibition to assist the Commissione Nazionale per le Società e la Borsa (CONSOB), the Italian regulator, following the imposition by CONSOB of a similar one-day short selling ban.

The FSA and CONSOB prohibitions were imposed under emergency powers contained in Article 23 of the EU Short Selling Regulation (EU/236/2012) under which national regulators can impose temporary short selling prohibitions after a significant fall in the price of a financial instrument to prevent a further “disorderly decline” in that instrument’s price.

Read more.

EU DEVELOPMENTS

EMIR Technical Standards Published in the *Official Journal of the European Union*

Technical Standards which clarify certain aspects of Regulation 648/2012 on over-the-counter (OTC) derivatives, central counterparties (CCPs) and trade repositories (generally known as the European Markets Infrastructure Regulation or EMIR) will enter into force on March 15, 2013, following their publication in the *Official Journal of the European Union* on February 23.

As reported in *Corporate and Financial Weekly Digest* of December 21, 2012, the technical standards relate to:

- Indirect clearing arrangements;
- The clearing obligation procedure;
- The public register;
- Access to a trading venue;
- Non-financial counterparties;
- Risk mitigation techniques for OTC derivatives contracts not cleared by a central counterparty (CCP);
- The specification of the provisions in legislation that relate to the requirements for CCPs;
- The capital, retained earnings and reserves of a CCP;
- The format of the records to be maintained by a CCP;
- The specification of the provisions in legislation that related to the minimum details of the data to be reported to trade repositories;
- The details of the application for registration as a trade repository;
- Data to be published and made available by trade repositories;
- Operational standards for aggregating, comparing and accessing the data published by trade repositories;
- The specification of the format and frequency of trade reports to trade repositories; and
- The format of applications for registration of trade repositories.

Read more.

For more information, contact:

SEC/CORPORATE

Michelle Griswold	212.940.8546	michelle.griswold@kattenlaw.com
Mark J. Reyes	312.902.5612	mark.reyes@kattenlaw.com
Mark D. Wood	312.902.5493	mark.wood@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
Kevin M. Foley	312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	312.902.5241	arthur.hahn@kattenlaw.com
Carolyn H. Jackson	44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Kathleen H. Moriarty	212.940.6304	kathleen.moriarty@jkattenlaw.com
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
Christopher T. Shannon	312.902.5322	chris.shannon@kattenlaw.com
Peter J. Shea	212.940.6447	peter.shea@kattenlaw.com
Marybeth Sorady	202.625.3727	marybeth.sorady@kattenlaw.com
James Van De Graaff	312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	212.940.8584	robert.weiss@kattenlaw.com
Meryl E. Wiener	212.940.8542	meryl.wiener@kattenlaw.com
Gregory E. Xethalis	212.940.8587	gregory.xethalis@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	310.788.4534	krassimira.zourkova@kattenlaw.com

LITIGATION

Michael M. Rosensaft	212.940.6631	michael.rosensaft@kattenlaw.com

BANKING

Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com
Christina J. Grigorian	202.625.3541	christina.grigorian@kattenlaw.com

EXECUTIVE COMPENSATION AND ERISA

Russell E. Greenblatt	312.902.5222	russell.greenblatt@kattenlaw.com
Daniel B. Lange	312.902.5624	daniel.lange@kattenlaw.com

EU/UK DEVELOPMENTS

Tim Aron	44.20.7776.7627	tim.aron@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

AUSTIN CENTURY CITY CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND ORANGE COUNTY SHANGHAI 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: Katten Muchin Rosenman UK LLP.