Katten
Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

MARCH 19, 2010

SEC/CORPORATE

SEC Issues Staff Legal Bulletin Regarding the Suspension of Reporting Obligations Pursuant to Rule 12h-3

On March 15, the Securities and Exchange Commission's Division of Corporation Finance issued Staff Legal Bulletin No. 18 to explain the operation of Rule 12h-3 under the Securities Exchange Act and identify two situations where issuers may utilize Rule 12h-3 to suspend their reporting obligations under Section 15(d) of the Exchange Act without first obtaining a no-action letter.

When an issuer's registration statement under the Securities Act of 1933 becomes effective, Section 15(d) of the Exchange Act requires the issuer to file periodic reports with the SEC for each class of securities covered by the registration statement. Section 15(d) also provides for automatic suspension of an issuer's reporting obligations if, on the first day of any fiscal year other than the fiscal year in which a registration statement became effective, there are fewer than 300 record holders of the securities offered under the registration statement.

Rule 12h-3 provides a mechanism by which an issuer's reporting obligations with respect to a class of securities registered under the Securities Act may be suspended at *any time during* the issuer's fiscal year. To avail itself of Rule 12h-3, an issuer must be current in its Exchange Act reporting obligations and have fewer than 300 record holders of the class of securities for which suspension is sought (or fewer than 500 record holders for issuers satisfying maximum asset value thresholds).

Pursuant to its terms, Rule 12h-3 is not available for any class of securities for a fiscal year in which a registration statement relating to that class becomes effective under the Securities Act, or is required to be updated pursuant to Section 10(a)(3) of the Securities Act (and, if the issuer is relying on having fewer than 500 record holder threshold noted above, during the two succeeding fiscal years). However, the Bulletin confirms the Division's view that, in the following two situations, the existence of a Securities Act registration statement that became effective or was required to be updated pursuant to Section 10(a)(3) during the time period specified in Rule 12h-3 will not preclude an issuer from filing a Form 15 to suspend its reporting obligations.

- *Abandoned Initial Public Offering*—An issuer with no Exchange Act reporting obligations which has a Securities Act registration statement become effective, but does not sell any securities pursuant to the registration statement, and the issuer, with the SEC's consent, withdraws the registration statement.
- *Acquired Issuer*—An issuer has been acquired by another entity, resulting in the class or classes of securities for which the issuer has Section 15(d) reporting obligations being either (a) extinguished, or (b) held or assumed by only one record holder (the acquiring entity).

While the ability of issuers to rely on Rule 12h-3 in the above situations has been the subject of numerous no-action requests (and favorable no-action responses), an issuer that fits within either of the two situations identified above will not need a no-action letter from the Division before filing a Form 15 to suspend its Section 15(d) reporting obligations in reliance on Rule 12h-3, provided the following conditions are satisfied.

- The issuer does not have a class of securities registered under Section 12 of the Exchange Act.
- The issuer is current in its reporting obligations at the time of filing Form 15 and does not exceed the record holder requirements described above.
- The issuer has deregistered any unsold securities from Securities Act registration statements and withdraws any registration statements under which there were no sales (which requires the SEC's consent).
- The issuer does not otherwise file Exchange Act reports during the time period in which it seeks to avail itself of the suspension provided by Rule 12h-3 (including any reports that may be required under any indenture governing outstanding debt).

Click here to view the text of Staff Legal Bulletin No. 18 regarding the application of Rule 12h-3.

SEC Issues New Interpretations on Executive Compensation and Compensation Consultant Reporting

On March 12, the Securities and Exchange Commission's Division of Corporation Finance issued new Compliance and Disclosure Interpretations (C&DIs) on executive compensation and compensation consultant reporting under Regulation S-K.

The SEC's new guidance included the following.

- Where a company grants non-equity incentive plan awards during a fiscal year that are based on the company's financial performance for that year, and the compensation committee determines the amounts earned pursuant to the awards after the end of the fiscal year, an executive's decision to decline an earned award does not change the fact that the award was granted and earned during the fiscal year. Accordingly, despite the executive officer's decision to decline the award, the grant of the award should be reflected in the executive officer's total compensation for purposes of determining whether the executive is a named executive officer (NEO). If the executive is an NEO, then the award should be reported in the Summary Compensation Table and the Grant of Plan-Based Awards Table. The SEC also noted that the executive's decision not to accept payment of the award should be disclosed in a separate column or footnote to the Summary Compensation Table and discussed in Compensation Discussion and Analysis to the extent the executive's decision affects the manner in which the company structures and implements performance-based compensation.
- If an executive officer advises the board of directors that he or she will not accept a bonus for a fiscal year before the board of directors takes discretionary action to grant such bonus, the company should not include the foregone bonus for determining NEO status nor report the foregone bonus in the Summary Compensation Table.
- The SEC clarified that for purposes of Item 407 of Regulation S-K, which requires disclosure of compensation consultant fees if the consultant and its affiliates provided advice on director and officer compensation and fees for additional services exceeded $120,000 during the last fiscal year, there are no limitations on the type of "additional services" included in the calculation of fees paid to the consultant and its affiliates. As such, payments for any product or service sold by the consultant or its affiliates to the reporting company should be included in the calculation.

Click here to view the C&DIs described above (Questions 119.25, 119.26 and 133.12).

LITIGATION

Second Circuit Addresses "Bespeaks Caution" Doctrine

On an appeal from the district court's dismissal of plaintiff's securities fraud complaint, the U.S. Court of Appeals for the Second Circuit applied the "bespeaks caution" doctrine regarding forward-looking statements with differing results.

Plaintiff predicated its claim on two statements defendant made on the same day: a press release and a conference call, relating to a proposed favorable amendment to a key agreement defendant had with the U.S. Postal Service. Plaintiff alleged that defendant's statements advised that an amendment was likely, and that defendant violated a duty to update the statements when it learned the amendment would not occur. In analyzing the statements, the court applied the "bespeaks caution" doctrine which renders certain forward-looking statements immaterial as a matter of law because "it cannot be said that any reasonable investor could consider them important in light of adequate cautionary language."

The court ruled that the press release was non-actionable, but that the conference call could form a basis for securities fraud liability. The press release stated that the defendant believed it had reached an agreement in principle and anticipated the agreement would be completed shortly. In the conference call, the defendant stated that it hoped to have an agreement within weeks, that it had an agreement in principle and that it was "very confident" that the agreement would be signed "in the not too distant future." The press release stated that there was "no guarantee" that agreement would be reached and thus the "bespeaks caution" doctrine insulated the statement from liability. However, in the conference call, the defendant indicated that the agreement was "imminent" and that in spite of boilerplate language warning that forward-looking statements were subject to risks and uncertainties, the defendant failed to adequately alert investors to the specific risk that the agreement would not materialize. (*Illinois State Bd. of Investment v. Authentidate Holding Corp.*, 2010 WL 889294, No. 09 Civ. 1751 (2d Cir. 2010))

Veil Piercing Allegations Insufficient to Impose Liability on Non-Party to Insurance Policy; Court Vacates Attachment of Electronic Fund Transfers

The U.S. District Court for the Southern District of New York denied cross motions for summary judgment, ruling that plaintiff's veil-piercing allegations were insufficient to establish liability against a non-party for payments due on an insurance agreement, as a matter of law.

Plaintiff insurer sued insured for amounts due under a maritime insurance agreement. Plaintiff also asserted a claim for the amount due against a non-party to the agreement under an alter-ego theory of liability. Plaintiff asserted that the two defendants shared offices, telephone numbers, the same managing director, were commonly owned and that the non-party had been involved in communications about the insurance policy. Defendant argued that it never made any premium payments on behalf of the insured and that a cross-claim between the two defendants was pending. The court ruled that plaintiff's evidence did not establish that the non-party defendant "egregiously dominated and controlled" the insured, precluding judgment as a matter of law in favor of the plaintiff.

The court also addressed a recent Second Circuit case on the issue of the attachment of electronic fund transfers passing through the Southern District of New York and facilitated by intermediary banks. The court vacated its own attachment order, holding that such transfers are not properly the subject of attachment and also noted that the length of time electronic fund transfers may be held by New York intermediary banks does not affect whether they can be attached. (*American Steamship Owners Mutual Protection v. Cleopatra Nav. Co. Ltd.*, 2010 WL 850185, No. 07 Civ. 9353 (S.D.N.Y. Mar. 11, 2010))

BROKER DEALER

Federal Regulators Jointly Issue Policy Statement Regarding AML

The Securities and Exchange Commission issued a policy statement on anti-money laundering (AML) issues jointly with a number of federal regulators including the Financial Crimes Enforcement Network, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation and in consultation with the staff of the Commodity Futures Trading Commission. The guidance "clarifies and consolidates existing regulatory expectations" for obtaining beneficial ownership information for certain accounts and customer relationships.

Read more.

PRIVATE INVESTMENT FUNDS

Financial Regulatory Reform Bill Includes Revised Private Fund Investment Advisers Registration Act of 2010

On March 15, Senate Banking Committee Chairman Christopher Dodd (D- Conn.) introduced a revised version of his comprehensive financial regulatory reform bill, the Restoring American Financial Stability Act of 2010 (the Dodd Bill). Among the proposals set forth in the Dodd Bill is the Private Fund Investment Advisers Registration Act of 2010 (the Private Fund Act), a bill similar to a bill of the same name proposed by Senator Dodd in his previously introduced 2009 financial regulatory reform bill. Among other things, the Private Fund Act would:

- raise the threshold for federal registration from $25 million to $100 million under management, a move expected to increase the number of advisers under state supervision by 28%;
- eliminate the exemption from registration for (1) intra-state advisers that manage private funds (defined as funds exempt under Section 3(c)(1) or 3(c)(7) of the Investment Company Act) and (2) advisers with fewer than 15 clients (including advisers with a single client, such as a manager of a single private fund);
- exempt from registration foreign private advisers with fewer than 15 U.S. clients and less than $25 million under management attributable to U.S. clients that neither hold themselves out to the U.S. public as advisers nor serve as advisers to registered investment companies;
- exempt from registration advisers to "venture capital funds," "private equity funds" and "family offices," with such terms left to the Securities and Exchange Commission to define;
- require private funds (including private equity funds but not including venture capital funds) to maintain and file records and reports (which will be deemed to be the records and reports of their advisers) that include descriptions of their assets under management and use of leverage, counterparty credit risk exposure, trading and investment positions, valuation policies, types of assets held, side arrangements or side letters, trading practices, and other information, with provisions for confidential treatment of such records and reports;

- instruct the SEC to increase by rule the current accredited investor standard to account for inflation, and to adjust the standard for inflation at least every five years thereafter;
- commission studies on (1) the appropriate criteria for determining qualification to invest in private funds, (2) the feasibility of forming a self-regulatory organization to oversee private funds, private equity funds and venture capital funds, and (3) the state of short selling, with a focus on the failure to deliver or the delay in delivery of shares sold short; and
- require advisers to take such steps to safeguard client assets over which they have custody as the SEC may by rule prescribe, including verification by an independent public accountant.

If enacted, the Private Fund Act would become effective after one year, although an adviser, at its discretion, may choose to register with the SEC during this one-year transition period.

The Dodd Bill also contains provisions that are similar to the Obama proposal known as the "Volcker Rule" and the recently proposed Senate bill, the Protect our Recovery through Oversight of Proprietary Trading Act (the PROP Trading Act), that would (1) prohibit banks from sponsoring or investing in hedge funds or private equity funds or from engaging in proprietary trading and (2) require certain non-bank financial institutions to set aside additional capital if they sponsor or invest in hedge funds or private equity funds or engage in proprietary trading.

To read the text of the Dodd Bill, click here.
To read Senator Dodd's summary of the Dodd Bill, click here.

Click here to read a summary of Senator Dodd's previously proposed 2009 regulatory reform bill in the November 13, 2009, edition of *Corporate and Financial Weekly Digest*.
Click here for more information on the PROP Trading Act in the March 12 edition of *Corporate and Financial Weekly Digest*.

FINANCIAL MARKETS

SEC Extends Temporary Exemptions Related to Central Clearing of CDS

The Securities and Exchange Commission has extended temporary exemptions that were granted last year to ICE Trust U.S. LLC to allow it to continue clearing certain credit default swap (CDS) trades. The SEC initially acted in the wake of the credit crisis to facilitate the operation of a number of central counterparties for CDS transactions by issuing a series of different conditional orders and exemptions. These orders, among other things, provided exemptions from clearing agency registration solely to perform the functions of a clearinghouse for certain CDS transactions that are not swap agreements excluded from the definition of a "security" in the Securities Exchange Act of 1934. The SEC's recent action extended the ICE Trust U.S. LLC exemptions until November 30. The SEC has not yet acted to grant similar extensions to NYSE Euronext or the Chicago Mercantile Exchange.

Read more.

Revised OTC Clearing Proposals Included in Senate Financial Reform Bill

On March 15, Senator Christopher Dodd introduced, as a discussion draft, a revised version of his financial regulatory reform bill. The revised bill includes changes to Title VII, which relates to over-the-counter (OTC) derivatives, including a revised definition of "major swap participant" and an amended transaction-based exemption for end-users. Title VIII of the bill also includes provisions that would grant the Federal Reserve Board authority to prescribe uniform risk management, payment, and clearing and settlement standards for systemically important "financial market utilities," a term that is defined to include derivatives clearing organizations and securities clearing agencies.

The Senate mark-up of the new bill is scheduled to begin on March 22. In announcing the bill, Senator Dodd noted that a substitute derivatives title, being drafted by Senators Reed and Gregg, may replace current Title VII of Senator Dodd's bill during the mark-up. In addition, the Senate Agriculture Committee is expected to introduce a separate OTC derivatives bill in early April.

The text of the new bill introduced by Senator Dodd is available here.

CFTC

NFA Sets Effective Date for New Quarterly Reporting Requirement for CPOs

The National Futures Association (NFA) has set an effective date of March 31 for new Compliance Rule 2-46, which requires registered commodity pool operators (CPOs), including CPOs that have claimed an exemption pursuant to Commodity Futures Trading Commission Rule 4.7, to file a quarterly report with NFA containing certain specified information. The reports are due within 45 days after the end of each calendar quarter and must include (1) the identity of the pool's administrator, carrying broker(s), trading manager(s) and custodians, (2) a statement of changes in the pool's net asset value over the quarter, (3) monthly performance information for the quarter, and (4) a schedule identifying any investments exceeding 10% of the pool's net asset value as of the end of the quarter. The new reporting requirements do not apply to persons operating pursuant to an exemption from registration under CFTC Rule 4.13.

The first quarterly reports under the new rule will be due by May 17, 2010, and must be filed electronically through NFA's EasyFile system. The NFA Notice to Members regarding the new rule is available here.

DCIO Grants No-Action Relief Permitting Introduction of Customers by Non-U.S. Bank Branches

The Division of Clearing and Intermediary Oversight (DCIO) of the Commodity Futures Trading Commission has granted no-action relief to a U.S.-based bank, permitting its foreign branches to introduce commodity futures and options customers located outside of the United States to an affiliated futures commission merchant (FCM) without such branches being required to register as introducing brokers (IBs) with the CFTC. Under Section 4d(1) of the Commodity Exchange Act (CEA), persons acting as IBs (which includes persons soliciting or accepting orders for the purchase or sale of commodity futures and options contracts) are required to register as such with the CFTC. In this case, the foreign branches would be compensated by the FCM for their introduction of non-U.S. customers to the FCM, and would therefore be considered to act as IBs and, absent relief, required to register.

The no-action relief is conditioned upon, among other things, the bank identifying all of its foreign branches engaged in introduction activities to National Futures Association, and the bank and the FCM agreeing to be jointly and severally liable for any violations of the CEA or CFTC regulations by the foreign branches. The DCIO staff issued a no-action letter based on similar facts in 2000 (Interpretative Letter No. 00-44).

A copy of the no-action letter is available here.

BANKING

Federal Banking Agencies Issue Final Policy Statement on Funding and Liquidity Risk Management

The federal banking agencies, in conjunction with the Conference of State Bank Supervisors, released a policy statement on March 17 explaining their expectations for sound funding and liquidity risk management practices. This policy statement, adopted by each of the agencies, summarizes the principles of sound liquidity risk management issued previously and, when appropriate, supplements them with the "Principles for Sound Liquidity Risk Management and Supervision" issued in September 2008 by the Basel Committee on Banking Supervision. The policy statement emphasizes the importance of cash flow projections, diversified funding sources, stress testing, a cushion of liquid assets, and a formal, well-developed contingency funding plan as primary tools for measuring and managing liquidity risk. The agencies expect each financial institution to manage funding and liquidity risk using processes and systems that are commensurate with the institution's complexity, risk profile and scope of operations. The policy statement will be effective 60 days after publication in the Federal Register, expected shortly.

Read more.

Senator Dodd Releases Financial Regulatory Reform Bill

The following summarizes sections of the Restoring American Financial Stability Act of 2010, a bill introduced by Senate Banking Committee Chairman Christopher Dodd (D-Conn.). Among other things, the bill would:

- transfer to the Federal Deposit Insurance Corporation (FDIC) the jurisdiction to regulate state banks and thrifts of all sizes and bank holding companies of state banks with assets below $50 billion.
- allow the Office of the Comptroller of the Currency (OCC) to regulate national banks and federal thrifts of all sizes and the holding companies of national banks and federal thrifts with assets below $50 billion. The

Office of Thrift Savings would be eliminated, and existing thrifts will be grandfathered in, but there would be no new charters for federal thrifts.

- cut back the jurisdiction of the Federal Reserve, which would regulate bank and thrift holding companies with assets of over $50 billion. The bill also requires that the president of the New York Reserve Bank be appointed by the President, with the advice and consent of the Senate.
- preserve the dual banking system, leaving in place the state banking system that governs most community banks. The state regulators would for the most part continue to share jurisdiction with the FDIC.
- create a new independent Consumer Financial Protection Bureau that would have the sole job of protecting American consumers from unfair, deceptive and abusive financial products and practices. The Bureau would be led by an independent director appointed by the President and confirmed by the Senate, and would have a dedicated budget paid by the Federal Reserve Board. The Bureau would write rules for consumer protections governing all entities—banks and non-banks—offering consumer financial services or products, and would have authority to examine and enforce regulations for banks and credit unions with assets of over $10 billion, all mortgage-related businesses (lenders, servicers, mortgage brokers and foreclosure scam operators) and large non-bank financial companies, such as large payday lenders, debt collectors and consumer reporting agencies. Banks with assets of $10 billion or less would be examined by the appropriate bank regulator. The bill appears to consolidate consumer protection responsibilities currently handled by the OCC, Office of Thrift Supervision, FDIC, Federal Reserve, National Credit Union Administration and Federal Trade Commission.
- create a new Financial Stability Oversight Council that would focus on identifying, monitoring and addressing systemic risks posed by large, complex financial firms as well as products and activities that spread risk across firms. It would make recommendations to regulators for increasingly stringent rules on companies that grow large and complex enough to pose a threat to the financial stability of the United States. The Council would be comprised of nine members including: Federal Reserve Board, Securities and Exchange Commission, Commodity Futures Trading Commission, OCC, FDIC, Federal Housing Finance Agency and the new Consumer Financial Protection Bureau. The Council would have the sole job of identifying and responding to emerging risks throughout the financial system. The Council would make recommendations to the Federal Reserve for increasingly strict rules for capital, leverage, liquidity, risk management and other requirements as companies grow in size and complexity, with significant requirements on companies that pose risks to the financial system. The Council would be authorized to require, with a 2/3 vote, regulation of non-bank financial companies that would pose a risk to the financial stability of the United States if they failed to be regulated by the Federal Reserve. The Council would also be able to approve, with a 2/3 vote, a Federal Reserve decision to require a large, complex company to divest some of its holdings if it poses a grave threat to the financial stability of the United States—but only as a last resort.
- require regulators to implement regulations for banks, their affiliates and bank holding companies, to prohibit proprietary trading, investment in and sponsorship of hedge funds and private equity funds, and to limit relationships with hedge funds and private equity funds. Non-bank financial institutions supervised by the Federal Reserve will also have restrictions on their proprietary trading and hedge fund and private equity investments. Regulations will be developed after a study by the Financial Stability Oversight Council and based on their recommendations.
- require large, complex companies to periodically submit plans for their rapid and orderly shutdown should the company go under. Companies would be subject to higher capital requirements and restrictions on growth and activity, as well as divestment, if they fail to submit acceptable plans. Significant costs for failing to produce a credible plan create incentives for firms to rationalize structures or operations that cannot be unwound easily.
- create an orderly liquidation mechanism for the FDIC to unwind failing systemically significant financial companies. Shareholders and unsecured creditors would bear losses and management would be removed. The Treasury, FDIC and the Federal Reserve would all agree under this procedure to put a company into the orderly liquidation process. A panel of three bankruptcy judges must convene and agree—within 24 hours—that a company is insolvent.
- charge the largest financial firms $50 billion for an upfront fund, built up over time, that would be used if needed for any liquidation. The industry, not the taxpayers, would pay for liquidating large, interconnected financial companies. The bill also allows FDIC to borrow from the U.S. Treasury department only for working capital that it expects to be repaid from the assets of the company being liquidated. The government would be first in line for repayment.
- amend the Federal Reserve's 13(3) lender of last resort authority to allow system-wide support for healthy institutions or systemically important market utilities with sufficient collateral to protect taxpayers from loss during a major destabilizing event, but not to prop up individual institutions. The Board must begin reporting within seven days of extending loans, periodically thereafter, and disclose borrowers, collateral and amounts borrowed unless doing so would defeat the purpose of the support. Disclosure may be delayed 12 months if it would compromise the program or financial stability. To provide protection against bank runs, the FDIC can guarantee debt of solvent insured banks and thrifts and their holding companies only if they meet a series of serious checks: the Board and the Council determine that there is a threat to financial stability; the

Treasury Secretary approves terms and conditions and determines a cap on overall guarantee amounts; the President must activate an expedited process for congressional review of the amount and use of the guarantees; and fees are set to cover all expected costs and losses are recouped from users of the program.

Read more.

EXECUTIVE COMPENSATION AND ERISA

COBRA Subsidy Changes Continue

Eligibility for the Consolidated Omnibus Budget Reconciliation Act (COBRA) subsidy has been extended until March 31, as reported in the March 12 edition of *Corporate and Financial Weekly Digest*. Further developments with respect to the COBRA subsidy include:

- The Department of Labor has posted updated model notices reflecting the recent extension, which are available here.
- The Senate passed the American Workers, State and Business Relief Act of 2010 (AWSBR), which would extend the COBRA subsidy eligibility period until December 31. The Senate's version of AWSBR is broader than the version initially passed by the House of Representatives. Before this extension to December 31 becomes effective, the versions must be reconciled and then signed by the President.
- On March 17, the House of Representatives passed a bill that would extend the eligibility period for the COBRA subsidy until April 30. The purpose behind this extension is to keep the COBRA subsidy in effect until the House of Representatives can address AWSBR. Before it takes effect, this interim extension must be passed by the Senate and signed by the President.

Inattention to COBRA Could Lead to Excise Taxes

With the numerous changes to the Consolidated Omnibus Budget Reconciliation Act (COBRA) subsidy and the subsidy's various notice requirements, it would not be surprising for an employer to make a mistake in complying with COBRA. Failures to comply with COBRA (including obligations unrelated to the subsidy) can lead to excise taxes under the federal tax code and trigger an obligation to file a Form 8928 with the Internal Revenue Service (IRS). For employers, this excise tax is $100-$200 per day and can reach up to $500,000.

Employers that monitor COBRA compliance regularly and fix any failures within 30 days can typically avoid imposition of the excise tax. An employer that willfully neglects its COBRA obligations or fails to reasonably monitor its compliance with such obligations will not be entitled to such relief. In addition, if the IRS finds a COBRA failure upon audit, it must impose an excise tax on the employer.

The IRS Form 8928 and its instructions can be found here.

UK DEVELOPMENTS

FSA Bans Prop Trader for Mismarking Positions

On March 16, the UK Financial Services Authority (FSA) announced that it had imposed a five-year prohibition order on Alexis Stenfors, a former trader with the London branch of Merrill Lynch International Bank Limited (MLIB) banning him from performing any function in relation to any regulated activity on the grounds that he is not a fit and proper person.

Mr. Stenfors was found to have deliberately mismarked the positions he traded on behalf of MLIB between mid-January 2009 and mid-February 2009 by around $100 million in order to avoid showing increasing losses in his books. The mismarking was discovered by MLIB, Mr. Stenfors was suspended and, after an internal investigation, dismissed by MLIB. The FSA's Decision Notice did not criticize MLIB.

To read the Final Notice in full, click here.

FSA Publishes its 2010-11 Business Plan

On March 17, the UK Financial Services Authority (FSA) published its Business Plan for 2010-2011. The document sets out the FSA's priorities for the coming year. The FSA characterized the Plan as "a demanding programme of work for the year requiring greater policy and supervisory resources." Its key areas of focus are:

- Delivering effective supervision, backed by the use of its enforcement powers, as a means to achieve credible deterrence
- Making the cultural and organizational changes to the FSA needed to implement intensive supervision
- Taking forward the policy reform agenda of the FSA's Turner Review and the wider policy agenda mandated by the European Union
- Fulfilling its role in promoting financial stability under the new Financial Services Bill—if that Bill is passed by the UK Parliament

In developing intensive supervision, the FSA's regulatory approach has moved to a more proactive stance. Supervisors are now making judgements on firms' business models and intervening earlier than was previously the case if they anticipate any risks that may arise from regulated firms' conduct, sales practices, senior management competence or product development.

The FSA considers that credible deterrence underpins its supervisory approach and emphasizes the number of criminal prosecutions for insider dealing prosecutions, and proceedings against a number of other individuals for insider dealing and making false or misleading statements to the market. (See the February 19 and March 12 editions of *Corporate and Financial Weekly Digest*).

To read the Plan in full, click here.

UK Government Consults on Security Interests Registration Regime

On March 12, the UK Department for Business, Innovation and Skills (BIS) published a consultation paper on the UK regime for the registration of security interests created by companies and limited liability partnerships (LLPs). Under English law, where a company or LLP uses its assets as security, it is required to register the security interest in accordance with the scheme now set out in the Companies Act 2006 but deriving essentially unchanged from the Companies Act 1900. This scheme has been subject to criticism on several grounds.

BIS is consulting on a number of areas in an effort to try to improve the security registration regime, including:

- What security interests should be registrable
- Abolishing the existing 21-day time limit for registration of a security interest and aspects of the consequences of registration or failure to register
- The registration procedure, including the possibility of introducing electronic filing
- Whether registration of security interest in a special register (such as for charges over land) might be treated as registration of that security interest on the Companies House register
- The application of the regime to non-UK companies

The consultation is open until June 18. BIS has indicated that it expects a further round of consultation before draft regulations will be prepared.

To read the consultation paper in full, click here.

Scope of UK Bank Payroll Tax Clarified

In December 2009, the UK Government introduced a Bank Payroll Tax (BPT) applicable in the UK to certain employees of banks and banking groups. It requires employers to pay BPT at 50% of any bonus over £25,000 paid to certain classes of employees between December 9, 2009, and April 5, 2010.

The Government has now confirmed that BPT will not apply to:

- any group which obtains 90% or more of its income from asset management activities; or
- any firm (or UK branch) which is not a deposit-taker in the UK and whose capital resources requirement (as defined in the Financial Services Authority's rules) is less than £100 million (approximately $150 million).

To read more, click here.

EU DEVELOPMENTS

Presidency Withdraws AIFM Directive Compromise Draft

On March 16, the Spanish Presidency announced the withdrawal of its compromise Alternative Investment Fund Manager Directive (AIFM Directive) proposal following the failure ahead of the March European Council of Ministers Ecofin meeting of finance ministers to reach a sufficient level of agreement on the detailed provisions of the proposal. The Presidency stated that further discussions were "postponed until a meeting to be held at a later, still undefined, date, but will definitely take place during the six-month period of the Spanish Presidency, which finishes at the end of June."

Meanwhile the ECON committee of the European Parliament is continuing its deliberations on the Gauzes Report proposing amendments to the European Commission's proposed draft AIFM Directive and the amendments to the Gauzes Report's proposals (numbering over 1,400) which have been tabled. The ECON Committee's latest discussions on March 17 indicated that there remains a wide divergence of views on matters of principle and of detail; so the final shape of ECON's report remains uncertain.

To read more, 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
Jonathan D. Weiner	212.940.6349	jonathan.weiner@kattenlaw.com

LITIGATION

Bruce M. Sabados	212.940.6369	bruce.sabados@kattenlaw.com
Brian Schmidt	212.940.8579	brian.schmidt@kattenlaw.com

FINANCIAL SERVICES

Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@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
Arthur W. Hahn	312.902.5241	arthur.hahn@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
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

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
EXECUTIVE COMPENSATION AND ERISA		
Ann M. Kim	312.902.5589	ann.kim@kattenlaw.com
Michael R. Durnwald	312.902.5697	michael.durnwald@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

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

Published for clients as a source of information. The material contained herein is not to be construed as legal advice or opinion.

CIRCULAR 230 DISCLOSURE: Pursuant to regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

©2010 Katten Muchin Rosenman LLP. All rights reserved.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK 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.