Katten
Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

Business/Financial News in Brief
May 12, 2006

SEC/Corporate

FIN 47 Causes Filing Delays and Uncertainty for Many Issuers

Advanced Environmental Dimensions (AED), a consulting firm that specializes in environmental financial reporting, has noted that a number of companies have encountered filing delays, reported material weaknesses in internal controls, or restated financial statements as a result of the implementation of Financial Interpretation No. 47, which was issued by the Financial Accounting Standards Board in March 2005. FIN 47 clarifies that liabilities associated with asset retirement obligations whose timing or settlement method are conditional upon future events should be recognized at fair value as soon as fair value is reasonably estimable. As a practical matter FIN 47 has had effect primarily in the environmental area. It requires companies to evaluate future environmental cleanup, disposal, and restoration obligations, which in some cases could amount to billions of dollars. According to AED, FIN 47's complexity has caused considerable confusion among both auditors and issuers.

Under FIN 47, if a company identifies that one of its buildings, solid hazardous waste units, or underground storage units contains asbestos, it has a legal obligation and must measure the fair value of the liability, which may be able to be quantified by quoting prices in the active market for the transfer of an identical or similar liability. If a market for such liability cannot be identified, the company must determine probability by developing different scenarios of retirement and how the issuer will address the issue. AED President C. Gregory Rogers characterized FIN 47 as a "major challenge", as companies have never been required to evaluate legal obligations related to their asset base in this way before.
(*Securities Law 360*, 5/9/06)

<u>For more information, contact:</u>
Robert L. Kohl (212) 940-6380 at or email robert.kohl@kattenlaw.com,
Mark A. Conley at (310) 788-4690 or email mark.conley@kattenlaw.com,
David Pentlow at (212) 940-6412 or email david.pentlow@kattenlaw.com, or
Carolyn F. Loffredo at (310) 788-4585 or email carolyn.loffredo@kattenlaw.com

Banking

Federal Banking Agencies Request Comment on Revised Statement Concerning Complex Structured Finance Activities

On May 9, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision and the Securities and Exchange Commission (the Agencies) requested public comment on a revised proposed statement on the complex structured finance transactions (CSFTs) undertaken by financial institutions. Originally released on May 19, 2004, the new statement, which would be supervisory guidance for entities supervised by the federal banking agencies, "describes the types of internal controls and risk management procedures that should help financial institutions identify, manage and address the heightened legal and reputational risks that may arise from certain complex structured finance transactions."

According to the Agencies, the initial draft of 2004 set forth risk management procedures and internal controls that were designed to assist financial institutions in identifying and mitigating the legal and reputational risks associated with CSFTs. Based upon public feedback provided by more than 40 respondents, however, the Agencies decided to shorten and reorganize the document to be more "principle-based" and to focus on the elevated legal and reputational risks of CSFTs. Importantly, the revised document also clarifies that it is not intended to cover structured finance activities that are familiar to the participants. Because, however, the revisions are so substantial, the Agencies have again invited public comment on the document.
http://www.federalreserve.gov/boarddocs/press/bcreg/2006/20060509/attachment.pdf

FDIC Board Votes to Maintain Premium Rates for Banks and Thrifts for Now, But Future Increases may be Substantial

The Board of Directors of the Federal Deposit Insurance Corporation (FDIC) voted on May 9 to keep the assessment rates charged to insured banks and savings associations unchanged for the second half of 2006.

The FDIC merged the Bank Insurance Fund (BIF) and the Savings Association Insurance Fund (SAIF) to form the Deposit Insurance Fund (DIF) on March 31, in accordance with the recently passed Federal Deposit Insurance Reform Act of 2005. The legislation also made changes to the FDIC's assessment authorities, for which final rules are required no later than November 5, 2006. Before the new rules become effective, the existing regulations will continue to apply, except that there will be one set of assessment rates that will apply to all FDIC-insured institutions (DIF members).

The reserve ratio for the funds combined stood at 1.25 percent as of December 31, 2005. An early estimate indicates that the reserve ratio for the DIF fell to 1.23 percent as of March 31, 2006, due to very strong insured deposit growth. While the banking industry remains healthy and no insured institution has failed since June 2004, the FDIC staff expects strong insured deposit growth to reduce the reserve ratio to 1.20 percent by year-end without an increase in premium rates.

The Board decided to maintain the current rate schedule in light of impending changes to the assessment system. After November of this year, the FDIC believes it will be able to manage the reserve ratio within a range and will have the authority to charge all institutions a risk-based premium regardless of the level of the reserve ratio. Under this new system, all institutions would be charged a risk-based premium but, initially, most institutions will have assessment credits to help offset premiums.

According to FDIC staff, the premium increase next year may be substantial absent a significant slowing in insured deposit growth. Continued strong deposit growth will move the reserve ratio toward the lower end of the range and will require higher premium levels to achieve a desired reserve ratio within a time frame the Board determines to be appropriate.

"Given the transition to a new deposit insurance law later this year, it makes sense for the FDIC to maintain the current rate schedule today," said FDIC Acting Chairman Martin Gruenberg. "However, it seems prudent to expect that a substantial premium charge may have to be imposed in November. How large that premium charge will be will depend on the circumstances at that time - the level of the reserve ratio, the projections for insured deposit growth, and how quickly the Board wants to raise the level of the deposit insurance fund."

http://www.fdic.gov/deposit/insurance/risk/index.html

For more information, contact:
Jeff Werthan at (202) 625-3569 or e-mail jeff.werthan@kattenlaw.com, or
Christina J. Grigorian at (202) 625-3541 or e-mail christina.grigorian@kattenlaw.com

Broker Dealer

NASD and NYSE Issue Joint Guidance on Charitable Contributions

The NASD and New York Stock Exchange issued a joint Notice to Members (Notice) regarding the implementation of policies and procedures to address potential conflicts when employees or agents of a customer solicit substantial charitable contributions from a member. Potential conflicts may arise when the employee or agent of the customer engaging in the solicitation is in a fiduciary capacity (e.g., also an employee of a mutual fund or pension plan, or an investment manager) and solicits contributions from members with which they do or intend to do business. The new policies and procedures protect against improprieties that may arise when such employee or agent is soliciting on behalf of a charity with which he in an individual capacity or the customer is aligned. The NASD and NYSE suggest that members implement written policies and procedures designed to prohibit solicitations or situations that could cause the employee or agent to act in a manner that is inconsistent with the best interests of, or his fiduciary responsibility to, the customer. The Notice does not impose specific policies. It allows firms the flexibility to adopt their own or establish different standards based on their structure or manner of charitable giving. For example, member firms may implement procedures that require approval for charitable contributions that exceed a dollar threshold or certain intervals of frequency. Under no circumstances should the dollar thresholds implemented be based upon the amount of business or anticipated business done with the customer. The establishment of a dollar or frequency threshold is to distinguish customary and minor contributions from substantial contributions. The Notice cautions against circumvention by having a registered person make the contribution and be reimbursed by the member firm. The Notice does not address customary charitable giving initiated by member firms.
http://www.nasd.com/web/groups/rules_regs/documents/notice_to_members/nasdw_016517.pdf

Notice of Filing of Amendment to Proposed Rule Change under MSRB Rules

The Municipal Securities Rulemaking Board (MSRB) recently filed with the Securities and Exchange Commission Amendment No. 2 to an original proposed rule change filed in December 2005 providing guidance on the definition of ‘solicitation’ for purposes of MSRB Rules G-37 and G-38, limiting political contributions and prohibiting municipal securities business for excess contributions. Rules G-37 and G-38 govern the terms under which a municipal securities dealer and affiliated entities can make contributions to people who award municipal securities business. Amendment No. 2 would make clear that a non-affiliated professional could make a political contribution and solicit municipal securities business if (i) the professional is paid solely for the provision of bona-fide professional services to the dealer and (ii) the professional is not being paid, directly or indirectly, by the dealer for communicating with a municipal issuer to obtain or retain municipal securities business for the dealer.
http://www.sec.gov/rules/sro/msrb/2006/34-53747.pdf

For more information, contact:
James D. Van De Graaff at (312) 902-5227 or e-mail james.vandegraaff@kattenlaw.com,
Daren R. Domina at (212) 940-6517 or e-mail daren.domina@kattenlaw.com,
Michael T. Foley at (312) 902-5494 or e-mail michael.foley@kattenlaw.com,
Patricia L. Levy at (312) 902 5322 or e-mail patricia.levy@kattenlaw.com, or
Morris N. Simkin at (212) 940-8654 or e-mail morris.simkin@kattenlaw.com

Litigation

Principals Lack Standing to Pursue Direct Claims for Injury to LLC

Plaintiffs, former principals of a limited liability company, filed an action alleging, among other things, violations of federal antitrust laws and the Racketeer Influenced and Corrupt Organizations Act. In dismissing the complaint on the ground that plaintiffs could not establish direct injuries distinct from those suffered by the LLC itself, the Court drew an analogy to the fact that shareholders do "not have standing to redress an injury to a corporation". Even though plaintiffs may have "suffered personal economic loss as a result of Defendants' wrongdoing", that loss "derives from their membership in the LLC". Absent a "special relationship" with defendants, any such indirect loss would be insufficient to support plaintiffs' standing directly to pursue the claims at issue. (*Finley v. Takisaki*, 2006 WL 1169794 (W.D. Wa. Apr. 28, 2006))

Accountants' Inaction Does Not Support Section 10(b) Liability

Plaintiffs, assignees of a defunct broker dealer, alleged that its accountants violated Section 10(b) of the Securities Exchange Act by failing to disclose material errors in financial statements that the broker-dealer subsequently provided to potential investors. In dismissing the complaint on the ground that, at most, the claims at issue sought to impose liability on the accountants as aiders and abettors, the Court noted, among other things, that because the broker-dealer was a closely held corporation, its accountants did not have a duty to notify everyone that might rely on the financial statements in question: "Since every financial statement of a corporation has the potential to be relied on by an entire universe of unidentifiable individuals, for an unlimited period of time after that statement is issued, the outside auditor of a closely-held operation cannot be required, indefinitely, to notify this entire class of individuals whenever a financial statement, neither fraudulently nor recklessly prepared, is no longer accurate." (*Overton v. Todman & Co.*, 2006 WL 1153307 (S.D.N.Y. May 2, 2006))

For more information, contact:
Joel W. Sternman at (212) 940-7060 or e-mail j.sternman@kattenlaw.com, or
Joanna M. Bernard at (212) 940-6549 or e-mail joanna.bernard@kattenlaw.com

Katten

Katten Muchin Rosenman LLP

www.kattenlaw.com

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

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

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

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

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

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

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

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