Katten
Katten Muchin Rosenman LLP

Corporate and Financial Weekly Digest

MAY 15, 2009

SEC/CORPORATE

SEC to Act on Proxy Access

On February 12, the Securities and Exchange Commission announced that at its Open Meeting, to be held on May 20, it will consider whether to propose changes to the federal proxy rules "to facilitate director nominations by shareholders".

Access to registrants' proxy statements for the purpose of including shareholder nominees has been a contentious issue for many years. The SEC had proposed two sets of access rules, once in 2003 and again in 2007, when the SEC proposed a two-step proxy access process, whereby a shareholder would have been permitted to include for consideration in a registrant's proxy statement by-law changes to permit direct access to the registrant's proxy statement for the purpose of nominating directors, subject to preconditions, including minimum ownership thresholds and disclosure requirements. After strong opposition, the SEC twice effectively withdrew its proposals, and currently, pursuant to Rule 14a-8(i)(8) of the SEC's proxy rules, a registrant is permitted to omit from its proxy statement a shareholder proposal "if the proposal relates to a nomination or an election for membership on the company's board of directors... or a procedure for such nomination or election."

Next week's *Corporate and Financial Weekly Digest* will include a summary of the SEC's access proposal.

Read more.

For more information, contact:

Robert L. Kohl	212.940.6380	robert.kohl@kattenlaw.com
Mark A. Conley	310.788.4690	mark.conley@kattenlaw.com

LITIGATION

Fourth Circuit Reverses Dismissal of Section 10(b) Claim

The plaintiffs, on behalf of shareholders of a company which owned various mutual funds, alleged, among other things, that the mutual funds' investment advisor was responsible for certain misleading statements appearing in prospectuses for a number of the funds in violation of Section 10(b) of the Securities Exchange Act of 1934. The plaintiffs alleged that the defendant misrepresented that the funds' managers did not permit, and took active measures to prevent, market timing of the funds. The district court held that plaintiffs had failed sufficiently to plead certain elements of a Section 10(b) claim. The Fourth Circuit reversed, holding that plaintiffs adequately alleged the reliance element of a Section 10(b) claim which requires that plaintiffs allege they relied on the defendant's false or misleading statements in the purchase or sale of securities. The plaintiffs argued that they adequately alleged reliance pursuant to the "fraud-on-the market" doctrine, which presumes reliance when the statements at issue become public. The defendant argued that the plaintiffs failed to allege that they made any public misrepresentations because the plaintiffs did not allege that the defendant made the statements in the prospectuses and did not allege that the statements in the prospectuses were attributable to the defendant.

The Fourth Circuit found that, although statements in the individual fund prospectuses were not attributed, the "clear essence" of the plaintiffs' complaint was that the defendant helped draft the allegedly misleading prospectuses. The Fourth Circuit also found that the plaintiff adequately alleged facts from which a court could infer that interested investors would have known that the defendant was responsible for the statement at the time it was made, even if the statement on its face was not directly attributed to the defendant. (*In re Mutual Funds*

Investment Litigation, 2009 WL 1241574 (4th Cir. May 7, 2009))

Court Denies Motion to Dismiss Breach of Contract and Unjust Enrichment Claims

The plaintiff corporation sold seventeen containers of apparel to two defendant corporations: Trends Sportswear, Ltd. (Trends Sportswear) and Pretty Girl, Inc. (PG). Plaintiff brought a breach of contract claim against both defendants, alleging that the defendants did not pay for all of the shipments. The defendants argued that the breach of contract action should be dismissed as to PG because the four transactions at issue were between the plaintiff and Trends Sportswear. The court rejected this argument, ruling that because PG and Trends Sportswear were overlapping entities and the plaintiff had done business with defendants under both "trade monikers," it would be premature to dismiss the action against PG at the pleading stage.

The defendants moved to dismiss plaintiff's unjust enrichment claim because, they argued, an unjust enrichment claim cannot survive where there is a clear and valid contract. The court also denied this motion, holding that because there was a dispute about whether there was a valid contract between the parties, the unjust enrichment claim should proceed. (*Globatex Group, Ltd. v. Trends Sportswear, Ltd.*, 2009 WL 1270002 (E.D.N.Y. May 6, 2009))

For more information, contact:		
Bruce M. Sabados	212.940.6369	bruce.sabados@kattenlaw.com
Vikas Khanna	212.940.6427	vikas.khanna@kattenlaw.com

BROKER DEALER

NYSE Arca Proposes Order Execution Rule Amendments

NYSE Arca, Inc. (NYSE Arca) filed with the Securities and Exchange Commission a proposed rule change to amend Rule 6.76A to allow marketable orders to be exposed to market participants for a brief period of time before routing to an away market center for execution at the national best bid/offer (NBBO). Under the current rule, if an order that is marketable against the NBBO is received, it is matched against any possible contra side interest in the display order process and in the working order process. If the order is still unexecuted, or if only partially unexecuted, the order is then routed away to the market or markets at the NBBO.

The proposed rule change will provide for the NYSE Arca System to expose the order, at the NBBO price, to any Options Trading Permit Holders who wish to subscribe to such notices, for a brief period of time not to exceed one second (exposure period). During the exposure period, orders and quotes that are equal to the NBBO and on the opposite side of the market will be matched against the exposed order and immediately executed as they are received. Orders and quotes that are better than the NBBO and on the opposite side of the market will also be matched against the exposed order, and immediately executed as they are received at the exposed price. At the end of the exposure period, the System will again attempt to match the balance of the order, if any, against any available Tracking Orders. If the order is still unexecuted, or if only partially unexecuted, it will be routed to the market(s) at the NBBO for execution

Read more.

FINRA Proposes Rule Changes Regarding Public Offerings and Conflicts of Interest

In a May 1 filing with the Securities and Exchange Commission, the Financial Industry Regulatory Authority proposed rule changes to modernize and simplify National Association of Securities Dealers Rule 2720, which governs public offerings of securities in which a member with a conflict of interest participates. Some of the more significant proposed changes include exempting certain public offerings from the filing and qualified independent underwriter (QIU) requirements, amending the definition of "conflict of interest," modifying the disclosure requirements in regard to offering documents and amending the provisions regarding the use of QIUs. The rule change proposal also includes corresponding amendments to FINRA Rule 5110, "Corporate Financing Rule – Underwriting Terms and Arrangements." The May 1 filing amends a rule change proposal filed on September 6, 2007. The SEC is accepting comments through June 3 on these proposed rule changes.

Read more.

FINRA Proposes Amendments to Rule on Options

The Financial Industry Regulatory Authority has proposed to amend its options rule, FINRA Rule 2360. The proposed rule change would establish higher position limits for options on selected exchange-traded funds (ETFs) in order to ensure consistency with the position limits for those ETFs under the rules of the Chicago Board Options Exchange, the International Securities Exchange, NASDAQ OMX PHLX, NYSE Amex, NYSE Arca and the Boston Options Exchange. FINRA's proposed rule change would also clarify (i) the application of position limits to conventional options on ETFs, and (ii) the appropriate registration qualifications for accepting and reviewing the acceptance of options discretionary accounts (i.e., the Series 4 or Series 9/10 for accepting such accounts and the Series 4 for reviewing such acceptance). In the filing made with the Securities and Exchange Commission relative to the proposed rule change, FINRA requested that the proposed amendments take effect immediately.

Read more.

For more information, contact:

Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Gary N. Distell	212.940.6490	gary.distell@kattenlaw.com
Daren R. Domina	212.940.6517	daren.domina@kattenlaw.com
Patricia L. Levy	312.902.5322	patricia.levy@kattenlaw.com
Ross Pazzol	312.902.5554	ross.pazzol@kattenlaw.com
James Van De Graaff	312.902.5227	james.vandegraaff@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com

PRIVATE INVESTMENT FUNDS

SEC Chairman Calls for Authority Over Hedge Funds Beyond Registration

In an interview aired on Bloomberg Television's "Political Capital with Al Hunt," Securities and Exchange Commission Chairman Mary Schapiro stated that it is "probably not enough just to register hedge funds," and that the SEC needed the authority to "inspect [hedge funds], look at their books and records, understand how they are doing business, and perhaps prescribe some other requirements for how they operate." While not currently recommending restrictions on borrowing or investing or requiring disclosure of short positions, she left open the possibility of considering these types of regulations by utilizing SEC rule-making authority as "situations evolve." Chairman Schapiro's views coincide with her statement that the SEC is reorienting itself towards an "investor-protection set of initiatives."

To view a podcast of the Bloomberg Television interview, click here.

FBAR Filings Disclosing Foreign Accounts Due June 30; New Rules Broaden Scope of Those Who Must File and May Apply to Hedge Funds and U.S. Investment Managers

United States persons (the definition of which includes entities as well as individuals) who have a financial interest in or signature or other authority over foreign financial accounts must file a Department of Treasury Form TD F 90-22.1 Report of Foreign Bank and Financial Accounts (FBAR) for 2008 by June 30. The FBAR is an informational return and does not impose tax. However, the penalty for willful failure to file FBARs is the greater of $100,000 or 50% of the total balance of the foreign accounts each year. In addition, there may be criminal penalties. The FBAR was recently revised and now contains a number of new requirements.

Hedge funds with foreign bank, security or other financial accounts, and U.S. investment managers and their employees with signature or other authority over such accounts, may be subject to FBAR reporting requirements. FBAR reporting obligations also may apply to U.S. investors in offshore hedge funds and to U.S. investors with significant investments in domestic hedge funds that have offshore bank, security or other financial accounts. It is still unclear to what extent FBAR reporting requirements will apply to offshore hedge funds and investment managers. We are still assessing the FBAR reporting requirements pertaining to various financial services industry participants and expect that additional guidance will be forthcoming in the near future.

Click here for a Katten *Client Advisory* on FBAR filing requirements.

For more information on Katten's May 20 client seminar on FBAR filing requirements, **click here**.

For more information, contact:		
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Jack P. Governale	212.940.8525	jack.governale@kattenlaw.com
Marilyn Selby Okoshi	212.940.8512	marilyn.okoshi@kattenlaw.com
Fred M. Santo	212.940.8720	fred.santo@kattenlaw.com
Meryl E. Wiener	212.940.8542	meryl.wiener@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com
Robert Loewy	212.940.6303	robert.loewy@kattenlaw.com

OTC DERIVATIVES

U.S. Treasury Proposes Regulatory Framework for OTC Derivatives

On May 13, the U.S. Treasury Department, in a joint statement with the Commodity Futures Trading Commission and Securities and Exchange Commission, announced its intention to seek legislative changes that could significantly alter the regulatory framework for over-the-counter (OTC) derivatives transactions and markets in the United States. According to the Treasury, these changes are designed, among other things, to prevent activities in these markets from posing risk to the financial system and to promote the efficiency and transparency of these markets. The Treasury's proposal focuses on five areas: (i) mandatory clearing of standardized OTC derivatives; (ii) regulation of large derivatives market participants; (iii) implementing transparency initiatives for the OTC derivatives markets; (iv) prevention of market manipulation, fraud and other market abuses; and (v) reexamination of the sophistication criteria that are currently applicable in the OTC derivatives markets.

The Acting Chairman of the CFTC and the Chairman of the SEC have stated that they support the Treasury's proposals, and the adoption of any legislation that implements these proposals will require close coordination among the Treasury, the CFTC and the SEC.

Click here for a Katten Client Advisory on the topic.

For more information, contact:		
Kevin M. Foley	312.902.5372	kevin.foley@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 Rosenzweig	312.902.5381	kenneth.rosenzweig@kattenlaw.com

CFTC

CFTC Requests Comment on OTC Clearing Petition

On May 13, the Commodity Futures Trading Commission requested public comment on a petition by Eurex Clearing AG (ECAG), a licensed central counterparty in Germany, for a CFTC determination, pursuant to Section 409(b)(3) of the Federal Deposit Insurance Corporation Improvement Act of 1991, that the German Federal Financial Supervisory Authority satisfies appropriate standards in its supervision of ECAG. An affirmative determination by the CFTC would permit ECAG to act as a multilateral clearing organization for the clearing of over-the-counter derivative transactions. The deadline for comments is May 29.

Read more.

For more information, contact:		
Kenneth M. Rosenzweig	312.902.5381	kenneth.rosenzweig@kattenlaw.com
Fred M. Santo	212.940.8720	fred.santo@kattenlaw.com
Kevin M. Foley	312.902.5372	kevin.foley@kattenlaw.com
Lance A. Zinman	312.902.5212	lance.zinman@kattenlaw.com

BANKING

Geithner Signals Reopening of CPP TARP Application Process

Treasury Secretary Timothy Geithner announced that he is planning to reopen the Capital Purchase Plan (CPP) application process now that major repayments are expected from some of the larger U.S. banks.

Speaking before the Independent Community Bankers Association on May 13, Secretary Geithner stated that "[u]sing the proceeds of the repayments we expect to receive from some of the largest banks, we plan to reopen the application window for banks with total assets under $500 million under the Capital Purchase Program, and raise from 3% of risk-weighted assets to 5% the amount for which qualifying institutions can apply. This applies to all term sheets—public and private corporations, Subchapter S corporations, and mutual institutions. Current CPP participants will be allowed to reapply, and will have an expedited approval process. In addition, we will extend the deadline for small banks to form a holding company for the purposes of CPP. Both the window to form a holding company and the window to apply or reapply for CPP will be open for six months."

While capital-deficient banks and banks that are concerned about impending capital deficiencies will no doubt welcome the news, the larger question is whether banks that currently meet regulatory capital standards and that feel confident about their capital levels will participate, given the reporting and lending obligations, as well as executive compensation restrictions, that apply to institutions that receive government money. It is also fair to say that there is no small measure of antipathy to becoming a business partner with the government, especially in light of substantive provisions in the CPP transactional documents that allow the Treasury to change the nature of the transaction unilaterally in the event of subsequent legislation.

Read more.

FinCEN Proposes Amendments to Definition of "Money Services Businesses"

On May 12, the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Treasury Department, released a proposed regulation revising a portion of the Bank Secrecy Act (BSA) with respect to which entities are money services businesses (MSBs) for purposes of the BSA's definitions.

The proposal is intended to: (i) ensure that certain foreign-located MSBs with a presence in the United States are subject to the BSA rules; (ii) update the MSB definitions to reflect prior agency guidance and rulings, current business operations and evolving technologies; and (iii) modify the definition of "stored value" so that issuers of stored value and sellers or redeemers of stored value are in the same category. The proposal also notes that stored value products present a complex myriad of regulatory issues and that FinCEN will be releasing a proposal regarding such products at a later date.

According to the release, the "proposed changes are intended to more clearly delineate the scope of entities regulated as MSBs, so that determining which entities are obligated to comply will be more straightforward and predictable."

Comments are due on or before September 9.

Read more.

For more information, contact:

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

ANTITRUST

Department of Justice Announces More Aggressive Antimonopoly Enforcement Policy

On May 11, U.S. Assistant Attorney General for Antitrust Christine Varney announced that the Department of Justice Antitrust Division had retracted its September 2008 report regarding Section 2 of the Sherman Act (the Section 2 Report). Section 2 deals with conduct by dominant firms and prohibits them from monopolizing or attempting to monopolize markets in which they do business. Section 2 covers activities such as predatory pricing, refusals to deal, bundled pricing and other conduct that may exclude competitors from the market.

Ms. Varney's announcement signals a fundamental change in the Justice Department's approach to monopolization issues. Under the Bush administration, the Justice Department released the Section 2 Report in an attempt to clarify antitrust law applicable to single-firm conduct. The Report, however, triggered widespread criticism from those who argued that the Bush administration's policies were far too lenient on firms with substantial market power and effectively gave such firms a "free pass" in exercising monopoly power. The reaction to the Section 2 Report was so intense that three of the four Commissioners on the Federal Trade Commission took the extraordinary step of publicly refusing to endorse or adopt it.

The Bush administration had not filed a single case against a dominant firm for violating Section 2 of the Sherman Act. Assistant Attorney General Varney's speech signals a clean break with that policy. In her remarks, Ms. Varney said, "Withdrawing the [Section 2] report is a shift in philosophy and the clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers." Ms. Varney also emphasized that the Justice Department planned to align itself with the European Union's stricter enforcement policies concerning single-firm conduct. This new enforcement policy will almost certainly result in increased government investigation of firms with large market shares and will likely lead to a resumption of Section 2 litigation by the Justice Department. For clients with large market shares, or for smaller firms that must live with dominant rivals, this is a significant development.

Read more.

For more information, contact:

James J. Calder	212.940.6460	james.calder@kattenlaw.com
Laura Keidan Martin	312.902.5487	laura.martin@kattenlaw.com
David S. Stoner	212.940.6493	david.stoner@kattenlaw.com

UK DEVELOPMENTS

UK Treasury Consults on More Effective Arrangements for Dealing With Investment Bank Failures

On May 11, HM Treasury published a report entitled: "Developing effective resolution arrangements for investment banks" (the Report). The Report is the result of Treasury working with a specialist Advisory Panel of investment banking, insolvency, legal and other experts, as well as the UK Financial Services Authority and the Bank of England. It sets out the UK Government's initial thinking on various reforms which may need to be considered in developing effective resolution arrangements for investment banks. It responds directly to the issues that were highlighted by the failure of Lehman Brothers, including the treatment of client money and assets, and the treatment of clients' open or unreconciled trading positions. It also examines what can be done to make the process of insolvency itself more effective, and limit the damage that may be caused by an investment bank failure.

Chapter 2 of the Report outlines the trading, clearing and settlement issues being considered. Client money and client assets issues are addressed in chapter 3, and insolvency proposals are set out in chapter 4.

A key element of the Report is addressing misconceptions on how the US and UK insolvency regimes respectively have dealt with the Lehman Brothers failure. It states:

> There has been some market commentary to the effect that customer protections and insolvency arrangements in the US have been operating more effectively than the UK arrangements in the context of the failure of Lehman Brothers. The industry experts assembled through the Advisory Panel have been clear that this perception is misconceived.

The Government is committed to working with the Advisory Panel and other industry experts, to explain, and where appropriate dispel, any of the misconceptions around how the US and UK regimes have operated with regard to the Lehman Brothers failure.

The comment period lasts until July 10. The next stage will be more detailed consultation as appropriate, including more detailed Treasury consultation in the fall of 2009 outlining possible market, regulatory and legislative solutions.

Read more.

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

* 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.

©2009 Katten Muchin Rosenman LLP. All rights reserved.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

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

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

London affiliate: Katten Muchin Rosenman Cornish LLP.