



September 28, 2007

SEC/Corporate

### The SEC Announces XBRL Milestones

On September 20, the Chairman of the Securities and Exchange Commission, Christopher Cox, announced that the combined market capitalization of companies submitting interactive data financial reports to the SEC has surpassed \$2 trillion, consisting of more than 40 companies that participate in the SEC's voluntary interactive data file program.

Interactive data refers to financial information provided using XBRL (eXtensive Business Reporting Language) or any other computer software language that labels companies' financial data with codes from standard lists called "taxonomies" so that investors and analysts can more easily locate, and analyze and compare desired information in public companies' financial statements.

In a September 25 Release trumpeted by the SEC last week as a forthcoming "major milestone," the SEC announced that it has now completed all work on developing data tags for every element of the entire system of U.S. generally accepted accounting principles. However, the September 25 Release also noted that before a public review is initiated (expected in December of this year) the XBRL taxonomy for U.S. GAAP will be tested by third parties. Now that "the last major obstacle" has been removed, Chairman Cox is reported to have asked the Staff of the SEC to make recommendations next spring on whether the use of XBRL should be required for all public company financial disclosures.

<http://www.sec.gov/news/press/2007/2007-191.htm>

<http://www.reuters.com/articlePrint?articleID=USN2541009720070926>

<http://www.sec.gov/news/press/2007/2007-200.htm>

### New Web Program to Alert Investors to Unregistered Soliciting Entities

On September 26, the Securities and Exchange Commission announced a new Web-based initiative called the "Public Alert: Unregistered Soliciting Entities" or "PAUSE" program designed to provide retail investors with timely relevant information to help them avoid questionable investment solicitations.

Through its PAUSE program, the SEC will post on its website factual information about unregistered soliciting entities that have been the subject of complaints forwarded by investors and others, including foreign securities regulators.

### SEC/CORPORATE

*For more information, contact:*

Robert L. Kohl  
212.940.6380  
[robert.kohl@kattenlaw.com](mailto:robert.kohl@kattenlaw.com)

Mark A. Conley  
310.788.4690  
[mark.conley@kattenlaw.com](mailto:mark.conley@kattenlaw.com)

Perri L. Melnick  
310.788.4732  
[perri.melnick@kattenlaw.com](mailto:perri.melnick@kattenlaw.com)

Jarrold N. Weber  
212.940.6317  
[jarrod.weber@kattenlaw.com](mailto:jarrod.weber@kattenlaw.com)

Before posting information about the entities, SEC staff will have determined either: (i) that there is no U.S. registered securities firm with that name, or (ii) that there is a U.S. registered securities firm with the same (or a similar) name but the solicitations are coming from people not affiliated with the registered entity. A second PAUSE list will name fictitious governmental agencies and international organizations referred to by the entities that are subjects of complaints.

The SEC is seeking public comments on the PAUSE program and will be accepting comments for 30 days.

<http://www.sec.gov/rules/other/2007/34-56534.pdf>

## Banking

### **Advanced Notice of Proposed Rulemaking Regarding Dividends**

On September 26, the Federal Deposit Insurance Corporation issued an Advanced Notice of Proposed Rulemaking (ANPRM) requesting comments on alternative methods for allocating dividends from the Deposit Insurance Fund (DIF) when the DIF's reserve ratio at the end of a calendar year exceeds certain statutory thresholds. Such dividends are now required by the Federal Deposit Insurance Reform Act of 2005. The existing FDIC regulations on assessment dividends, established as a temporary rule in 2006, will expire on December 31, 2008.

The ANPRM sets forth two general approaches to allocating dividends: the fund balance method and the payments method. According to the FDIC in its commentary included in the ANPRM, "the allocation methods potentially differ most significantly in the way they balance two of the statutory factors that the FDIC must consider when allocating dividends – institutions' relative 1996 assessment bases and assessments paid after 1996 – and, thus, in the way each method treats older versus newer institutions." The FDIC believes that the "fund balance method implicitly balances the two factors" while the payments method "requires explicit decision making."

Pursuant to the ANPRM, the larger an institution's 1996 assessment base, the "older" it is. An institution that was chartered before 1996 and that has grown significantly since then would be deemed a "newer" institution as would an institution chartered after 1996 that had no 1996 assessment base.

Comments are due by November 19.

<http://www.fdic.gov/news/board/911case2reg.pdf>

### **Final Rules on Expanded Examination Cycle for Certain Institutions Issued**

On September 21, the federal bank and thrift agencies issued final rules expanding the range of small institutions eligible for an extended 18-month on-site examination cycle. The final rules allow well-capitalized and well-managed banks and savings associations with up to \$500 million in total assets and a composite CAMELS rating of 1 or 2 to qualify for an 18-month (rather than a 12-month) on-site examination cycle.

Until recently, only institutions with less than \$250 million in total assets could qualify for an extended 18-month on-site examination cycle. The final rules also make parallel changes to the agencies' regulations governing the on-site examination cycle for U.S. branches and agencies of foreign banks consistent

## **BANKING**

*For more information, contact:*

Jeff Werthan  
202.625.3569  
[jeff.werthan@kattenlaw.com](mailto:jeff.werthan@kattenlaw.com)

Christina J. Grigorian  
202.625.3541  
[christina.grigorian@kattenlaw.com](mailto:christina.grigorian@kattenlaw.com)

Adam Bolter  
202.625.3665  
[adam.bolter@kattenlaw.com](mailto:adam.bolter@kattenlaw.com)

with the International Banking Act of 1978.

The final rules, which are identical to the proposed interim rules the agencies issued for public comment in April, implement section 605 of the Financial Services Regulatory Relief Act of 2006 and related provisions from the International Banking Act, both of which are already effective.

The final rules are effective upon publication in the *Federal Register*, which is expected shortly.

<http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20070921a1.pdf>

## United Kingdom Developments

### FSA Shuts Down Boiler Room Scams

On September 25, the UK Financial Services Authority (FSA) announced that two UK-based firms have been placed into liquidation by the UK High Court following the FSA's intervention. The FSA believes that these scams may have fraudulently persuaded up to 800 people into buying worthless shares. Investors are believed to have lost up to £3.5 million (\$7.5 million).

Chesteroak Limited and Bingen Investments Limited were shut down following allegations that they were dealing in or arranging deals in shares without proper authorization.

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2007/101.shtml>

### New Provisions of the UK Companies Act 2006 Come into Force

From October 1, additional provisions of the UK Companies Act 2006 (the Act) will be implemented. These provisions include those relating to the exercise of shareholders' rights, company directors, derivative actions by shareholders, general meetings and resolutions and the appointment and retirement of directors by rotation.

New model Articles of Association which are set out in the Act for companies (and which will apply in default of a company drafting its own Articles of Association) (called Table A Articles) are effective from October 1 principally to remove or modify existing provisions under the UK Companies Act 1985 that conflict with new sections that are coming into force. The approach taken in amending Table A has been to amend only those provisions which are necessary to avoid actual conflict between Table A and the Act. Where the Act permits a company to modify the effect of a statutory provision in its Articles, Table A has not been amended.

The UK Department for Business Enterprise and Regulatory Reform has published a copy of the revised Articles of Association marked to show changes from the previous standard form Articles of Association.

<http://www.berr.gov.uk/files/file41251.doc>

## EU Developments

### New EU Directive on M&A in the Financial Services Sector Published

On September 21, the European Commission published in its Official Journal the text of a directive on procedural rules and evaluation criteria for the prudential assessment of acquisitions and the increase of holdings in the financial sector. The directive seeks to improve the current EU legal

## UK DEVELOPMENTS

*For more information, contact:*

Martin Cornish  
44.20.7776.7622  
[martin.cornish@kattenlaw.co.uk](mailto:martin.cornish@kattenlaw.co.uk)

Sam Tyfield  
44.20.7776.7640  
[sam.tyfield@kattenlaw.co.uk](mailto:sam.tyfield@kattenlaw.co.uk)

Edward Black  
44.20.7776.7624  
[edward.black@kattenlaw.co.uk](mailto:edward.black@kattenlaw.co.uk)

Sean Donovan-Smith  
44.20.7776.7625  
[sean.donovan-smith@kattenlaw.co.uk](mailto:sean.donovan-smith@kattenlaw.co.uk)

## EU DEVELOPMENTS

*For more information, contact:*

Martin Cornish  
44.20.7776.7622  
[martin.cornish@kattenlaw.co.uk](mailto:martin.cornish@kattenlaw.co.uk)

Sam Tyfield  
44.20.7776.7640  
[sam.tyfield@kattenlaw.co.uk](mailto:sam.tyfield@kattenlaw.co.uk)

framework of the supervisory approval process for mergers and acquisitions in the financial services sectors.

[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l\\_247/l\\_24720070921en00010016.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_247/l_24720070921en00010016.pdf)

## Litigation

### **Impairment of Corporation's Capital Determined When Redemption Is Requested**

Plaintiffs, preferred stockholders, brought a breach of contract action against the issuer Company for failing to redeem their stock as required by the parties' stock purchase agreement. The stock purchase agreement contained a mandatory redemption provision permitting the stockholders to require the defendant company to redeem their shares if it failed to consummate an initial public offering within a specified period. Although no IPO was consummated, defendant refused plaintiffs' request to redeem the shares on the ground that doing so would "impair" its capital in violation of Delaware law.

Under Delaware law, a corporation's capital is impaired when funds necessary for redemption exceed the corporation's "surplus," that is, "[t]he excess, if any, at any given time, of the net assets of the corporation over the amount so determined to be capital." Plaintiffs argued that an amendment to the governing statute applied, under which impairment is measured when the instrument is issued. The U.S. District Court for the Southern District of New York rejected plaintiffs' argument because the amendment, by its terms, only applied to notes, debentures and other obligations, not stock purchase agreements. As a result, the Court granted defendant's cross-motion for summary judgment, holding that under the plain language of the statute, impairment is to be measured at the time redemption is requested. (*Azar v. 1-800 Doctors, Inc.*, No. 05 CV 8370 (KMW), 2007 WL 2702201 (S.D.N.Y. Sept. 17, 2007))

### **Complaint Dismissed for Failure to Plead Securities Fraud with Particularity**

A Texas district court dismissed a securities fraud class action for failure to meet the pleading requirements of the Private Securities Litigation Reform Act. Defendants developed a drug that had been approved for marketing abroad. The drug had not yet been approved by the Food and Drug Administration, although it had issued two letters stating the drug was "approvable." Plaintiffs alleged that the company made false and misleading statements that caused the price of its stock to be artificially inflated, and identified statements made by defendants in press releases, corporate reports and conference calls with analysts relating to clinical studies and comparisons with a competing drug.

Plaintiffs did not allege that defendants falsified or misstated the status and results of the clinical trial, but rather alleged the statements were false because the supporting trials were "inadequate." The Court determined that absent a particularized allegation that the company knew its trials were fraudulent, plaintiffs failed to allege a false statement. The Court further determined that the company's statements that it had a "good shot" at receiving priority review from the FDA were statements concerning the company's "hopes and expectations" accompanied by appropriate cautionary language and thus were protected by the PSLRA's "safe harbor" provision which protects such forward-looking statements. (*Oppenheim Pramerica Asset Mgmt. S.A.R.L. v. Encysive Pharms., Inc.*, No. Civ.A.H.-06-3022, 2007 WL 2720074 (S.D.Tex. Sept. 18, 2007))

Edward Black  
44.20.7776.7624  
[edward.black@kattenlaw.co.uk](mailto:edward.black@kattenlaw.co.uk)

Sean Donovan-Smith  
44.20.7776.7625  
[sean.donovan-smith@kattenlaw.co.uk](mailto:sean.donovan-smith@kattenlaw.co.uk)

#### LITIGATION

*For more information, contact:*

Steve Shiffman  
212.940.6785  
[steven.shiffman@kattenlaw.com](mailto:steven.shiffman@kattenlaw.com)

Bonnie Lynn Chmil  
212.940.6415  
[bonnie.chmil@kattenlaw.com](mailto:bonnie.chmil@kattenlaw.com)

## Senators Urge CFTC and FERC to Cooperate in Energy Cases

In a letter sent to the Acting Chairman of the Commodity Futures Trading Commission, Senators Dianne Feinstein (D-Calif.), Ron Wyden (D-Ore.) and Maria Cantwell (D-Wash.) encouraged the CFTC and the Federal Energy Regulatory Commission (FERC) to cooperate when pursuing cases involving alleged misconduct in the energy markets. Legislation sponsored by the three Senators and enacted in 2005 conferred anti-manipulation enforcement authority in the natural gas and electricity markets on FERC, and enforcement actions brought by the two agencies in connection with the collapse of Amaranth Advisors have engendered jurisdictional disputes. The Senators urged the agencies “to fight market manipulators, not each other.”

[http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord\\_id=286b68eb-ad9f-84c8-dfbc-29305f8b8eac&Region\\_id=&Issue\\_id=](http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=286b68eb-ad9f-84c8-dfbc-29305f8b8eac&Region_id=&Issue_id=)

## CFTC Staff Issues CPO Registration Relief

The Commodity Futures Trading Commission’s Division of Clearing and Intermediary Oversight (DCIO) issued two substantively identical no-action letters, allowing the investment manager of a commodity pool to serve as the registered commodity pool operator (CPO) in lieu of the pool’s general partner. DCIO conditioned relief on the following facts: (i) the manager was registered as a CPO; (ii) the manager and the general partner were affiliates under common ownership and control; (iii) the general partner represented that it would not solicit investors, manage any property of the pool or undertake any other activities subject to CFTC regulation; and (iv) the manager and the general partner each acknowledged joint and several liability for the other’s commodities laws violations.

<http://www.cftc.gov/stellent/groups/public/@documents07/documents/letter/07-18.pdf>

<http://www.cftc.gov/stellent/groups/public/@documents07/documents/letter/07-19.pdf>

*For more information, contact:*

Kenneth Rosenzweig  
312.902.5381  
[kenneth.rosenzweig@kattenlaw.com](mailto:kenneth.rosenzweig@kattenlaw.com)

William Natbony  
212.940.8930  
[william.natbony@kattenlaw.com](mailto:william.natbony@kattenlaw.com)

Fred M. Santo  
212.940.8720  
[fred.santo@kattenlaw.com](mailto:fred.santo@kattenlaw.com)

Kevin Foley  
312.902.5372  
[kevin.foley@kattenlaw.com](mailto:kevin.foley@kattenlaw.com)

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.

©2007 Katten Muchin Rosenman LLP. All rights reserved.

# Katten

**KattenMuchinRosenman LLP**

[www.kattenlaw.com](http://www.kattenlaw.com)

## **Charlotte**

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

## **Los Angeles**

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

## **Chicago**

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

## **New York**

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

## **Irving**

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

## **Palo Alto**

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

## **London**

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

## **Washington, DC**

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

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

ATTORNEY ADVERTISING DISCLOSURE: Prior results do not guarantee a similar outcome. Some visual images used herein include actors. We are not providing you with information about our Firm because we have targeted you as needing our services for a particular matter, and we are not soliciting you for any particular matter or assignment. We are providing this information to make you aware of the type and quality of legal services we provide. The material contained herein is not to be construed as legal advice or opinion. For additional information, contact Tasneem K. Goodman, Director of Marketing, at 312.902.5440.

