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SEC/CORPORATE

JOBS Act: SEC Proposes Rules Regarding Solicitation and Advertising in Securities Offerings

Please see the below entry under **BROKER DEALER**. The proposed rules will be discussed further in an upcoming Katten *Client Advisory*.

SEC Increases Listing Fees for Fiscal Year 2013

On August 31, the Securities and Exchange Commission announced that effective October 1, the fees that public companies and other issuers pay to register their securities with the SEC will increase from $114.60 per million dollars to $136.40 per million dollars. This fee rate is applicable to the registration of securities under Section 6(b) of the Securities Act of 1933, the repurchase of securities under Section 13(e) of the Securities Exchange Act of 1934, and proxy solicitations and statements in corporate control transactions under Section 14(g) of the Exchange Act.

Click here for the SEC's fee rate advisory.
Click here for the SEC's order setting the registration fees.

BROKER DEALER

JOBS Act: SEC Proposes Rules Regarding Solicitation and Advertising in Securities Offerings

The Jumpstart our Business Startups Act (JOBS Act) directed the Securities and Exchange Commission to (1) remove the prohibition under Rule 502(c) of Regulation D against general solicitation and general advertising in connection with offers and sales of securities made pursuant to Rule 506 (which provides an exemption from registration under the Securities Act of 1933 for private offerings) and (2) revise Rule 144A(d)(1) under the Securities Act to provide that securities sold pursuant to Rule 144A may be offered and advertised (but not sold) to persons other than qualified institutional buyers (QIBs). On August 29, the SEC issued a release that proposed amendments to Rules 506 and 144A (Proposing Release).

The proposed amendment to Rule 506 provides that the prohibition against general solicitation and general advertising contained in Rule 502(c) does not apply to offers and sales of securities made pursuant to Rule 506, provided that all purchasers of the securities are "accredited investors". In this regard, the proposed amendment requires the issuer to take reasonable steps to verify that purchasers of the securities are accredited investors. The proposed amendment does not specify the methods that the issuer must use to verify that purchasers are accredited investors; instead the Proposing Release indicates that the determination of whether the steps are reasonable would be an objective determination based on the particular facts and circumstances of each transaction. Additionally, the Proposing Release affirms the retention of existing Rule 506 provisions so that companies conducting Rule 506 offerings without the use of general solicitation and general advertising would not be subject to the new verification requirement.

With respect to Rule 144A(d)(1), the proposed amendment provides that securities may be offered and advertised to persons other than QIBs provided that the securities are sold only to persons that the seller and any person acting on behalf of the seller "reasonably believe" are QIBs.

Furthermore, the Proposing Release indicates that Form D will be revised to include a check box for issuers to indicate whether they are using general solicitation or general advertising in connection with a Rule 506 offering.

The SEC is seeking public comment on the proposed rules, and the comment period ends on October 5.

Click here for fact sheet regarding proposed rules. Click here for Proposing Release.

The proposed rules will be discussed further in an upcoming Katten *Client Advisory*.

SEC Issues Risk Alert on MSRB "Pay-To-Play" Prohibitions

On August 31, the Securities and Exchange Commission issued an alert (Risk Alert) to inform firms engaged in municipal securities business about areas of concern identified in compliance examinations with respect to Municipal Securities Rulemaking Board (MSRB) "Pay-to-Play" prohibitions. The areas of concern identified by examination staff included the following:

- Compliance with MSRB Rule G-37's ban on doing business with a municipal issuer within two years of a political contribution to officials of the issuer by any of the firm's municipal finance professionals.
- Possible MSRB Rule G-8 recordkeeping violations.
- Failure to file accurate and complete Form G-37 with regulators regarding political contributions.
- Inadequate supervision.

In addition to identifying these areas of concern, the Risk Alert describes observations by examination staff regarding supervisory practices and controls for compliance with MSRB rules that some firms have elected to adopt. These include training programs for municipal finance professionals, self-certification of compliance with firm requirements regarding political contributions, surveillance of employee political contributions and preclearance or restrictions on political contributions. The Risk Alert emphasizes that the practices listed may not be applicable to a particular firm's business, and other approaches to compliance policies and procedures may be appropriate.

Click here to see Risk Alert.

DERIVATIVES

Withholding on Derivatives Is Postponed

The Internal Revenue Service has postponed for one year the effective date for withholding on so-called "dividend equivalent payments" made on notional principal contracts. As a result, for most notional principal contracts, withholding will not be required prior to January 1, 2014. The postponement is intended to allow investment banks and other financial institutions sufficient time to develop the systems needed to implement the withholding rules.

For more information, click here.

CFTC

NFA Registration Requirements for Swap FCMs, IBs, CPOs and CTAs

On August 22, the National Futures Association (NFA) proposed amendments to its bylaws and registration rules that will require any NFA member that is registered with the Commodity Futures Trading Commission as a futures commission merchant (FCM), introducing broker (IB), commodity pool operator (CPO) or commodity trading

advisor (CTA) and that engages in swap activities that are subject to the jurisdiction of the CFTC to be approved as a "swaps firm" by NFA.

In addition, any individual that engages in swap activities on behalf of a swap FCM, IB, CPO or CTA must be approved as a swaps associated person. An NFA member will not be approved as a swaps firm unless it has a least one principal registered as a swaps associated person at all times, and NFA will deem a member firm that fails to do so to have requested the withdrawal of the swaps firm's approval.

The proposed rule provides an exemption from the proficiency (Series 3) examination requirements for associated persons whose activities are limited solely to swaps.

The proposed rule is available here.

Additional information regarding NFA registration is available here.

NFA Establishes Pre-Filing Option for Current 4.13(a)(4) Pools

On September 6, the National Futures Association (NFA) notified its members that it will modify its electronic exemption system to establish a pre-filing option for pools that wish to claim relief under Commodity Futures Trading Commission Regulations 4.7 or 4.12 or CFTC Advisory 18-96 after the Regulation 4.13(a)(4) exemption is revoked. In February 2012, the CFTC rescinded an exemption from CPO registration for the operators of certain qualifying pools under CFTC Regulation 4.13(a)(4), effective December 31, 2012. Unless operators of these pools qualify for an exemption under CFTC Regulation 4.13(a)(3), they must register as a CPO. A CPO that does not qualify for the 4.13(a)(3) exemption may be able to obtain relief from certain regulatory requirements pursuant to CFTC Regulation 4.7, 4.12 or CFTC Advisory 18-96. NFA is modifying its electronic exemption system to allow affected persons to pre-file for the applicable exemption with an effective date of January 1, 2013.

The notice to members is available here.

CFTC Approves Conforming Amendments for CPO and CTA Regulations

On September 5, the Commodity Futures Trading Commission published final conforming amendments to Part 4 of its regulations, which govern the operations and activities of CPOs and CTAs. These amendments reflect changes made to the Commodity Exchange Act (CEA) by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). The Dodd-Frank Act broadened the CPO and CTA definitions to include swap-related activity. The final amendments require CPOs and CTAs that are subject to the requirements of Part 4 of the CFTC's regulations to include information on swap intermediaries and activities under the disclosure, reporting and recordkeeping requirements of Part 4.

The conforming amendments will become effective on November 5, 2012.

The final rule is available here.

CFTC Issues Final Rules Related to Swap Trading Relationship Documentation, Swap Confirmations, and Swap Portfolio Reconciliation and Compression

On August 27, the Commodity Futures Trading Commission published final rules related to swap trading documentation for swap dealers (SDs) and major swap participants (MSPs). The final rules set forth standards for the timely and accurate confirmation of swaps, require the reconciliation and compression of swap portfolios, and set forth requirements for documenting the swap trading relationship between and among SDs, MSPs and their counterparties.

The final rules related to swap trading relationship documentation require each SD and MSP to establish policies and procedures reasonably designed to ensure that the parties have agreed in writing to all terms governing their trading relationship. These requirements do not apply to swaps that: (1) were executed prior to the compliance date of the final rules; (2) are executed on a designated contract market (DCM) or executed anonymously on a swap execution facility (SEF), provided that certain conditions are met; or (3) are cleared by a derivatives clearing organization (DCO).

The final confirmation rules require each SD and MSP to send an acknowledgment of the transaction as soon as technologically practicable, but no later than the time periods set forth in the rules. Each SD or MSP must establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction within the prescribed time frame. The swap confirmation rules do not apply to swap transactions: (1) executed on a SEF or DCM, provided that certain conditions are met; or (2) submitted for clearing by a DCO, provided that the transaction is submitted for clearing as soon as technologically practicable, but no later than the times set forth in the rules, and all terms are confirmed at the same time as the transaction is accepted for clearing.

The final rules also require SDs and MSPs to adhere to certain portfolio reconciliation and compression requirements and related recordkeeping obligations for swap transactions. The portfolio reconciliation and compression requirements do not apply to swaps cleared by a DCO.

The final rules are available here.

LITIGATION

District Court Grants SEC's Motion Seeking Final Judgment for Disgorgement Against Ponzi Scheme Defendants

The U.S. District Court for the District of Colorado granted the Securities and Exchange Commission's motion for entry of final judgment against two defendants that had perpetrated a Ponzi scheme, ordering disgorgement and assessing civil monetary penalties equal to the difference between the amounts received from and distributed to investors. For the purposes of reaching a final judgment, the defendants admitted the facts as alleged by the SEC that they ran a Ponzi scheme that raised over $54 million and defrauded hundreds of investors; however, defendants disputed the disgorgement and penalty amounts sought by the SEC. Noting that the primary purpose of disgorgement is deterrence, the District Court found that the SEC's requested amount of disgorgement, the difference between the amounts received from and distributed to investors (approximately $37 million), was proper. In reaching its conclusion, the District Court rejected defendants' arguments that disgorgement should be limited to the amount defendants' "actually received" in their bank accounts on the ground that all contributions to the corporation controlled by defendants "benefitted" them. The District Court did, however, order the amount of disgorgement to be reduced by any amount returned to the corporation's investors by its receiver.

SEC v. Mantria Corp. et al., Civil Action No. 09-cv-02676-CMA-MJW (D. Co. Aug. 30, 2012).

Ninth Circuit Find Defendant in Violation of FTC Consent Decree and Affirms District Court's Contempt Order

The U.S. Court of Appeals for the Ninth Circuit affirmed a district court's finding that defendant had violated a consent decree entered into with the Federal Trade Commission in which defendant had agreed to clearly and conspicuously disclose costs, fees or charges to be incurred in connection with prepaid debit cards. The consent decree resolved an FTC case against EDebitPay LLC that alleged that EDebitPay's online marketing of prepaid debit cards and short-term loans violated Section 5 of the Federal Trade Commission Act. Two years after the district court ordered the consent decree, EDebitPay marketed a "no cost" prepaid debit card that, among other things, involved a $9.95 monthly charge. EDebitPay's website alternately buried the disclosure of the monthly charge in its 4,720-word "Terms & Conditions" document and failed to disclose the monthly charge entirely. The Ninth Circuit found that the district court did not abuse its discretion in interpreting the consent decree to encompass all EDebitPay products, and further agreed that the way in which EDebitPay marketed the "no cost" prepaid debit card did, in fact, violate the consent decree. Relying on a district court's "broad equitable power to order appropriate relief in civil contempt proceedings," the Ninth Circuit affirmed the district court's order that EDebitPay pay the FTC the full amount lost by consumers and not just disgorge its profits.

FTC v. EDebitPay, LLC et al., No. 11-55431, 2012 WL 3667396 (9th Cir. Aug. 28, 2012).

BANKING

Agencies Issue Proposed Rule on Appraisals for Higher-Risk Mortgages

On August 15, six federal financial regulatory agencies issued a proposed rule to establish new appraisal requirements for "higher-risk mortgage loans." The proposed rule would implement amendments to the Truth in Lending Act enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act). Under the Dodd-Frank Act, mortgage loans are higher-risk if they are secured by a consumer's home and have interest rates above a certain threshold. For higher-risk mortgage loans, the proposed rule would require creditors to use a licensed or certified appraiser who prepares a written report based on a physical inspection of the interior of the property. The proposed rule also would require creditors to disclose to applicants information about the purpose of the appraisal and provide consumers with a free copy of any appraisal report.

Creditors would have to obtain an additional appraisal at no cost to the consumer for a home-purchase higher-risk mortgage loan if the seller acquired the property for a lower price during the past six months. This requirement would address fraudulent property flipping by seeking to ensure that the value of the property being used as collateral for the loan legitimately increased.

The proposed rule is being issued by the Board of Governors of the Federal Reserve System, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the National Credit Union Administration, and the Office of the Comptroller of the Currency.

The agencies are seeking comments from the public on all aspects of the proposal. The public will have 60 days, or until October 15, to review and comment on the substance of the proposal.

For more information, click here.

Consumer Financial Protection Bureau Proposes Rues to Bring 'Greater Accountability' to Mortgage Market

On August 17, the Consumer Financial Protection Bureau (CFPB) proposed rules that would bring "greater accountability to the mortgage loan origination market." These rules "would make it easier for consumers to understand mortgage costs and compare loans so they can choose the best deal."

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) places certain restrictions on the points and fees offered with most mortgages and the qualification and compensation of loan originators. Most notably, without this rulemaking, the Dodd-Frank Act would prohibit payment of upfront points and fees for most mortgages even where a consumer prefers a loan with a lower interest rate and some upfront costs. The CFPB is seeking public comment on a proposal that would:

- Require Lenders to Make a No-Point, No-Fee Loan Option Available: Under the proposed rule, creditors would have to make available to consumers a loan without discount points or origination points or fees, unless the consumers are unlikely to qualify for such a loan. These options would enable a consumer buying or refinancing a home to better compare competing offers from different creditors, better able to compare loan offers from a particular creditor, and decide whether they would receive an adequate reduction in monthly loan payments in exchange for the choice of making upfront payments.

- Require an Interest-Rate Reduction When Consumers Elect to Pay Upfront Points or Fees: Consumers can pay points, which are expressed as a percentage of the loan amount, and fees to covers costs associated with origination or prepaid interest charges. While these points and fees come in many different names and combinations, they all should function similarly to reduce the interest rate and thus a consumer’s monthly loan payments. The CFPB is seeking comment on proposals to require that any upfront payment, whether it is a point or a fee, must be “bona fide,” which means that consumers must receive at least a certain minimum reduction of the interest rate in return for paying the point or fee.

In addition to regulating upfront points and fees, the CFPB is proposing changes to existing rules governing mortgage loan originators’ qualifications and compensation. Mortgage loan originators, who take mortgage loan applications from consumers seeking to buy a home or refinance a mortgage, include mortgage brokers and loan officers. The rules the CFPB is proposing would:

- Set Qualification and Screening Standards: Under state law and the federal Secure and Fair Enforcement for Mortgage Licensing Act, loan originators currently have to meet different sets of standards, depending on whether they work for a bank, thrift, mortgage brokerage, or nonprofit organization. The CFPB is proposing rules to implement Dodd-Frank Act requirements that all loan originators be qualified. The proposal would help level the playing field for different types of loan originators so consumers could be confident that originators are ethical and knowledgeable. The proposed rule includes:
    - *Character and Fitness Requirements:* All loan originators would be subject to the same standards for character, fitness, and financial responsibility;
    - *Criminal Background Checks:* Loan originators would be screened for felony convictions; and
    - *Training Requirements:* Loan originators would be required to undertake training to ensure they have the knowledge necessary for the types of loans they originate.
- Prohibit Payment of Steering Incentives to Mortgage Loan Originators: In 2010, the Federal Reserve Board issued a rule that was designed to curtail the practice of loan originators directing consumers into higher priced loans based not on the consumer's interest, but on the possibility that the loan originator could earn more money. The Dodd-Frank Act included a similar provision banning the practice of varying loan originator compensation based on interest rates or other loan terms. The CFPB's rule would implement the Dodd-Frank Act provision and clarify certain issues in the existing rule that have created industry confusion.
- Place Restrictions on Arbitration Clauses and Financing of Credit Insurance: The proposal implements Dodd-Frank Act provisions that, for both mortgage and home equity loans, prohibit including mandatory arbitration clauses in loan documents and increasing loan amounts to cover credit insurance premiums.

The public will have until October 16, to review and provide comments on the proposed rules. The CFPB will review and analyze the comments before issuing final rules in January 2013.

For more information, click here and here.

Consumer Financial Protection Bureau Releases Exam Procedures for Consumer Reporting Market

On September 5, the Consumer Financial Protection Bureau (CFPB) released the procedures it will use in examining credit bureaus and other consumer reporting companies. These procedures "are a field guide for CFPB examiners looking to check that these companies are following the law." The CFPB's authority to supervise consumer reporting companies takes effect September 30, 2012.

A consumer report may contain such information as a consumer's credit history and other transaction details. Lenders use credit reports to evaluate a borrower who is applying for credit cards, mortgages, automobile loans, and other types of credit. Consumer reports also serve other purposes, such as determining eligibility and pricing for other types of products and services and informing decisions about other relationships. For example, consumer reports may be used to set premiums for auto and homeowners insurance or to make employment decisions.

The Dodd-Frank Wall Street Reform and Consumer Protection Act gave the CFPB authority to supervise "larger participants" in the consumer financial markets as defined by rule. In July 2012, the CFPB identified a market for consumer reporting and defined larger participants to include companies in that market that have more than $7 million in annual receipts. The CFPB's supervisory authority will cover an estimated 30 companies that account for about 94 percent of the market's annual receipts.

Examiners "will be looking to verify that consumer reporting companies are complying with requirements of federal consumer financial law," including:

- Using and Providing Accurate Information: Examiners will assess whether companies have reasonable procedures in place to ensure accuracy of the information about consumers that appears in their reports. This will include looking at how companies screen information that they receive for accuracy and how

companies match incoming information to a particular consumer's file to make sure it appears on the right consumer's report.

- Handling Consumer Disputes: Examiners will determine if reporting companies conduct reasonable investigations when consumers dispute the accuracy or completeness of their files. Examiners will also evaluate the systems, procedures, and policies used by the company for tracking, handling, investigating, and resolving consumer inquiries, disputes, and complaints.

- Making Disclosures Available: Examiners will determine whether reporting companies disclose to consumers their file information and credit scores when required to do so, and whether they have trained personnel to explain the information in their disclosures to consumers.

- Preventing Fraud and Identity Theft: Examiners will look to see whether these companies are fulfilling the requirements to address identity theft and to protect active duty military consumers, through such means as fraud and active duty alerts, and blocking of reporting of information that stems from identity theft.

The procedures released "are an extension of the CFPB's general Supervisory and Examination Manual and provide guidance on how the CFPB will be conducting its monitoring in the consumer reporting market. The examination process will be an ongoing process of pre-examination scoping and review of information, data analysis, onsite examinations, and regular communication with supervised entities, as well as follow-up monitoring. When necessary, examiners will coordinate and work closely with the CFPB's enforcement staff, who may take appropriate enforcement actions to address harm to consumers."

Examiners will "evaluate the quality of the regulated entity's compliance management systems, review practices to ensure they comply with federal consumer financial law, and identify risks to consumers throughout the consumer reporting process. The CFPB has issued similar procedures for other companies under its supervision, such as mortgage originators, mortgage servicers, and payday lenders."

For more information, click here.

OCC Rescinds Documents

On August 24, the Office of the Comptroller of the Currency (OCC), regulator of national banks and federal savings associations, announced that it is rescinding documents as part of its ongoing effort to develop an integrated supervisory policy platform for its regulatees.

The rescinded documents and the documents that supersede them, if any, are listed in the OCC bulletin. The reason each document is rescinded is noted as one of the following:

- Outdated – The document is no longer needed. Any attachments to the document are rescinded only as they relate to national banks and federal savings associations.

- Replaced – The document and any attachments are superseded by subsequent guidance.

- Incorporated – The document conveyed interagency guidance that was incorporated into a *Comptroller's Handbook* booklet.

- Transmittal – The document is a cover letter that merely conveyed another document. The rescission does not change the applicability of the conveyed document. To determine the applicability of the conveyed document, please refer to the original issuer of the document.

The list of rescinded documents may be accessed here.

UK DEVELOPMENTS

FSA Consults on Client Assets Regime Changes

On September 6, the UK Financial Services Authority (FSA) issued CP12/22, a combined Consultation Paper

(CP) and Discussion Paper (DP) addressing changes to the client money and custody assets (collectively "client assets") regime for firms undertaking regulated investment business.

The paper, entitled *Client Assets Regime: EMIR, Multiple Pools and the Wider Review* is divided into three parts. Part I addresses changes required by the European Markets Infrastructure Regulation (EMIR). In Parts II and III, the FSA proposes potentially far-reaching changes to its client assets regime. Part II considers proposals which would enable the introduction of multiple client money pools which the FSA characterised as "the most radical change that has been made to the client money regime in over 20 years." This proposal would allow firms, subject to clients' consent, to operate client money sub-pools which would be legally and operationally separate for (for example) different lines of business or different client types.

Part III is a Discussion Paper that provides an overview of the fundamental review of the client assets regime that the FSA has started and seeks comment on some wider issues raised with the aim of producing better results in the event of the insolvency of an investment firm. It is intended that the review will build on lessons learned from recent broker insolvencies, such as Lehman Brothers International and MF Global. The objectives of the review are:

- Improving the speed of return of client assets following the insolvency of an investment firm;
- Reducing the market impact of an insolvency of an investment firm that holds client assets; and
- Achieving a greater return of client assets to clients following an insolvency of an investment firm.

Responses to Part I are requested by October 16. Responses to Parts II and III are requested by November 30.

For more information, click here.

EU DEVELOPMENTS

European Commission Consultation on Benchmarks and Market Indices

On September 5, the European Commission published a *Consultation Document on the Regulation of Indices* in which it sought views on a possible new regulatory framework to be applicable to the production and use of indices serving as benchmarks in financial and other contracts.

The Commission has already amended its proposals for the Market Abuse Regulation (COM(2012) 2011/0295 (COD)) and for the Criminal Sanctions for Insider Dealing and Market Manipulation Directive (COM(2012) 2011/0297 (COD)) to remove any doubt that manipulation of benchmarks is "clearly and unequivocally illegal" and subject to sanctions. The aim of this consultation is to focus ways in which the production and governance of benchmarks could be improved by identifying the key issues and shortcomings and assessing what legal framework changes may be needed to enhance the future integrity of benchmarks.

The Commission is requesting comment on the following issues:

- General information on indices and benchmarks, including who produces them and the purposes for which they are used.
- Governance and transparency arrangements concerning the calculation of benchmarks.
- The purposes and uses of benchmarks.
- The role of private and public bodies in the provision of benchmarks.
- The potential impact of the regulation of benchmarks, transition, continuity and international issues.

Consultation responses are requested by November 15.

For more information, click here.

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

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