Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

September 16, 2011

SEC/CORPORATE

SEC Announces Creation of Advisory Committee on Small and Emerging Companies

On September 13, the Securities and Exchange Commission announced the formation of an Advisory Committee on Small and Emerging Companies. According to the SEC, the committee is intended to facilitate advice and recommendations specifically related to privately held businesses and publicly traded companies with market capitalizations of less than $250 million.

The committee will advise and consult with the SEC on such issues as financing through private and public securities offerings, trading in securities of small and emerging public companies and public reporting for such companies. The SEC indicated that it will seek the committee's input in connection with, among other things, the SEC's recently-announced review of rules related to the triggers for public reporting and rules restricting general solicitation in private placements.

The committee will be co-chaired by Stephen M. Graham, a partner at Fenwick & West LLP, and Christine Jacobs, the CEO and Chairman of Theragenics Corp.

To read the SEC's press release announcing the creation of the committee, click here.

BROKER DEALER

FINRA Provides Guidance on Prohibition Against Offering Favorable Research to Induce Participation in an Offering

The Financial Industry Regulatory Authority (FINRA) has issued Regulatory Notice 11-41 (the Notice) reminding firms of the prohibition against offering favorable research in return for an issuer's investment banking business. It has come to FINRA's attention that certain issuers may be attempting to extract implicit promises of favorable research from firms by suggesting (publicly or directly) to potential deal participants that positive research coverage would be a condition to being selected as an underwriter or selling group member.

NASD Rule 2711(e) prohibits firms from directly or indirectly offering favorable research or a specific rating or price target as consideration or inducement for business or compensation. NASD Rule 2711(c)(4) prohibits a firm's research analysts from participating in any efforts to solicit investment banking business. Additionally, FINRA has interpreted Rule 2711(c)(4) to prohibit the inclusion of any information in pitch materials about a firm's research capacity in a manner that suggests, directly or indirectly, that the firm might provide favorable research coverage.

Accordingly, FINRA stated that in circumstances where an issuer makes known, expressly or implicitly, that the selection of an offering participant will be predicated on an expectation of positive research coverage, FINRA will closely scrutinize the offering participants' research and other deal-related activities for compliance with, among others, NASD Rule 2711 and SEC Regulation Analyst Certification. Therefore, member firms that wish to participate in offerings where such implication has been made by an issuer must:

- Expressly repudiate to the issuer any expectation with respect to the content of research coverage and document such repudiation;
- Implement heightened supervision of their pitch meetings, communications with the issuer, and any other solicitation activities, to ensure that the member firm has not expressly or impliedly agreed to the issuer's research expectation; and
- Increase oversight of the preparation and content of the member firm's research on the subject company, both before and after deal participants are chosen. The member firm must also oversee any permissible communications between its research and investment banking personnel.

Click here to read Regulatory Notice 11-41.

Broker-Dealers and Advisors Involved in Bank Loans to State and Local Governments May Be Subject to MRSB Rules

The Municipal Securities Rulemaking Board (MSRB) has issued Notice 2011-052 (the Notice) which provides that certain financings that are called "bank loans" may be municipal securities and therefore subject to MSRB rules. For example, if a broker-dealer serves as a placement agent for a "bank loan" that is deemed a municipal security, the broker-dealer is subject to all applicable MSRB rules, as well as other federal securities laws. Additionally, the Notice provides that when, as agent, a broker-dealer effects a direct purchase of variable rate demand obligations (VRDOs) by its bank affiliate followed by a restructuring of such VRDOs, such restructuring may be so significant that it amounts to a primary offering of municipal securities which may trigger obligations under Rule G-32.

The Notice provides that when banks make loans to state and local governments, even if only to provide a source of funds for those governments to purchase their own securities, the question of whether those loans will be considered securities is often a difficult one. Therefore, broker-dealers and municipal advisors that play a role in bank financings evidenced by notes should consult legal counsel to determine whether the financings are securities or loans. Broker-dealers and advisors should be aware that whether the financing is merely called a loan is not necessarily dispositive of whether the financing is a loan or a security, and an incorrect analysis of such may have considerable consequences.

Click here to read MSRB Notice 2011-52

CBOE Implements Origin Code "L" for Non-Trading Permit Holder Affiliate Orders

Effective September 1, the Chicago Board Options Exchange, Inc. (CBOE) has implemented origin code "L" to identify proprietary orders of "Non-Trading Permit Holder Affiliates" for purposes of hedging the proprietary over-the-counter trading of the Clearing Trading Permit Holder or its affiliates to aggregate with the trading activity of the Clearing Trading Permit Holder for purposes of the fee cap and slide scale. "Non-Trading Permit Holder Affiliates" are wholly-owned affiliates or subsidiaries of Clearing Trading Permit Holders that are registered U.S. or foreign broker-dealers and are not themselves CBOE Trading Permit Holders.

Click here to read Regulatory Circular RG11-103.

CFTC

IOSCO Publishes Commodity Derivatives Markets Supervisory Principles

The Technical Committee of the International Organization of Securities Commissions (IOSCO) published a report, prepared by the IOSCO Task Force on Commodity Futures Markets, on principles for the regulation and supervision of commodity derivatives markets (the Principles). The report addresses the G20's November 2010 request for further work on regulation and supervision of physical commodity derivatives markets.

The Principles build upon and expand the guidance provided in the 1997 *Tokyo Communiqué* (which set benchmarks for contract design, market surveillance, and information-sharing for physical commodity derivatives markets). The Principles aim to ensure a globally consistent approach to the oversight of commodity derivatives markets that will deliver effective supervision, combat market manipulation, and improve price transparency. While the Principles are primarily intended to apply to exchange-traded futures contracts, options on futures contracts, options referenced to a physical commodity, and index or price series that may settle in cash or by

physical delivery, many of the Principles are intended also to apply to over-the-counter markets.

The Principles address the following subjects: design of physical commodity derivatives contracts; surveillance of commodity derivatives markets; disorderly markets; enforcement and information sharing; and enhancing price discovery and transparency.

The IOSCO report may be found here.

LITIGATION

Sixth Circuit Finds That Mutual Fund Class Action Is Preempted By SLUSA

Shareholders in three mutual funds issued by Morgan Keegan Select Fund, Inc. (the Funds) filed a state court class action alleging that the Funds' officers, directors, and affiliates took unjustified risks in allocating the Funds' assets and then concealed those risks from shareholders, causing the shareholders to retain their shares while the shares dropped in value. The complaint asserted only state law causes of action. The U.S. District Court for the Western District of Tennessee ruled that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) precluded the plaintiffs' class action and dismissed their claims with prejudice.

The plaintiffs argued on appeal that their claims fell within SLUSA's "Delaware carve-out" permitting many tender offer litigations to proceed as state court class actions. The U.S. Court of Appeals for the Sixth Circuit rejected plaintiffs' argument because the complaint alleged that the defendants' conduct caused the plaintiffs to hold or retain their shares, while the text of the SLUSA carve-out applies only to claims that "involve…the purchase or sale of securities by the issuer…exclusively from or to holders of equity securities of the issuer." The plaintiffs' "holder" claims did not allege any purchase or sale within the meaning of the SLUSA carve-out.

The plaintiffs further argued that SLUSA bars only claims that require fraud as an essential or necessary element, and that their complaint should be permitted to proceed because it included causes of action that did not require fraud or misrepresentation (e.g., breach of fiduciary duty). The Sixth Circuit rejected this argument, finding that SLUSA bars actions that involve allegations of misrepresentations or omissions in connection with the purchase or sale of securities, regardless of whether such allegations can be considered essential elements of any individual cause of action.

Atkinson, MD, et al. v. Morgan Asset Mgmt, Inc., No. 09-6265, 2011 WL 3926376 (6th Cir. Sep. 8, 2011).

Eleventh Circuit Court of Appeals Affirms Dismissal of Whistleblower Retaliation Suit

The plaintiff, a former employee of Stein Mart, Inc., brought claims alleging that Stein Mart wrongfully dismissed her in violation of the Sarbanes-Oxley Act of 2002 and the Florida Whistleblower Act. The U.S. District Court for the Middle District of Florida granted summary judgment in favor of Stein Mart, and the U.S. Court of Appeals for the Eleventh Circuit affirmed on appeal.

The plaintiff alleged that Stein Mart terminated her employment in retaliation for her reporting what she believed to be unlawful business and accounting practices, including: (1) improper collection of markdown allowances from vendors; (2) changing season codes on older inventory; and (3) inaccurate accounting of the value of inventory. Stein Mart contended that it dismissed the plaintiff because she mishandled the company's fragrance purchases during a holiday season and subsequently failed to improve in her performance even after being counseled about her deficiencies.

The Eleventh Circuit observed that in a Sarbanes-Oxley retaliation case, the employee "bears the initial burden of making a *prima facie* showing of retaliatory discrimination; the burden then shifts to the employer to rebut the employee's *prima facie* case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity." The Eleventh Circuit found that Stein Mart established by clear and convincing evidence that it would have terminated plaintiff's employment "even in the absence of her protected conduct," *i.e.*, that it terminated plaintiff for legitimate, non-retaliatory reasons. The plaintiff, in contrast, failed to come forward with any evidence, other than her own "personal views," supporting her position that she was terminated because she reported misconduct. Absent such evidence, the Eleventh Circuit concluded that the case could not survive summary judgment.

Johnson v. Stein Mart, Inc., No. 10-13434, 2011 WL 3962819 (11th Cir. Sep. 9, 2011).

BANKING

FDIC Approves Rules Requiring Living Wills and Contingency Plans

The Federal Deposit Insurance Corporation (FDIC) on September 13 approved a final rule (the Rule) to be issued jointly by the FDIC and the Federal Reserve Board (the Board) to implement Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. This provision requires bank holding companies with assets of $50 billion or more and companies designated as systemic by the Financial Stability Oversight Council to report periodically to the FDIC and the Federal Reserve the company's plan for its rapid and orderly resolution in the event of material financial distress or failure. The Rule approved by the FDIC implements these requirements and "will be considered by the Federal Reserve in the coming days." Approval is expected.

The rule requires the company to describe its plan of how it could be resolved in a bankruptcy proceeding. The goal is to achieve a rapid and orderly resolution of an organization in such a way as not to cause a systemic risk to the financial system. The final rule also sets specific standards for the resolution plans (the Plans), including "requiring a strategic analysis of the plan's components, a description of the range of specific actions to be taken in the resolution, and analyses of the company's organization, material entities, interconnections and interdependencies, and management information systems among other elements." Additionally, the rule would require covered entities to identify core business lines, critical services and their providers, and "provide a strategy for the sale of core business lines." Further, the Plans "should provide a strategy to unwind or separate the covered depository institution (CIDI) and its subsidiaries from the organizational structure of its parent company in a cost-effective and timely fashion ... [and] should also describe remediation or mitigating steps that can be taken to eliminate or mitigate obstacles to such separation." Moreover, the Plans "should provide a strategy for the sale or disposition of the deposit franchise, including branches, core business lines and major assets of the CIDI in a manner that ensures that depositors receive access to their insured deposits within one business day of the institution’s failure [and in cases of a closure other than on a Friday, two days]…, maximizes the net present value return from the sale or disposition of such assets and minimizes the amount of any loss realized in the resolution of cases. The Plans should also describe how the strategies for the separation of the CIDI and its subsidiaries from its parent company’s organization and sale or disposition of deposit franchise, core business lines and major assets can be demonstrated to be the least costly to the Deposit Insurance Fund." With respect to these criteria, it would seem that bankers will need to have knowledge of FDIC receivership operations, including how the FDIC analyzes transactional costs to the DIF.

Submission of resolution plans will be staggered based on the asset size of a covered company's U.S. operations. Companies with $250 billion or more in non-bank assets must submit plans on or before July 1, 2012; companies with $100 billion or more in total non-bank assets must submit plans on or before July 1, 2013; and companies that predominately operate through one or more insured depository institutions must submit plans on or before December 31, 2013. Plans are required to be updated annually. A company that experiences a material event after a plan is submitted has 45 days to notify regulators "after any event, occurrence, change in conditions or circumstances or change which results in, *or could reasonably be foreseen to have* [emphasis supplied], a material effect on the Plans of the CIDI. The FDIC further stated that "[i]n regard to what constitutes a material effect on the Plans, the effect on the Plans should be of such significance as to render the Plans ineffective, in whole *or in part* [emphasis supplied], until an update is made to the plan. It is believed that the italicized portions of the quoted rule will cause bankers to grapple with concerns about hindsight and what constitutes ineffectiveness of "part" of the plan. The FDIC stated that the Rule now provides for a multi-step review process that "affords the covered institutions the opportunity to correct deficiencies in their resolution plans before the FDIC would use its enforcement powers."

The FDIC expects that plans submitted would be subject to the Freedom of Information Act (FOIA). It proposed that plans be submitted in two sections: public and confidential. The FDIC stated that "it will presume" the confidential section is exempt under FOIA, but also stated that "a CIDI should submit a properly substantiated request for confidential treatment of any details in the confidential section that it believes are subject to withholding under exemption 4 of the FOIA. In addition, the FDIC will have to make formal exemption and segregability determinations if and when a plan is requested under the FOIA."

Separately, the FDIC's Board of Directors approved a complementary Interim Final Rule under the Federal Deposit Insurance Act to require insured depository institutions with $50 billion or more in total assets to submit periodic contingency plans to the FDIC for resolution in the event of the depository institution failure. The interim

rule follows a Notice of Proposed Rulemaking issued by the FDIC in May 2010. This interim rule has a 60-day comment period.

To read the Interim Final Rule, click here.
To review Resolution Plan Work Streams, click here.

Federal Reserve Publishes Interchange fee Guidelines

On September 14, the Federal Reserve Board published *Regulation II: Debit Card Interchange Fees and Routing, 12 CFR 235, Debit Card Interchange Fees and Routing--A Small Entity Compliance Guide.* The guide provides, in a question and answer format, information regarding the new system of interchange fees that take effect on October 1.

EXECUTIVE COMPENSATION AND ERISA

Failure to Provide COBRA Notice Tolls Statute of Limitations

Under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), an employer that sponsors a group health plan is generally required to provide an employee with a right to continue healthcare coverage after the employee's termination of employment. The employer (or its healthcare administrator) must also notify terminated employees of their COBRA rights. This notice must be given within 44 days from the date of the employee's termination of employment. Although COBRA does not provide a limitations period for improper-notice claims (i.e., the statute of limitations), courts "borrow" the most analogous limitations period from the forum state. On August 22, the United States Court of Appeals for the Eleventh Circuit ruled on the timing of that notice and the statute of limitations for improper-notice claims.

In *Cummings v. Washington Mutual*, *Cummings v. JPMorgan Chase Bank* (11th Cir., 10-101076, 8/22/11), a former employee claimed that because he did not receive his COBRA notice, he personally incurred over $2,000 in medical expenses on behalf of his wife. The employee had terminated employment in March 2007 and learned of his failure to receive a COBRA notice in March 2008, when he met with his lawyer. The former employee filed an action under COBRA in July 2008.

The Eleventh Circuit noted that a one-year statute of limitations period applies to COBRA improper-notice claims in this case. The crux of the case was determining when this one-year period of limitations expired and whether the employee's filing was timely.

The employer argued that because the employee filed his claim in July 2008, he was outside of the one-year limitations period because the claim should have been brought within one year of the last date available under the notification deadline (May 2008). The employee argued that his claim was timely because he filed his claim within one year of the date that he learned that of the failure to receive his notice (before March 2009).

The Eleventh Circuit ruled in favor of the employee stating that "notice is of enormous importance" in COBRA cases and that his claim for benefits was timely filed despite the 16 months that had lapsed since his termination of employment. The Eleventh Circuit decided that, by beginning the statute of limitations when the notification period expires as the employer suggests, it is possible that the limitations period would run before an employee would even learn of his right to bring an action for a failure to receive a proper COBRA notice. The Eleventh Circuit decided that COBRA improper-notice claims accrue when an employee either knows or should know the facts necessary to bring an improper-notice claim.

This case is important because it effectively requires employers to ensure that former employees actually receive the COBRA notice. This requirement places an additional burden on employers and healthcare administrators. Otherwise, former employees can sue their former employer until they know or should know that they have a right to COBRA coverage, which is the intent of the notice. In other words, if a former employee never receives a notice, even if sent by an employer, the former employee may not learn of their COBRA rights which could leave the statute of limitations period open indefinitely.

For more information about the case, click here.

UK DEVELOPMENTS

FSA Imposes £8 Million Market Abuse Fine

On August 31, the UK Financial Services Authority (FSA) announced an £8 million (approximately $12.6 million) fine on Swift Trade Inc. (Swift Trade), a Canadian company that is not FSA authorized or regulated, for market abuse in the form of "layering." It placed relatively large orders on one side of the London Stock Exchange (LSE) order book, which moved the share price. It then traded on the opposite side of the order book to profit from the share price movement. It then rapidly deleted the large orders that had been entered in order to cause the movement in price and repeated this conduct in reverse on the other side of the order book. None of these large orders were intended to be traded. They were carefully placed close enough to the touch price (i.e., the best bid and offer prevailing in the market at the time) to give a false and misleading impression of supply and demand, but far enough away to minimize the risk that they would be traded. The trading activity caused many individual share prices to be positioned at an artificial level, from which Swift Trade profited directly.

Swift Trade has appealed the FSA's decision to the Upper Tribunal. Under powers granted to the FSA under the Financial Services and Markets Act 2010 taking effect from October 2010, the FSA can publish decision notices that are under appeal in appropriate cases.

The FSA determined that during 2007, Swift Trade carried out many of manipulative trades that caused a succession of small price movements in a wide range of individual shares on the LSE. Swift Trade's profits from its market abuse were in excess of £1.75m (approximately $2.76 million).

The FSA decision notice states that the FSA considers this to be a particularly serious case of market abuse. It was widespread and repeated on many occasions involving tens of thousands of trading orders by many individual traders, sometimes acting in concert with each other across many locations worldwide. The trading led to a false or misleading impression of supply and demand and an artificial share price in the shares they traded which was to the detriment of other market participants. The FSA believes that such conduct, if unchecked, could undermine market confidence.

After Swift Trade became aware that the LSE had concerns about its trading activity, it actively sought to evade restrictions on its trading. It refined its trading pattern to avoid detection. Although Swift Trade undertook to impose effective controls on its trading, instead it took further action to avoid regulatory scrutiny (e.g., by changing its Direct Market Access provider).

For more information, click here.

FSA Obtains High Court Injunction Against Market Manipulation

On September 1, the UK Financial Services Authority (FSA) announced that it had obtained an interim High Court injunction preventing a number of companies and individuals from market manipulating in respect of certain UK-listed shares.

The FSA's injunction was against Da Vinci Invest Ltd, a UK incorporated but Swiss-based fund manager, a related Singapore-based company Da Vinci Invest PTE Ltd, and Mineworld Ltd, registered in the Seychelles, together with three individuals Szabolcs Banya, Tamas Pornye and Gyorgi Brad (each of whom is a resident of Switzerland and/or Hungary) who traded on behalf of those companies.

The FSA considers that these companies and individuals have committed market abuse by "layering", which created a misleading impression as to the supply and demand of the shares in question. The conduct, the subject of the proceedings, took place from August 2010 to July 2011. The companies and individuals traded across a number of UK trading platforms and the FSA estimates that their profits from market abuse exceeded £1 million (approximately $1.6 million).

The FSA obtained an interim injunction freezing the assets of the companies on July 12, and a further order continuing the freezing injunction and restraining the market abuse on August 31.

To view the press release, click here.

Independent Commission on Banking Publishes Final Report

The Independent Commission on Banking (ICB) published its Final Report on September 12. The Final Report recommends that UK retail banking activities should be ring-fenced into separate subsidiaries and the imposition on both banks and other financial conglomerates of capital requirements that are substantially stricter than those required by Basel III standards.

The ICB's main recommendations are consistent with those of its April 2011 Interim Report (as reported in the April 15, 2011 edition of *Corporate and Financial Weekly Digest*). The likely implementation date for the recommendations is in 2019.

Ring-fenced banks will be required to be separate legal entities. Services which will be required to be within ring-fenced entities are proposed to include deposit taking from and lending to individuals and small and medium sized enterprises. Services which must be provided outside the ring-fenced entities are proposed to include derivatives business, secondary market activities, services/activities that would resulting in the holding of trading book assets, services/activities that would result in a requirement to hold regulatory capital against market risk, and services to customers outside the European Union.

Where a ring-fenced bank is part of a wider corporate group, its relationships with other group entities in that group must be carried out on an arm's length basis. It must not be dependent for its solvency or liquidity on financial support from any other group entity. The ring-fenced entity will be required to have an independent board of directors.

To view the Final Report, 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 Weiner	212.940.6349	jonathan.weiner@kattenlaw.com

FINANCIAL SERVICES

Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Guy C. Dempsey, Jr.	212.940.8593	guy.dempsey@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
Maureen C. Guilfoile	312.902.5425	maureen.guilfoile@kattenlaw.com
Arthur W. Hahn	312.902.5241	arthur.hahn@kattenlaw.com
Joseph Iskowitz	212.940.6351	joseph.iskowitz@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

LITIGATION		
William M. Regan	212.640.6541	william.regan@kattenlaw.com
Joseph Gallo	212.940.6549	joseph.gallo@kattenlaw.com
BANKING		
Jeffrey M. Werthan	202.625.3569	jeff.werthan@kattenlaw.com
EXECUTIVE COMPENSATION AND ERISA		
Ann Kim	312.902.5589	ann.kim@kattenlaw.com
Christopher Buch	312.902.5509	christopher.buch@kattenlaw.com
UK DEVELOPMENTS		
Edward Black	44.20.7776.7624	edward.black@kattenlaw.co.uk
Andrew Turner	44.20.7776.7627	andrew.turner@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.

©2011 Katten Muchin Rosenman LLP. All rights reserved.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND 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 UK LLP.