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CORPORATE & FINANCIAL
WEEKLY DIGEST

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Please note that *Corporate and Financial Weekly Digest* will not be published on September 2. The next issue will be distributed on September 9.

SEC/CORPORATE

PCAOB Solicits Comments on Mandatory Audit Firm Rotation

On August 16, the Public Company Accounting Oversight Board (PCAOB) issued a Concept Release in which it proposed mandatory audit firm rotation as a method to enhance auditor independence, objectivity and professional skepticism. The PCAOB stated that its inspections frequently indicated audit deficiencies that may be attributable to a failure by an audit firm to exercise the required independence, professional skepticism and objectivity by putting the interests of company management before that of investors. The PCAOB stated that a mandatory audit firm rotation requirement, by ending an audit firm's ability to turn each new engagement into a long term income stream, could fundamentally change an audit firm's relationship with its audit client and might, as a result, significantly enhance the audit firm's ability to serve as an independent gatekeeper.

The PCAOB is soliciting comments regarding, among other questions, what effect a rotation requirement would have on audit costs and whether (i) mandatory audit firm rotation would enhance an audit firm's objectivity and ability and willingness to resist management pressure, (ii) a periodic review of a company's financial statements by a new audit firm engaged by a company due to a mandatory audit firm rotation requirement would enhance auditor independence and protect investors, and (iii) the current state of the audit profession, in light of rules requiring the rotation of an engagement partner of an audit firm and audit committee practices following the passage of the Sarbanes-Oxley Act, as well as recently promulgated and pending changes to the PCAOB's auditing standards, may have rendered some of the historical arguments for mandatory audit firm rotation no longer relevant. Additionally, the PCAOB is soliciting comments on numerous considerations in connection with a rotation requirement, including the length of the term of an engagement by an audit firm prior to mandatory rotation.

The issuance of this Concept Release may indicate that significant changes may be forthcoming under new PCAOB Chairman James Doty as it follows a Concept Release issued by the PCAOB on June 21, as reported in the July 8 edition of *Corporate & Financial Weekly Digest*, in which it proposed potential alternatives for changing the content of audit reports in order to "provide investors with more transparency into the audit process and more insight into the company's financial statements or other information outside the financial statements."

Comments on the Concept Release should be received by the PCAOB by December 14. The PCAOB expects to hold a public roundtable in the first quarter of 2012 to discuss the proposals addressed in the Concept Release.

To read the PCAOB Concept Release, click here.

BROKER DEALER

FINRA Provides Additional Guidance Concerning Social Networking Websites and Business Communications

The Financial Industry Regulatory Authority has issued additional guidance on the application of FINRA rules governing social media sites and business communications. In January 2010, FINRA issued Regulatory Notice 10-06 (Notice), providing guidance on the application of FINRA rules regarding communications with the public and reminding member firms of the recordkeeping, suitability, supervision and content requirements for such communications. Since the publication of the Notice, member firms have raised additional questions regarding the application of the rules. FINRA states that the new guidance responds to these questions by providing further clarification about application of the rules to new technologies, and is not intended to alter the principles or the guidance provided in the prior Notice. The additional guidance addresses the following topics: (i) recordkeeping; (ii) supervision; (iii) third-party posts, third party links and websites; and (iv) accessing social media sites from personal devices.

Click here to read Regulatory Notice 11-39.

Effective Dates Announced for New Operations Professional Registration Category and Consolidated FINRA Continuing Education Rule

The Securities and Exchange Commission approved the Financial Industry Regulatory Authority's proposal to establish a registration category and qualification examination requirement (Series 99) for certain member firm operations personnel, as well as adopt continuing education requirements for such operations personnel and adopt NASD Rule 1120 as FINRA Rule 1250 in the consolidated FINRA rulebook with certain changes. The new rules will take effect on October 17. In addition, member firms must identify those persons required to register as an Operations Professional (Day-One Professionals) (i.e., persons who meet the depth of personnel criteria and are engaged in one or more covered functions as of the effective date of the rule) as of October 17. Day-One Professionals must request Operations Professional registration via Form U4 in the CRD system on or before December 16. Those Day-One Professionals must then pass any necessary examination on or before October 17, 2012.

Click here to read Regulatory Notice 11-33.

Click here to read a summary of the SEC's approval of registration, qualification and continuing education requirements for certain member firm operations personnel in the June 24 edition of *Corporate & Financial Weekly Digest*.

CFTC

CFTC Appoints Gary Barnett as Swaps Division Director

Gary Barnett has been appointed to serve as the Director of the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight, a newly created division that is part of the CFTC's restructuring to fulfill its expanded responsibilities under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Mr. Barnett is currently head of the U.S. Derivatives and Structured Finance Practice Group at Linklaters LLP in New York, NY.

The CFTC press release may be found here.

BIS/IOSCO Publish Consultative Report on OTC Derivatives Data Reporting and Aggregation Requirements

The Committee on Payment and Settlement Systems (CPSS) of the Bank for International Settlements and the International Organization of Securities Commissions (IOSCO) have published a consultative report on the gathering, storing, and dissemination of over-the-counter (OTC) derivatives data by trade repositories (TRs). The consultative report was prepared in response to the October 2010 report of the Financial Stability Board, "Implementing OTC Derivatives Market Reforms," which requested the CPSS and IOSCO to consult with other

regulators to develop (i) minimum data reporting requirements and standardized formats and (ii) the methodology and mechanism for data aggregation.

The consultative report proposes requirements and data formats for both market participants reporting to TRs and for TRs reporting to regulators and the general public. In addition, the consultative report discusses issues relating to data access for authorities and reporting entities and mechanisms for the aggregation of OTC derivatives data, including the development of a system of standard legal entity identifiers.

The comment period for the consultative report ends September 23. The consultative report may be found here.

LITIGATION

Foreign Trade Antitrust Improvements Act is Not a Jurisdictional Bar to Antitrust Suit

In *Animal Science Products, Inc. v. China Minmetals Corp*., the U.S. Court of Appeals for the Third Circuit overturned its prior decisions in *Turicentro, S.A. v. Am. Airlines Inc*. and *Carpet Group Int'l v. Oriental Rug Importers Ass'n,* and held that the Foreign Trade Antitrust Improvements Act (the "FTAIA") sets forth substantive merits requirements for private antitrust claims rather than a jurisdictional threshold to antitrust suits brought in connection with foreign commerce and international trade.

The Sherman Act, the primary source of U.S. antitrust law, was limited in scope by the FTAIA, which provides that the Sherman Act will not apply to conduct involving trade or commerce with foreign nations. There are two exceptions. Under the "import trade or commerce" exception, the Sherman Act will apply where the defendants are involved in import trade or import commerce. Under the "effects" exception, the Sherman Act will apply where the conduct at issue in the antitrust action has a direct, substantial, and reasonably foreseeable effect on domestic, import, or export commerce.

The plaintiff in *Animal Science Products, Inc. v. China Minmetals Corp.*, a domestic purchaser of magnesite, sued seventeen Chinese business entities under Section 1 of the Sherman Act, alleging that Chinese producers and exporters conspired to fix prices of the magnesite exported to and sold in the United States. The District Court, applying earlier Third Circuit precedent, determined that the court lacked subject matter jurisdiction because the plaintiff failed to plead facts showing that either of the FTAIA's exceptions applied.

In vacating the District Court's decision, the Third Circuit relied on the Supreme Court's decision in *Arbaugh v. Y&H Corp.*, holding that, unless Congress expressly states otherwise, federal courts should not interpret statutory language as creating limitations on a district court's subject matter jurisdiction. The Third Circuit found that the District Court had subject matter jurisdiction because plaintiff's claim "arose under" a federal statute and nothing in the FTAIA mentioned subject matter jurisdiction. The FTAIA's two exceptions should be analyzed in the context of determining whether the complaint states a viable cause of action, not as jurisdictional issues.

The Third Circuit adjusted the tests for the FTAIA exceptions as well. Under the "import trade or commerce" exception, the Third Circuit noted that defendants need not be engaged in the physical import of goods to be subject to an antitrust suit. A foreign company may be liable under United States antitrust laws if the alleged anticompetitive behavior "was directed at an import market." As for the "effects" exception, the Third Circuit rejected the proposition that a plaintiff must demonstrate that the defendants "subjectively intended" to impact U.S. commerce. A plaintiff needs to only demonstrate that, as an objective matter, it was reasonably foreseeable that the defendant's conduct would have a direct and substantial effect on U.S. commerce. *Animal Science Products, Inc. v. China Minmetals Corp., et al., No. 10-2288 (3d Cir. Aug. 17, 2011).*

Post-Judgment Interest Rate Applies When Judgment is "Meaningfully Ascertained"

In *NML Capital Ltd v. The Republic of Argentina*, the U.S. Court of Appeals for the Second Circuit held that Argentina was liable for prejudgment contract interest only through the date on which the District Court first determined liability in a final judgment, and not through to a later date on which that judgment was partially modified as a result of the appeals process.

In 1998, Argentina issued a series of Floating Rate Accrual Notes scheduled to mature in April 2005. The Notes provided for a semiannual interest payment to the bond holder "until the principal hereof is paid or made available for payment." In December 2001, Argentina declared a debt moratorium and refused to make the interest

payments, and in April 2005 it refused to pay the principal on the Notes. Plaintiff bondholders sued, and while Argentina conceded that some amount was due to the bondholders, it contested the inclusion of interest payments scheduled after April 2005 (or, where the bondholders validly exercised the right to accelerate the Notes, scheduled after the date of acceleration). In June 2009, the District Court held that only those bonds which were not accelerated had continued to accumulate interest at the high rate set forth in the bond – the remaining bonds accumulated interest at the lower statutory rate. The New York Court of Appeals, on questions certified to it by the Second Circuit, disagreed and answered that all of the bonds accumulated interest at the note-prescribed rate.

Before the Second Circuit, the bondholders argued that the answers provided by the Court of Appeals required that the District Court's judgment be vacated, that the case be remanded, and that a completely new judgment be entered. In practical terms, this would have caused the notes to continue to accumulate interest at the significantly higher pre-judgment contract rate during the period from the initial judgment in 2009 until a new post-appeal judgment was entered. The Republic of Argentina argued that the original judgment should simply be modified, not vacated, and replaced by a new judgment. The difference in the parties' position amounted to $119 million.

The Second Circuit agreed with Argentina, holding the bondholder's right to pre-judgment contract interest ended when the judgment was first "meaningfully ascertained." The District Court's 2009 judgment, which correctly determined liability and (largely) allocated interest was sufficient for the judgment to be meaningfully ascertained. As a result, only post-judgment interest applied from June 2009 onwards. *NML Capital v. Republic of Argentina, No. 09-2707-cv (L) (2d. Cir Aug. 17, 2011).*

BANKING

Federal Reserve, OCC, and FDIC Announce Results of Shared National Credit Review

On August 25, the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation (the agencies) announced the results of the shared national credit (SNC) annual review. A SNC is any loan or formal loan commitment, and any asset such as real estate, stocks, notes, bonds, and debentures, taken as debts previously contracted, extended to borrowers by a federally supervised institution, its subsidiaries, and affiliates that aggregates to $20 million or more and is shared by three or more unaffiliated supervised institutions. Many of these loan commitments are also shared with foreign banking organizations (FBOs) and nonbanks, including securitization pools, hedge funds, insurance companies, and pension funds.

The agencies stated that the credit quality of large loan commitments owned by U.S. banking organizations, FBOs, and nonbanks improved in 2011 for the second consecutive year, according to the 2011 SNC Review. A loan commitment is the obligation of a lender to make loans or issue letters of credit pursuant to a formal loan agreement.

Total criticized loans declined more than 28 percent to $321 billion in 2011, although the percentage of criticized assets remained high compared to pre-financial crisis levels. A criticized loan is rated special mention, substandard, doubtful, or loss. Loans rated as doubtful or loss (the two weakest categories) fell 50 percent to $24 billion in 2011.

Reasons for improvement in credit quality included better operating performance among borrowers, debt restructurings, bankruptcy resolutions, and ongoing access to bond and equity markets. Industries that led the improvement in credit quality were real estate and construction, media and telecommunications, and finance and insurance.

Despite this progress, poorly underwritten loans originated in 2006 and 2007 continued to adversely affect the SNC portfolio. Approximately 60 percent of criticized assets originated in these years. Refinancing risk remained elevated as nearly $2 trillion, or 78 percent of the SNC portfolio, matures by the end of 2014. Of this maturing amount, $204 billion was criticized. It is noteworthy that although nonbank entities, such as securitization pools, hedge funds, insurance companies, and pension funds, owned the smallest share of loan commitments, they owned the largest share (58 percent) of classified credits (rated substandard, doubtful, or loss).

In other highlights of the review:

- Total SNC commitments increased less than 1 percent from the 2010 review. Total SNC loans outstanding fell $93 billion to $1.1 trillion, a decline of 8 percent.

- Criticized assets represented 13 percent of the SNC portfolio, compared with 18 percent in 2010.
- Classified assets declined 30 percent to $215 billion in 2011 and represented 9 percent of the portfolio, compared with 12 percent in 2010.
- Credits rated special mention, which exhibited potential weakness and could result in further deterioration if uncorrected, declined 25 percent to $106 billion in 2011 and represented 4 percent of the portfolio, compared with 6 percent in 2010.
- Nonaccruals declined to $101 billion from $151 billion. Adjusted for losses, nonaccrual loans declined to $92 billion from $137 billion, a 33 percent reduction.
- The distribution of credits across entities (U.S. banking organizations, FBOs, and nonbanks) remained relatively unchanged. U.S. banking organizations owned 42 percent of total SNC loan commitments, FBOs owned 38 percent, and nonbanks owned 20 percent. The share owned by nonbanks declined for the first time since 2001. Nonbanks continued to own a larger share of classified (58 percent) and nonaccrual (60 percent) assets compared with their total share of the SNC portfolio. Institutions insured by the Federal Deposit Insurance Corporation owned only 17 percent of classified assets and 15 percent of nonaccrual loans.
- The media and telecommunications industry group led other industry groups in criticized volume with $70 billion. Finance and insurance followed with $37 billion, then real estate and construction with $35 billion. Although these groups had the largest dollar volume of criticized loans, the three groups with the highest percentage of criticized loans were entertainment and recreation, media and telecommunications, and commercial services.
- The 2011 review indicated that the number of credits originated in 2010 rose dramatically compared to 2009 and 2008. Although the overall quality of underwriting in 2010 was significantly better than in 2007, some easing of standards was noted compared to the relatively tighter standards in 2009 and the latter half of 2008.

In conducting the 2011 SNC Review, the agencies reviewed $910 billion of the $2.5 trillion credit commitments in the portfolio. The sample was weighted toward non-investment grade and criticized credits. The results of the review are based on analyses prepared in the second quarter of 2011 using credit-related data provided by federally supervised institutions as of December 31, 2010, and March 31, 2011.

To view the results of the shared national credit annual review, click here.

Federal Reserve Issues Reporting Rules for Savings and Loan Holding Companies

On February 8, the Federal Reserve (or the Board) published in the Federal Register a notice of intent (NOI) to require savings and loan holding companies (SLHCs) to submit the same reports as bank holding companies (BHCs), beginning with the March 31, 2012 reporting period. The NOI stated that the Board would issue a formal proposed notice on information collection activities for SLHCs. The Federal Reserve is proposing a two-year phase-in period for most SLHCs to file Federal Reserve regulatory reports with the Board, as well as an exemption for some SLHCs from initially filing Federal Reserve regulatory reports.

All SLHCs would continue to submit all currently required Office of Thrift Supervision (OTS) reports, the Schedule HC – Thrift Holding Companies as part of the Thrift Financial Report (TFR) and the H-(b)11, through December 31, 2011, reporting period, using the existing processing, editing and validating system, which is the Electronic Filing System (EFS) established by the OTS. Effective for 2012, all SLHCs would still be required to report the HOLA H-(b)11 report (OTS Form H-(b)11; OMB No. 7100-0334) with the Federal Reserve. In addition, SLHCs that are initially exempt from reporting using the Federal Reserve's regulatory reports would still be required to report Thrift Financial Report Schedule HC (OTS 1313; OMB No. 1557-0255) and the Federal Reserve's FR Y-6 and FR Y-7 regulatory reports. Details about how SLHCs will submit TFR Schedule HC to the Federal Reserve effective for 2012 will be described in a separate notice in the Federal Register later this year. Additionally, the Federal Reserve will issue a transmittal letter later this year with information regarding the submission of the HOLA H-(b)11 report. Reporting requirements for BHCs would not be affected by this proposal. The Federal Reserve also proposes to revise other regulatory reports filed by BHCs to include SLHCs in the reporting panels going forward, as needed for supervisory purposes.

The Federal Reserve plans to issue a separate reporting proposal for the FR Y-10 report later in 2011 or early in 2012 that will address the Federal Reserve's plans to collect organizational structure and activity information from SLHCs in order to populate its National Information Center (NIC) data base with a comprehensive list of subsidiaries and affiliates of each SLHC.

Also, the Federal Reserve proposes to initially exempt SLHCs in either of the following categories from reporting using the Federal Reserve's BHC reports:

- SLHCs that are exempt pursuant to section 10(c)(9)(C) of the Home Owners' Loan Act (generally, involving unitary SLHCs that were in existence before May 4, 1999) and whose savings association subsidiaries' consolidated assets make up less than 5 percent of the total consolidated assets of the SLHC as of the quarter end prior to the reporting date quarter end; or

- SLHCs where the top-tier holding company is an insurance company that only prepares SAP financial statements.

For exempt SLHCs, the Federal Reserve would rely on reports provided to other regulators, such as the Securities and Exchange Commission, and supervisory information gathered by examiners from the parent organization. The Federal Reserve stated it believes that it is prudent to re-evaluate reporting requirements for all SLHCs that are exempt pursuant to section 10(c)(9)(C) of HOLA after the Federal Reserve has more experience with supervision of these companies.

For all SLHCs that are not excluded from reporting, the Federal Reserve believes a phased-in approach should allow the SLHCs to develop reporting systems over a period of time and would reduce the risk of data quality concerns. The phase-in approach would take two years to implement and would begin no sooner than the March 31, 2012, reporting period, when savings associations are required to file the Call Report. Reporting requirements for BHCs would not be affected by this proposal. During 2012, SLHCs that are not excluded above would be required to submit the FR Y-9 series of reports and one of two year-end annual reports (FR Y-6 or FR Y-7 reports), although SLHCs that must file the FR Y-9C report would not be required to complete Schedule HC-R, Regulatory Capital, until consolidated regulatory capital requirements for SLHCs are established. During 2013, these SLHCs would be required to submit all BHC regulatory reports that are applicable to the SLHC, depending on the size, complexity and nature of the holding company. All SLHCs submitting reports to the Federal Reserve would also continue to submit the Form H-(b)11 until further notice.

The Federal Reserve will accept comments on the proposal through November 1.

To read the notice of intent published in the Federal Register, click here.

EXECUTIVE COMPENSATION AND ERISA

Details Released Regarding New "Summary of Benefits and Coverage" For Group Health Plans

On August 22, federal government agencies (the Department of Health and Human Services, Department of Labor, and U.S. Treasury Department) published proposed regulations concerning the new mandated "summary of benefits and coverage" (SBC). Beginning March 23, 2012, group health plans (and health insurance issuers) must provide plan participants and beneficiaries with plan information in the form of the new SBC.

FORMAT. The Patient Protection and Affordable Care Act of 2010 mandates a four page summary, but the agencies have interpreted this requirement as four double-sided pages. Thus, the form can extend for eight sides, though the SBC template contained in the regulations is six single-sided pages long.

An SBC must be provided for each benefit package offered by the plan for which the participant or beneficiary is eligible. The SBC must be a stand-alone document, must use specific terminology mandated in the regulations, and its print must not be smaller than 12-point font.

The specific template for the SBC can be found here.

REQUIRED TERMINOLOGY AND EXAMPLES. The regulations mandate the SBC to use specific terms and examples. The required "Coverage Examples" are described as being similar to the 'nutrition facts' label required for packaged foods. The Coverage Examples would illustrate what proportion of care expenses the plan would cover for (1) having a baby, (2) treating breast cancer, and (3) managing diabetes.

TIMING FOR DISTRIBUTION. The SBC must be provided:

- as part of any written application materials distributed for enrollment
- if participants or beneficiaries are required to renew to maintain coverage, when the coverage is renewed. If renewal is automatic, no later than 30 days prior to the new plan year
- to special enrollees (pursuant to the Health Insurance Portability and Accountability Act special enrollment rights), within seven days of request for enrollment
- as soon as practicable (but no later than seven days) upon request.

The proposed regulations can be found here.

EU DEVELOPMENTS

European Regulators Extend Short Selling Restrictions

The short selling restrictions reported in the August 19 edition of *Corporate & Financial Weekly Digest* have been extended by Spain and Italy until September 30, and by France until "at least November 11, 2011." The Belgian and Greek restrictions remain of indefinite duration.

Belgium
To view the FSMA website, click here.

France
To view the AMF website, click here.

Italy
To view the CONSOB website, click here.

Spain
To view the CNMV website, click here.

Greece
To view the HCMC website, click here.

ESMA Issues Draft Advice on Possible AIFMD Implementing Measures in Relation to Supervision and Third Countries

On August 23, the European Securities and Markets Authority (ESMA) published consultation paper ESMA/2011/270 (Consultation on ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive in relation to supervision and third countries.)

The draft advice contained in the consultation paper covers three broad areas with respect to detailed rules on supervision and third country entities underlying the EU Alternative Investment Fund Managers Directive (AIFMD).

Supervisory co-operation and exchange of information. ESMA's draft advice under this heading focuses on the relationships between EU regulatory authorities and third country regulators. ESMA envisages that the arrangements should take the form of written agreements allowing for exchange of information for both supervisory and enforcement purposes. The agreements to be put in place should impose a duty on each relevant third country authority to assist the relevant EU regulator where it is necessary to enforce EU or national legislation. Finally, ESMA considers it important that the arrangement make provision for exchange of information for the purposes of systemic risk oversight.

Delegation of portfolio or risk management functions to third country entities. This section of the draft advice sets out ESMA's proposals for additional requirements which would apply when fund managers delegate all or part of the portfolio or risk management functions to an entity outside the EU. The proposals focus on provisions to be included in the applicable written agreement to be put in place with relevant third country regulators which, under ESMA's proposals, would need to allow for access to information, the possibility of on-site inspections of the entity

to which functions are delegated and the carrying out of enforcement actions in the case of a breach of the regulations.

Assessment of equivalence of third country depositary frameworks. Under the AIFMD, the depositary of a relevant fund may be established in a non-EU third country subject to certain conditions. In this part of the draft advice, ESMA sets out its proposals on the matters to be taken into account when assessing whether the prudential regulation and supervision applicable to a depositary established in a third country (i) has the same effect as the provisions of the AIFMD; and (ii) can be considered as effectively enforced.

ESMA states that it has identified a number of criteria for this purpose, such as the independence of the relevant regulatory authority, the requirements on eligibility of entities wishing to act as depositary, equivalence of capital requirements and the existence of sanctions in the case of violations.

Concerning the arrangements to be put in place with third country authorities in general, ESMA notes its preference for a single agreement to be negotiated by ESMA in each case in order to ensure consistency and avoid a proliferation of bilateral agreements between EU national regulators and third country regulators. Responses to the consultation are requested by September 23, in order for ESMA to finalize its advice to the European Commission by the November 16 deadline given to ESMA by the Commission.

To view the consultation paper, 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
Palash I. Pandya	212.940.6451	palash.pandya@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 Regan	212.940.6541	william.regan@kattenlaw.com
Dean N. Razavi	212.940.6743	dean.razavi@kattenlaw.com

BANKING

Jeffrey M. Werthan	202.625.3569	jeff.werthan@kattenlaw.com
Christina Grigorian	202.625.3541	christina.grigorian@kattenlaw.com

EXECUTIVE COMPENSATION AND ERISA

Russell E. Greenblatt	312.902.5222	russell.greenblatt@kattenlaw.com
Michael R. Durnwald	312.902.5697	michael.durnwald@kattenlaw.com
Christopher K. Buch	312.902.5509	christopher.buch@kattenlaw.com

EU DEVELOPMENTS

Edward Black	44.20.7776.7624	edward.black@kattenlaw.co.uk
Sam Tyfield	44.20.7776.7643	sam.tyfield@kattenlaw.co.uk

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CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND WASHINGTON, DC

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