Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

November 30, 2012

SEC/CORPORATE

SEC Posts Small Entity Compliance Guide Regarding Conflict Minerals Disclosure

On November 13, the Division of Corporation Finance of the Securities and Exchange Commission posted A Small Entity Compliance Guide (Compliance Guide) on its website related to the final rule implementing disclosure and reporting requirements regarding the use by issuers of conflict minerals from the Democratic Republic of the Congo (DRC) and adjoining countries (collectively, the Covered Countries). "Conflict minerals" are tantalum, tin, gold, tungsten, their derivatives, or any other minerals or their derivatives determined by the US Secretary of State to be financing conflict in the Covered Countries. The final rule applies to issuers who file reports with the SEC under Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 and for which conflict minerals are "necessary to the functionality or production of a product to be manufactured by the company" or "contracted to be manufactured." Conflict minerals disclosures will be filed on new Form SD be due on May 31 of each year, beginning May 31, 2014, for calendar year 2013. See the August 24, 2012, edition of *Corporate and Financial Weekly Digest*.

The Compliance Guide provides a brief overview of the final rules and includes a helpful flowchart from the final rules, but does not provide substantive interpretation of the final rules.

Click here to view the Compliance Guide.

SEC Publishes List of Rules to Be Reviewed Over Next 12 Months

On November 28, the Securities and Exchange Commission published a list of rules to be reviewed pursuant to the Regulatory Flexibility Act (RFA). The RFA requires federal agencies to review rules that have a significant impact on a substantial number of small entities within 10 years of the publication of such rules as final rules. The purpose of the review is to determine whether the rules should be continued without change or amended or rescinded in light of the continued need for the rule, the nature of comments received concerning the rule, the complexity of the rule and the extent to which the rule overlaps, duplicates or conflicts with other federal or state rules. Among the rules listed for review by the Staff of the SEC during the next 12 months is Rule 155 adopted under the Securities Act of 1933.

Rule 155 provides a non-exclusive safe harbor from integration of private and registered offerings. In case of a registered offering following an abandoned private offering, conditions in the rule include that no securities were sold in the private offering, all offering activity was terminated before the filing of a registration statement, that the registration statement disclose information about the abandoned private offering and that the registration statement is not filed until at least 30 calendar days following termination of all offering activity in the private offering, with certain exceptions.

In case of a private offering following an abandoned registered offering, conditions include that no securities were sold in the registered offering, that the issuer has withdrawn the registration statement for the abandoned offering and that the offerings under the private offering are not commenced earlier than 30 days after the effective date of the withdrawal of the registration statement.

The SEC Staff may well review the continued applicability of Rule 155 in its present form in light of its proposed amendment of Rules 506 and 144A to eliminate the ban on general advertising and general solicitation in certain circumstances, as these proposed amendments themselves affect a practical, if partial, "integration" of public/private offerings. See the September 17, 2012, Katten *Client Advisory*.

Read more.

Please see "SEC Whistleblower Report Highlights New Program's Activity and Success" in Litigation below.

Register for Our 2013 Proxy Season Update Webinar

On Thursday, December 13 at noon CST please join Katten Muchin Rosenman LLP, Ernst & Young LLP and Georgeson Inc. for a timely discussion via webcast of key developments and trends impacting public companies in the 2013 Annual Report and Proxy Season.

Further details are available here; click here to register.

CFTC

CFTC Issues Required Clearing Determination for Certain Credit Default and Interest Rate Swaps

In its first mandatory clearing determination, as required by the Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), the Commodity Futures Trading Commission has determined that certain types of credit default swaps (CDS) and interest rate swaps must be cleared through a registered derivatives clearing organization (DCO). Compliance deadlines vary based on the type of entity entering into the swap. Swap dealers, major swap participants and certain active funds must comply with the clearing requirement for any swap entered into on or after March 11, 2013. Commodity pools, private funds and persons predominantly engaged in activities that are in the business of banking must comply by June 10, 2013. Investment managers and ERISA pension plans will have until September 9, 2013, to comply with the clearing requirement for such swaps. The CFTC also clarified that any swap entered into before an entity's respective compliance date is exempt from this clearing mandate.

The CFTC's determination specifies four classes of interest rate swaps (fixed-to-floating swaps, basis swaps, forward rate agreements and overnight index swaps) on four currencies (US dollars, Euros, British pounds and Japanese yen) and two classes of credit default swaps on five North American and European CDS indices. These specific classes of swaps are currently cleared by four DCOs (Chicago Mercantile Exchange, ICE Clear Credit, ICE Clear Europe and LCH.Clearnet Ltd.).

More information on the determination and the specific classes of swaps to be cleared is available here.

CFTC Grants Temporary No-Action Relief from Swap Data Reporting Rules

The Division of Swap Dealer and Intermediary Oversight of the Commodity Futures Trading Commission issued temporary no-action relief to swap dealers (SDs) from certain requirements of Parts 43, 45 and 46 of CFTC regulations (Swap Data Reporting Rules). This no-action relief was adopted in response to concerns raised by market participants that if no relief were granted, very few SDs would be initially registered, potentially allowing the market to identify the counterparties to the reported trades. Allowing the identity of counterparties to be discovered is a violation of CFTC Regulation 43.4(d)(1). The CFTC believes that this temporary no-action relief will help eliminate such concerns.

The CFTC no-action letter is available here.

CFTC Grants Temporary No-Action Relief from Clearing Requirement for Swaps Between Affiliated Counterparties

The Division of Clearing and Risk (DCR) of the Commodity Futures Trading Commission issued temporary no-action relief from the swaps clearing requirement for swaps that are entered into between affiliated counterparties. Earlier this year, the CFTC released a proposed rule that would exempt from the clearing requirement swaps entered into by two affiliates (Inter-affiliate Exemption). As a result of the CFTC's first clearing requirement determination (see "CFTC Issues Required Clearing Determination for Certain Credit Default and Interest Rate Swaps" in **CFTC** above) and the fact that the Inter-affiliate Exemption has not yet been finalized, the CFTC granted this temporary relief to remove any uncertainty pending adoption of a final rule. For this relief to apply: (i) the parties must be affiliates, (ii) the parties must issue consolidated financial statements and (iii) both parties must agree not to clear the swap.

The CFTC's temporary no-action letter is available here.

CFTC Grants No-Action Relief for Certain Cleared Repo Transactions

The Division of Clearing and Risk (DCR) of the Commodity Futures Trading Commission has adopted a no-action position authorizing registered futures commission merchants (FCMs) to enter into repurchase and reverse repurchase agreements (each, a Repo) that are cleared by a securities clearing agency. Although a securities clearing agency is not a permitted counterparty under CFTC Regulation 1.25(d)(2), DCR determined that FCMs engaging in repurchase transactions, whereby the ultimate counterparty is a securities clearing agency, poses no additional credit risk to customer funds, and in fact may reduce the credit risk in the transaction.

The CFTC's no-action letter is available here.

CFTC Requests Comment on CME Swap Data Reporting Rules

The Commodity Futures Trading Commission has requested comment on rules submitted by the Chicago Mercantile Exchange (CME) that would require the CME's clearing house to report all creation and continuation data to the CME's swap data repository and to any counterparty that requests such information.

While these proposed rules are under review, the CFTC has withdrawn several questions from its "Frequently Asked Questions on the Reporting of Cleared Swaps" that relate to matters potentially affected by the proposed rule. For more information on which questions were withdrawn, click here.

More information on the CME's rules is available here.

LITIGATION

SEC Whistleblower Report Highlights New Program's Activity and Success

On November 15, the Securities and Exchange Commission released its Annual Report on the Dodd-Frank Whistleblower Program (DFWP), which is required by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Administered by the Office of the Whistleblower (OWB), DFWP permits a tipster to receive a reward for voluntarily submitting information that leads to a successful SEC enforcement action. The information must be original and result in a recovery of more than $1 million. Whistleblower awards must be 10% to 30% of any sanctions collected.

This is the first full-year report for DFWP and the data indicates that enforcement actions are on the rise, a trend likely to continue thanks to the growing number of tips received through the OWB. Whereas the SEC received about 650 calls to the whistleblower hotline in the five months of 2011 that DFWP was active, the hotline received over 3,000 calls in 2012. Ultimately, just over 3,000 tips were formally submitted to the OWB in 2012.

Whistleblowers reported from across the country and abroad. All 50 states, plus the District of Columbia and Puerto Rico, were represented, as were 49 countries. California, New York and Florida produced the largest

number of tips, with 435 (17.4%), 246 (9.8%) and 202 (8.1%), respectively. The United Kingdom, Canada, India and China were the major international sources.

The most common type of tip concerned corporate disclosures and financials (547, or 18.2%). Offering fraud (465 tips, or 15.5%) and manipulation (457 tips, or 15.2%) were a close second and third. Although a mere 115 tips, representing 3.8% of the total, related to the Foreign Corrupt Practices Act, experts expect that number to rise. Anti-corruption enforcement continues to be a priority for the Department of Justice and SEC, and whistleblowers, such as those who report to DFWP, are likely to play integral roles in such actions.

There is more than $450 million available for whistleblower awards, which gives tipsters plenty of incentive to report. The SEC, thus far, has issued only one award through DFWP: in August, an anonymous whistleblower was awarded the maximum amount—30%—of the ultimate recovery in a multimillion-dollar fraud enforcement action. To date, that whistleblower has received close to $50,000 of the $150,000 thus far collected by the SEC. According to the report, there are 143 other enforcement actions in which whistleblowers may be eligible to receive awards; those matters are still in process.

Many predict that counsel well versed in assisting False Claims Act whistleblowers will transfer their knowledge and attention to DFWP, and thus the number and quality of tips will increase. To address this possibility, experts advise executives and management to adopt a proactive, preventive approach to compliance by promoting internal reporting, responding quickly and flexibly to issues, and focusing on international as well as domestic operations.

The US Securities and Exchange Commission's *Annual Report on the Dodd-Frank Whistleblower Program, Fiscal Year 2012*, is available here.

Second Circuit Denies Investor's Second Appeal for New Trial

Frederic Bourke Jr. (Bourke) recently lost a second appeal stemming from his 2009 conviction for violating the Foreign Corrupt Practices Act (FCPA). That conviction arose out of Bourke's investment in a venture that sought a controlling interest in the Azerbaijani state-controlled oil company through that country's privatization program. A jury found that Bourke made his investment with knowledge that bribes had been paid or were promised to high level government officials, including the then-President of Azerbaijan, to ensure the venture's success in the privatization auction process. On November 28, a three-judge panel of the US Court of Appeals for the Second Circuit affirmed the decision of the US District Court for the Southern District of New York denying Bourke's motion for a new trial under Federal Rule of Criminal Procedure 33(b), based on allegedly "newly discovered evidence" that probably would have resulted in an acquittal.

Bourke claimed that he was entitled to a new trial on the theory that the government knowingly allowed a cooperating witness to offer perjured testimony at trial on the critical issue of knowledge of the bribery scheme. The alleged "newly discovered evidence" of perjury was a statement by a government attorney at the appellate argument responding to the defense claim that because the government had documentary evidence in conflict with the cooperator's testimony, the government should have rehabilitated the witness during pretrial preparation. Government counsel contended that "it would have been utterly improper for us to show [the cooperator] the [evidence] to point out to him that his recollection . . . was apparently flawed." Bourke argued that the government's statement was an admission that prosecutors knew of the discrepancy between the evidence and the witness's testimony, and therefore knowingly introduced perjured testimony.

The Second Circuit, however, interpreted the statements as merely hypothetical. Because nothing indicated actual knowledge of either the discrepancy in the evidence or potential perjury, the court refused to characterize conjecture as "newly discovered evidence." Moreover, it emphasized Bourke's repeated, critical failure to prove that the cooperating witness actually committed perjury, as opposed to confused the facts. In light of these shortcomings, the Second Circuit held that the lower court did not abuse its discretion in denying the new trial. This decision represents yet another blow to Bourke, who previously lost a direct appeal of his FCPA conviction.

United States v. Bourke, No. 11-5390-cr (2d Cir. Nov. 28, 2012).

BANKING

FinCEN, Federal Reserve Seek Comments on Bank Secrecy Act Definitions

On November 29, the Financial Crimes Enforcement Network (FinCEN), a bureau of the US Department of the Treasury, and the Federal Reserve Board (Board) issued a notice of proposed rulemaking seeking comments on a proposal to amend the definitions of "funds transfer" and "transmittal of funds" under the regulations implementing the Bank Secrecy Act (BSA). The proposed amendments "are necessary to maintain the current scope of funds transfers and transmittals subject to the BSA in light of amendments to the Electronic Funds Transfer Act (EFTA) made by the Dodd-Frank Wall Street Reform and Consumer Protection Act."

Recent amendments to the EFTA and the recently finalized revisions to Regulation E, which implements the EFTA, are effective February 7, 2013, and will result in an expanded scope of the transactions subject to the EFTA's remittance provisions. Some of these transactions have, to date, been covered by the regulations implementing the BSA. When the changes to Regulation E become effective, these transactions—which include international funds transfers sent by consumers through banks, and cash-based or account-based transmittals of funds sent by consumers through money transmitters—will fall outside the BSA rules' definitions of "funds transfer" and "transmittal of funds". To avoid this result, the Board and FinCEN are proposing to amend the definitions of funds transfer and transmittal of funds under the regulations implementing the BSA to limit the exclusion of EFTA-covered transactions from the recordkeeping and travel rules. The recordkeeping and travel rules provide uniform recordkeeping and transmittal requirements for financial institutions and are intended to help law enforcement and regulatory authorities detect, investigate and prosecute money laundering and other financial crimes by preserving an information trail about persons sending and receiving funds through the funds transfer system.

Comments on the proposed rule are due January 25, 2013.

Read more.

Federal Reserve, FDIC and OCC Issue Stress Test Requirements

On November 15, the Federal Reserve Board, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation (the Agencies) released interim guidance that describes how the Agencies will develop and distribute scenarios for use in annual stress tests required under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The guidance "outlines the consultative processes that the Agencies will use to gather information on material vulnerabilities or salient risks and to coordinate with each other to develop the scenarios each year." The scenarios include baseline, adverse and severely adverse scenarios. Each includes 26 variables, including economic activity, unemployment, exchange rates, prices, incomes and interest rates. The Agencies stated that "the adverse and severely adverse scenarios are not forecasts, but rather hypothetical scenarios designed to assess the strength and resilience of financial institutions."

The implementing regulation required a covered institution with over $50 billion in average total consolidated assets to conduct its first stress test under the rule in September 2012. Institutions that are $10 to $50 billion in asset size must conduct their first stress test under the rule with data "as of" September 2013 with separate templates that will be forthcoming at a later date.

Section 165(i)(2) of the Dodd-Frank Act requires certain financial companies, including national banks and federal savings associations with total consolidated assets of more than $10 billion, to conduct annual stress tests.

To read more, click here and here.

For more information, contact:

SEC/CORPORATE		
Robert L. Kohl	212.940.6380	robert.kohl@kattenlaw.com
Robert J. Wild	312.902.5567	robert.wild@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	212.940.6615	henry.bregstein@kattenlaw.com
Wendy E. Cohen	212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey, Jr.	212.940.8593	guy.dempsey@kattenlaw.com
Kevin M. Foley	312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	312.902.5241	arthur.hahn@kattenlaw.com
Joseph Iskowitz	212.940.6351	joseph.iskowitz@kattenlaw.com
Carolyn H. Jackson	44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Kathleen H. Moriarty	212.940.6304	kathleen.moriarty@jkattenlaw.com
Raymond Mouhadeb	212.940.6762	raymond.mouhadeb@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
Christopher T. Shannon	312.902.5322	chris.shannon@kattenlaw.com
Peter J. Shea	212.940.6447	peter.shea@kattenlaw.com
Marybeth Sorady	202.625.3727	marybeth.sorady@kattenlaw.com
James Van De Graaff	312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	212.940.8584	robert.weiss@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		
Emily Stern	212.940.8515	emily.stern@kattenlaw.com
BANKING		
Jeff Werthan	202.625.3569	jeff.werthan@kattenlaw.com

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

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

AUSTIN CENTURY CITY CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK OAKLAND ORANGE COUNTY SHANGHAI 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.