Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

July 26, 2013

## SEC/CORPORATE

### District Court Rejects Challenge to SEC Conflict Minerals Rule

On July 23, the US District Court for the District of Columbia issued a decision granting the Securities and Exchange Commission's motion for summary judgment in a challenge to the SEC's "conflict minerals" rule that was promulgated in August 2012. As discussed in detail in the *Corporate and Financial Weekly Digest* edition of August, 24, 2012, and a Katten Client Advisory of August 31, 2012, Rule 13p-1 (Conflict Minerals Rule) under the Securities Exchange Act of 1934, as amended (Exchange Act), and the related requirements of Form SD, require each registrant that files reports with the SEC under Sections 13(a) or 15(d) of the Exchange Act (i) to determine whether it is covered by the Conflict Minerals Rule, (ii) if the rule is applicable to the issuer, to conduct a reasonable country of origin inquiry for its conflict minerals and (iii) if the issuer knows or has reason to believe that its conflict minerals may have originated in the Democratic Republic of Congo (or its adjoining countries), to use due diligence to more definitively determine the source and chain of custody of its conflict minerals and, in certain circumstances, to file a Conflicts Minerals Report with the SEC.

The plaintiffs challenged the Conflict Minerals Rule on two grounds: first, that the SEC's rulemaking was arbitrary and capricious under the Administrative Procedure Act and, second, that the requirement under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Conflict Minerals Rule to post conflict minerals disclosure on an issuer's corporate website constitutes compelled speech in violation of the First Amendment. The court rejected the plaintiffs' challenge that the SEC's rulemaking was arbitrary and capricious, noting, among other things, that the SEC (i) properly considered whether the Conflict Minerals Rule would "promote efficiency, competition and capital formation" in accordance with the requirements of the Exchange Act, (ii) adequately evaluated the costs of the Conflicts Minerals Rule and (iii) permissively construed Section 1502 when crafting the Conflict Minerals Rule. Similarly, the court rejected the plaintiffs' First Amendment challenge, noting that the SEC's requirement to report conflict minerals disclosure on an issuer's corporate website was permissible under existing case law and, accordingly, satisfied applicable constitutional scrutiny.

While the plaintiffs may appeal the court's ruling, issuers should be preparing to comply with the Conflict Minerals Rule for the calendar year beginning January 1, 2013 (regardless of the issuer's fiscal year), with any initial Form SD required to be filed with the SEC no later than May 31, 2014.

Read more.

## CFTC

### Mandatory Clearing of iTraxx CDS Indices for Category 2 Entities Began July 25

The Division of Clearing and Risk of the Commodity Futures Trading Commission announced that commodity pools, private funds (other than active funds) and certain other persons predominantly engaged in banking or financial activities (Category 2 Entities) must clear iTraxx credit default swap (CDS) indices required to be cleared under Section 2(h) of the Commodity Exchange Act and CFTC Regulations 50.2 and 50.4(b) beginning on July

25. Swap dealers, security-based swap dealers, major swap participants, major security-based swap participants and active funds (Category 1 Entities) have been required to comply with the clearing requirements for iTraxx CDS indices since April 26. All other entities not characterized as Category 1 Entities and Category 2 Entities must comply with such clearing requirements beginning October 23.

More information is available here.

### CFTC Issues Extension of Time-Limited No-Action Relief to Cooperatives

The Division of Clearing and Risk of the Commodity Futures Trading Commission has extended the expiration date for relief granted in an earlier no-action letter from the swap clearing requirement under Section 2(h) of the Commodity Exchange Act (CEA) and CFTC Regulation 50.4 for certain swaps and certain cooperatives until the earlier of August 16 or the effective date of a final rulemaking on the cooperative exemption. In order to qualify for such no-action relief, one of the counterparties to a swap transaction must be an "exempt cooperative." An exempt cooperative is a cooperative that, subject to certain exceptions, (i) is formed and existing pursuant to federal or state law as a cooperative, and (ii) is a "financial entity" solely because of Section 2(h)(7)(C)(i)(VIII) of the CEA. Additionally, the swap (either a credit default swap or an interest rate swap) must be entered into by a member of an exempt cooperative in connection with originating a loan for such member or to hedge or mitigate commercial risk associated with loans to members of an exempt cooperative. The proposed cooperative rulemaking includes an exemption from the clearing requirements substantially similar to the no-action relief provided in the no-action letter.

CFTC Letter No. 13-47 is available here.

## LITIGATION

### Order for Insider Trader to Pay $10.2 Million in Restitution to Morgan Stanley Affirmed

The US Court of Appeals for the Second Circuit has affirmed the lower court's order directing Joseph Skowron III, a convicted insider trader and former portfolio manager at Morgan Stanley, to pay his former employer $10.2 million in restitution.

The restitution awarded was comprised of $6.4 million in compensation Skowron received while he was at Morgan Stanley and $3.8 million in legal fees. On appeal, Skowron argued that his compensation was not Morgan Stanley's "property," as defined in the Mandatory Victim Restitution Act (MVRA), and that legal fees were neither part of the investigation nor necessary expenses.

The Second Circuit rejected Skowron's argument, holding that restitution of his salary was appropriate because he had committed honest services fraud. The court held that the MVRA's provisions applied even where the defendant was not convicted of honest services fraud, so long as he participated in a bribery or kickback scheme. Additionally, the court held that restitution of legal fees, including those Morgan Stanley advanced to its employees during the Securities and Exchange Commission investigation, were appropriate. Although these employees were not "victims" of Skowron's scheme, they had a right to indemnification from Morgan Stanley during the investigation.

*US v. Skowron*, No. 12-1284 (2d Cir. July 16, 2013).

### Sixth Circuit Reaffirms Class Certification in Light of *Amgen* and *Comcast*

The US Court of Appeals for the Sixth Circuit has reaffirmed the certification of a class of purchasers of Whirlpool appliances in light of the Supreme Court's recent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

In 2010, a class of Ohio purchasers of the Whirlpool Duet washers was certified as to liability in a products liability action against Whirlpool, with proof of damages reserved for individual determination, and in 2012 the Sixth Circuit affirmed. This year, the Supreme Court vacated the decision with instructions to reconsider in light of its March opinion in *Comcast*, which held that certification was not proper where the proposed class failed to demonstrate that damages could be decided on a class-wide basis.

On remand, Whirlpool argued that, because consumer laundry habits vary widely from household to household, the question of what caused mold to grow in the Whirlpool washing machines would need to be determined on an individual basis not suitable for class action. The Sixth Circuit rejected the argument, citing *Amgen Inc. v. Connecticut Retirement Plans*, 133 S. Ct. 1184 (2013). The court noted that if the plaintiffs successfully proved a defective design, all class members had experienced injury by virtue of Whirlpool's failure to disclose it; if the plaintiffs failed, then no action could be maintained. As a result, the class stood to "prevail or fail in unison," and was appropriately certified. Notably, the Sixth Circuit distinguished and limited *Comcast* on the grounds that only a liability class, and not a damages class, had been certified, suggesting that *Comcast* may not have broad applicability in class actions where the questions of liability and damages are tried separately.

*Glazer v. Whirlpool Corporation*, No. 10-4188 (6th Cir. July 18, 2013).

**For more information, contact:**


SEC/CORPORATE

| | | |
|---|---|---|
| **David S. Kravitz** | 212.940.6354 | david.kravitz@kattenlaw.com |
| **Mark D. Wood** | 312.902.5493 | mark.wood@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 |
| **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 |
| **James Van De Graaff** | 312.902.5227 | james.vandegraaff@kattenlaw.com |
| **Robert Weiss** | 212.940.8584 | robert.weiss@kattenlaw.com |
| **Gregory E. Xethalis** | 212.940.8587 | gregory.xethalis@kattenlaw.com |
| **Lance A. Zinman** | 312.902.5212 | lance.zinman@kattenlaw.com |
| **Krassimira Zourkova** | 312.902.5334 | krassimira.zourkova@kattenlaw.com |

LITIGATION

| | | |
|---|---|---|
| **Bruce M. Sabados** | 212.940.6369 | bruce.sabados@kattenlaw.com |
| **Dean N. Razavi** | 212.940.6743 | dean.razavi@kattenlaw.com |


* 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.

©2013 Katten Muchin Rosenman LLP. All rights reserved.



Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | HOUSTON | IRVING | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | 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: Katten Muchin Rosenman UK LLP.*