VIII. Finance, Mergers, and Acquisitions

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A. Introduction

In 2013, Hawaii and Michigan expanded the use of dedicated rate securitization. The Securities and Exchange Commission (SEC) issued its first financial penalty against an issuer of municipal securities as part of its increased focus on "bad actors" in the municipal securities markets. On the regulatory front, late 2013 and early 2014 saw the Public Company Accounting Oversight Board (PCAOB) propose new audit report standards and the SEC implement final

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Jumpstart Our Business Startups Act (JOBS)[1] rules, as well as propose new JOBS rules. Additionally, the Ontario Securities Commission (OSC) issued an order affecting the "Canadian Wrapper," which is commonly used for sales of securities in Canada. Finally, merger activity in the utility industry continued apace through the end of 2013 and into 2014.

B. Dedicated Rate Securitization Developments

1. Hawaii GEMS Program

In June 2013, Hawaii passed legislation, Senate Bill 1087,[2] for a Green Market Securitization Program (GEMS), which provides for the on-bill financing of ratepayers' investment in clean energy technology infrastructure, such as solar panels. The GEMS structure is modeled on more traditional utility securitizations. As with other dedicated rate utility securitizations, the public utilities commission will issue an irrevocable financing order that (1) permits the recovery of a fee or charge to each utility customer, effective upon the issuance of the bonds; (2) contains a formulaic adjustment mechanism for the timely payment of the bonds and related financing costs; (3) contains a methodology for allocating the fee among utilities and customer classes; and (4) contains non-bypassability provisions.

In contrast to the prior uses of securitization structures, the proceeds of the GEMS bonds are not directly or indirectly provided to the utility but rather loaned to certain customers of the utility to provide financing for investments in green energy technology. The GEMS bonds are to be issued by the State of Hawaii, acting through the Department of Business, Economic Development and Tourism, which will make the initial application to the Hawaii Public Utilities Commission for a financing order. The bond proceeds are to be deposited in a special fund from which customer loans will be funded. The special fund is to be repaid through charges on the bills of customers obtaining the loans. Separately, the debt service on the GEMS bonds is to be paid through the imposition of a "utility-wide non-bypassable surcharge" as specified in the financing order. To date, no transaction has occurred under the GEMS statute and the details of the structure have yet to be made explicit. In contrast to prior securitizations, the charge and transaction are not necessarily utility specific, because any of the four electric utilities serving the islands may impose a common charge and serve as billing and collection agent.

2. Michigan Expands Types of Costs That Are Recoverable Through Utility Securitization

Although utility securitization is not new in Michigan, 2013 saw an expansion in the types of costs for which recovery is permitted in the state. Michigan's util-

1. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, *available at* http://www.gpo.gov/fdsys/pkg/PLAW-112publ106/html/PLAW-112publ106.htm.

2. Full text of the legislation is available at: http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=1087&year=2013.

ity securitization law (2000 PA 142)[3] was first adopted in 2000 as part of the state's transition to a competitive market; certain Michigan utilities successfully completed securitization transactions in the early 2000s.

In a financing order issued in December 2013,[4] the Michigan Public Service Commission (Michigan PSC) permitted recovery via securitization of the unrecovered book value of coal-fired generating plants that are being retired earlier than their planned retirement dates as a result of changes in environmental regulations. The Michigan PSC agreed with the applicant utility that the unrecovered book value associated with the referenced units is a generation-related asset that qualifies for treatment as a regulatory asset, the standard for "qualified costs"[5] that the statute authorizes for securitization.

C. Municipal Securities Market Developments

As noted in the 2013 edition of *Recent Developments*, the SEC and various securities industry self-regulatory organizations have increased their scrutiny of disclosure practices in the municipal securities markets. The trend continued during the reporting period.

In late 2013, the chief of the SEC enforcement division's municipal securities unit, LeeAnn Gaunt, stated that 2014 would see increased enforcement focus on municipal issuers and issuer officials.[6] She was quoted as saying that the SEC will make public a number of municipal securities enforcement actions in 2014 and that it had a "healthy pipeline" of such actions entering the year.

In late 2013, the SEC issued its first financial penalty against a municipal bond issuer, the developer of an ice hockey arena in Washington State. Also fined were the issuer's underwriter, and the lead investment banker on the transaction.[7] At issue was the failure to disclose in bond offering documents unfavorable revenue projections received from a consultant to the issuer, which called into question the viability of the arena.[8] The SEC brought the actions against the issuer under Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933, as amended,[9] and against the underwriter and its employee under Section 17(a)(3).

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3. Full text of the legislation is available at: http://www.legislature.mi.gov/(S(skd004453fheox45joyeneau))/mileg.aspx?page=getobject&objectname=2000-sb-1253&userid.

4. Full text of the financing order is available at: http://efile.mpsc.state.mi.us/efile/viewcase.php?casenum=17473.

5. Michigan Public Service Commission, Financing Order Case No. U-17473, at 46, 47 (Dec. 6, 2013), *available at* http://efile.mpsc.state.mi.us/efile/viewcase.php?casenum=17473.

6. Kyle Glazier, *Expect a Lot of Enforcement in 2014, Experts Say*, Bond Buyer, Dec. 30, 2013, *available at* http://www.bondbuyer.com/issues/122_249/expect-a-lot-of-enforcement-in-2014-experts-say-1058577-1.html.

7. Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Remedial Sanctions and a Cease-and Desist Order, *In the Matter* of Greater Wenatchee Regional Events Ctr. Pub. Facilities Dist., 2013 SEC LEXIS 3493 (SEC 2013), *available at* http://www.sec.gov/litigation/admin/2013/33-9471.pdf.

8. Michael Corkery, *SEC Fines a Muni Bond Issuer for First Time; Underwriter Penalized*, Wall St. J., Nov. 5, 2013, *available at* http://online.wsj.com/news/articles/SB10001424052702304391204579179913392679956.

9. 15 U.S.C. § 77q(a)(2), (b).

The Missouri Secretary of State filed a civil fraud enforcement action against Morgan Keegan & Co. Inc., alleging that Morgan Keegan failed "to satisfy basic due diligence standards" in underwriting a series of bonds issued by a Missouri municipality.[10] The state had previously brought an administrative action against Morgan Keegan arising from the same bond issuance.[11] The suit alleges that Morgan Keegan failed to conduct adequate diligence of the private entity that was the conduit obligor of the bonds. Morgan Keegan has denied wrongdoing in the matter.

On July 29, 2013, the SEC charged an Indiana school district and the underwriter of its bonds with various violations of the 1933 Act and the Securities Exchange Act of 1934, as amended (the 1934 Act).[12] In *In the Matter of West Clark Community Schools*,[13] the SEC found that West Clark Community Schools had affirmatively stated in public bond offering documents that it had not failed for the previous five years to comply in all material respects with its continuing disclosure undertakings pursuant to Rule 15c2-12 under the 1934 Act (Rule 15c2-12).[14] Rule 15c2-12 requires, among other things, that an issuer disclose in its bond offering documents a description of its continuing disclosure undertakings pursuant to Rule 15c2-12 and any instances in the previous five years in which an issuer failed to comply in all material respects with any such undertaking. The SEC found that, despite West Clark's statements to the contrary, it failed to submit any of its contractually required disclosures between 2005 and 2010. The SEC found that West Clark's false statements constituted a violation of Section 17(a)(2) of the 1933 Act, Section 10(b) of the 1934 Act, and Rule 10b-5(b).[15] Without admitting or denying the SEC's findings, West Clark consented to a cease and desist order under Section 8A of the 1933 Act and Section 21C of the 1934 Act and agreed to take remedial actions and implement procedures to assure future compliance.

In a companion proceeding, *In the Matter of City Securities Corporation and Randy G. Ruhl*,[16] the SEC found that City Securities Corporation conducted inadequate due diligence and failed to form a reasonable basis for believing the truthfulness of material statements in West Clark's offering documents.

10. Complaint, State of Missouri v. Morgan Keegan & Co. v. State of Missouri (13th Judicial Cir., filed Nov. 21, 2013), *available at* http://www.bondbuyer.com/pdfs/MovsMKeegan112613.pdf.

11. Yvette Shields, *Missouri Brings New Case Against Moberly Bond Underwriter*, Bond Buyer, Nov. 26, 2013, *available at* http://www.bondbuyer.com/issues/122_228/missouri-brings-new-case-against-moberly-bond-underwriter-1057744-1.html.

12. 15 U.S.C. § 78a, *available at* http://www.sec.gov/about/laws/sea34.pdf.

13. Press Release, Securities and Exchange Commission, SEC Charges School District and Muni Bond Underwriter in Indiana with Defrauding Investors (July 29, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539734122.

14. 17 C.F.R. § 240.15c2-12, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=52fd42358a484f3216d0f1e40ade3175&node=17:4.0.1.1.1.2.94.322&rgn=div8.

15. 17 C.F.R. § 240.10b-5, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=036e08976125f82acaa9747320a2748e&node=17:4.0.1.1.1.1.65.94&rgn=div8.

16. Press Release, Securities and Exchange Commission, SEC Charges School District and Muni Bond Underwriter in Indiana with Defrauding Investors (July 29, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539734122.

City Securities was found to have violated Section 17(a)(2) of the 1933 Act; Sections 10(b), 15(c)(2) and 15B(c)(1) of the 1934 Act; and Rules 10b-5(b) and 15c2-12, together with related Municipal Securities Rulemaking Board (MSRB) rules. In addition, Randy Ruhl, supervisor of City Securities' Public Finance and Municipal Bond Department, was found to have willfully aided and abetted those violations and to have violated MSRB rules relating to improper gifts and gratuities to issuers.

City Securities, without admitting or denying the SEC's findings, consented to a cease and desist order and agreed to pay $579,446 in disgorgement and penalties. Ruhl similarly consented to a cease and desist order and paid $38,475 in disgorgement and penalties and was barred from any supervisory capacity with any broker, dealer, investment advisor, municipal securities dealer, municipal advisor, transfer agent, or credit rating agency.

On September 13, 2013, the SEC instituted cease and desist proceedings under Section 8A of the 1933 Act against Public Health Trust of Miami-Dade County, Florida (PHT). Without admitting or denying the SEC's findings, PHT consented to the entry of a cease and desist order.[17] The SEC found that a 2009 official statement used in the offering of bonds issued by Miami-Dade County for the benefit of PHT contained misstated financial information relating to PHT and misrepresented that PHT's financial statements were prepared in accordance with generally accepted accounting principles, thereby violating Sections 17(a)(2) and 17(a)(3) of the 1934 Act. The SEC also found that PHT had taken substantial remedial actions since the 2009 bond offering and ordered no additional remedial action be undertaken in connection with the issuance of its cease and desist order.

In March 2014, the SEC launched its Municipalities Continuing Disclosure Cooperation Initiative, which is designed to encourage issuers and underwriters of municipal securities to self-report violations of their continuing disclosure obligations under Rule 15c2-12.[18] SEC representatives have stated that issuers and underwriters that choose not to self-report can expect to face increased sanctions for violations. Under the initiative, issuers that self-report will be required to establish policies and procedures regarding their disclosure obligations, but will not face monetary penalties. Underwriters, on the other hand, will be subject to financial penalties on a per offering basis, but those penalties will be capped at $500,000 in the aggregate.[19]

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17. Press Release, Securities and Exchange Commission, SEC Charges Operator of Miami-Dade County's Largest Hospital with Misleading Investors About Financial Condition (Sept. 13, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539807423.

18. Kyle Glazier, *SEC Urges Muni Issuers, Underwriters to Report Violations*, BOND BUYER, Mar. 10, 2014, *available at* http://www.bondbuyer.com/issues/123_47/sec-urges-muni-issuers-underwriters-to-report-violations-1060557-1.html.

19. Press Release, Securities and Exchange Commission, Municipalities Continuing Disclosure Cooperation Initiative (Mar. 10, 2014), *available at* http://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml.

D. Regulatory Developments

1. PCAOB Proposed Auditor Report Changes and Status of IFRS Convergence

(a) PCAOB's Proposed Changes to Auditor's Report

On August 13, 2013, the PCAOB proposed two new auditing standards that would significantly expand the scope and content of the auditor's report and heighten the level of the auditors' responsibility in providing information to investors regarding their audit.[20] If adopted, the proposed amendments would be one of the most significant changes to the auditor's report since the 1940s. The two new standards are: (1) the Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion (the Proposed Auditor Reporting Standard) and (ii) the Auditor's Responsibilities Regarding Other Information in Certain Documents Containing Audited Financial Statements and the Related Auditor's Report (the Proposed Other Information Standard). The initial comment period for the proposed changes expired on December 11, 2013. The PCAOB held a public meeting to discuss the proposed changes on April 2–3, 2014, and reopened the comment period until May 2, 2014.[21] The PCAOB release states that if the proposed changes are adopted, they would be effective for audits of financial statements for fiscal years beginning on or after December 15, 2015, subject to SEC approval.

(i) Proposed Auditor Reporting Standard

(a) Critical Audit Matters—Investors rely on the auditor's report to assess whether a company's financial statements present fairly, in all material respects, the financial position, results of operations, and cash flows of the company in conformity with the applicable financial reporting framework. This reporting structure is commonly referred to as the "pass/fail" model (i.e., whether the financial statements are fairly presented (pass) or not (fail)). The basic elements of the existing auditor's report include (1) identity of the financial statements that were subject to the audit, (2) description regarding the nature of the audit, and (3) the auditor's opinion as to whether the audited financial statements pass muster under the pass/fail structure. As it exists today, the auditor's report does not provide any information specifically tailored to a particular audit. The familiar language is largely boilerplate.

The Proposed Auditor Reporting Standard would require auditors to include discussion in the auditor's report regarding "critical audit matters." The PCAOB explained that "critical audit matters" are those matters the auditor addressed

20. Press Release, Public Company Accounting Oversight Board, Proposed Auditing Standards (PCAOB Release) (Aug. 13, 2013), *available at* http://pcaobus.org/Rules/Rulemaking/Docket034/Release_2013-005_ARM.pdf.

21. Press Release, Public Company Accounting Oversight Board, PCAOB Announces Panelists and Agenda for April Public Meeting on the Auditor's Reporting Model Proposal (Mar. 20, 2014), *available at* http://pcaobus.org/news/releases/pages/03202014_arm.aspx.

during the audit of the financial statements that (1) involved the most difficult, subjective, or complex auditor judgments; (2) posed the most difficulty to the auditor in obtaining sufficient evidence; or (3) posed the most difficulty to the auditor in forming an opinion on the financial statements. The PCAOB release stated that including this discussion does not impose new audit performance requirements or amend the objective of the audit of the financial statements. Under the proposed standard, the auditor's report would be required to (1) identify critical audit matters or determine and disclose their absence; (2) describe the considerations that led the auditor to determine that a particular matter amounted to a critical audit matter; and (3) refer to the relevant financial statement accounts and disclosures that relate to the critical audit matter, when applicable. In the PCAOB release, the PCAOB states that it expects that most companies will have at least one critical audit matter.

(B) Additional Disclosure About the Audit and the Auditor—The proposed changes would also require the auditor's report to include a statement regarding the auditor's independence and the year the auditor began serving as the company's auditor.

(ii) Proposed Other Information Standard

The Proposed Other Information Standard is intended to increase the auditor's responsibility with respect to "other information" that is separate from the financial statements but may be relevant to an audit of the financial statements or to the auditor's opinion with respect to the financial statements. According to the PCAOB Release, "other information" is information, other than the audited financial statements and the related auditor's report, included in a company's annual report on Form 10-K[22] that is filed with the SEC. "Other information" in a company's Form 10-K would include (but is not limited to) items such as (1) selected financial data, (2) management's discussion and analysis of financial condition and results of operations, (3) exhibits, and (4) certain information incorporated by reference in the Form 10-K.

Under the current auditing standards, auditors have no reporting obligation to disclose their responsibility with respect to "other information." The existing standards merely require the auditor to "read and consider" such other information in certain documents, such as the Form 10-K. The proposed changes would not only require auditors to perform procedures in order to evaluate the other information but would also require them to describe their responsibilities with respect to such information and the results of their evaluation in the auditor's report. The proposal is designed to ensure consistency between the audited financial statements and the other information; the PCAOB believes it could enhance the amount and quality of information provided to investors.

If adopted, the proposals could substantially change the audit process, increase the length of the audit period, and expand the scope and content of the

22. 17 C.F.R. § 249.310, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=5c8cf59b2ecb1c3374d0177af73c2e18&node=17:4.0.1.1.9.4.123.4&rgn=div8.

related auditor's report, which would, in turn, have cost implications for both issuers and auditors. The proposed changes also have the potential to increase liability for auditors.

(b) Update on the Status of Incorporation of IFRS into the Financial Reporting System for U.S. Issuers

Efforts to converge generally accepted accounting principles used in the United States (US GAAP) and the International Financial Reporting Standards (IFRS) have been underway for many years. In this effort, the Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) have worked together to achieve the goal of convergence. In 2002, the FASB and the IASB entered into the Norwalk Agreement[23] in which they pledged to use their efforts towards the international convergence of accounting standards by minimizing differences between the two accounting standards to make them fully compatible.[24] In accordance with the Norwalk Agreement, both boards have combined their efforts and have made significant progress on several convergence projects, including, but not limited to, revenue recognition, lease accounting, and financial instruments.

In February 2010, the SEC published the Commission Statement in Support of Convergence and Global Accounting Standards, noting, among other things, that it had directed the staff of the Office of the Chief Accountant of the SEC to develop and execute a work plan to assist the SEC in evaluating (1) the effect of incorporating the IFRS into the financial reporting system for U.S. issuers and (2) how any such incorporation should be implemented. On July 13, 2012, the staff published a final report on its work plan, which summarized key areas of focus and issues surrounding the potential incorporation of IFRS into US GAAP, including the fundamental differences between US GAAP and IFRS, the potential cost to U.S. issuers in the event of convergence, investor understanding and education regarding IFRS, and governance. Findings provided in the work plan are designed to assist the SEC in assessing whether, when, and how the current financial reporting system for U.S. issuers should be transitioned to a system incorporating IFRS. However, the work plan was not designed to answer the threshold question of whether transitioning to IFRS is in the best interests of the U.S. securities markets generally and U.S. investors specifically. The staff stated that additional analysis and consideration of this threshold question is necessary before any SEC decision.

One fundamental difference between IFRS and US GAAP is that IFRS lacks guidance with respect to certain industries (e.g., utilities) or types of common

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23. The Financial Accounting Standards Board and the International Accounting Standards Board, Memorandum of Understanding, Norwalk Agreement (Sept. 18, 2002), *available at* http://www.fasb.org/news/memorandum.pdf.

24. The two boards also signed a memorandum of understanding in 2006, identifying short-term and long-term convergence projects, which was subsequently updated in 2008 and 2010, respectively.

transactions. Instead, the IASB supports the use of industry-neutral accounting principles. For example, US GAAP permits a utility company to accrue assets or liabilities based on future cash flows or outflows permitted or required by the utility's regulator. The IFRS, however, does not include such a standard for rate-regulated activities, which suggests that the recognition of rate-regulated assets or liabilities is not permitted under the IFRS. The absence of such standards under IFRS raises concern for regulators and rate-regulated issuers.

A great deal of additional effort is required in order establish high-quality, global accounting standards, including eliminating or minimizing the fundamental differences between US GAAP and IFRS. Despite the issuance of the final report, it remains unclear when the SEC will reach a decision on the threshold question, given the absence of any timeline provided by the staff and the lack of any staff recommendation outlined in the work plan with respect to convergence.

2. JOBS Act Final Rules and Additional Proposals

At its July 10, 2013, open meeting, the SEC enacted final rules and proposed additional rules pursuant to the JOBS Act. The SEC amended Rules 506[25] and 144A[26] to allow issuers to use general solicitation and public advertising in certain private securities offerings. Additionally, the SEC proposed new rules for monitoring and regulating the private placement market and for providing additional protections to purchasers that invest in a privately placed offering via a general solicitation, as is now permitted.

(a) Final Rule 506(c)

The SEC adopted Rule 506(c), which (1) allows general solicitation for securities offerings as long as the purchasers are accredited investors and (2) requires issuers to take "reasonable steps" to ensure that purchasers are accredited investors. Determining whether an inquiry is "reasonable" is an objective analysis by the issuer in light of the specific facts and context of the offering, each purchaser, and the transaction as a whole. Examples of factors that should be used to reasonably determine whether a purchaser is an accredited investor include:

- the nature of the purchaser,
- the amount and type of information that the issuer has about the purchaser,
- the nature of the offering, and
- the terms of the offering.

Additionally, Rule 506(c) also includes four safe harbor methods for ensuring that an investor, if a natural person, is an accredited investor. If one of the

25. 17 C.F.R. § 230.506, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=1cd83416656374944fb8dde50f93c7ac&node=17:3.0.1.1.12.0.46.181&rgn=div8.

26. 17 C.F.R. § 230.144A, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=1cd83416656374944fb8dde50f93c7ac&node=17:3.0.1.1.12.0.36.29&rgn=div8.

following methods is used, the reasonable steps requirement is deemed satisfied:

- verification of income by reviewing IRS forms for the previous two years and a written representation of the investor to determine that the investor has reached or has a reasonable expectation of reaching the income threshold necessary to be an accredited investor during the current year;
- verification of net worth by reviewing certain forms of documentation dated within the previous three months and accompanied by a written representation of the investor, evidencing the investor's income;
- written confirmation from a registered broker-dealer, SEC-registered investment adviser, a licensed attorney, or certified public accountant that such person has taken reasonable steps within the previous three months to determine that an investor is accredited; or
- self-certification from an investor holding securities issued in a Rule 506(b) offering and who continues to hold such securities after the Rule 506(c) effective date.

Any issuer offering or selling securities without registration and in reliance on Rules 504,[27] 505,[28] or 506 is required to file a Form D[29] with the SEC no later than fifteen calendar days after the offering. Form D will now also include a checkbox allowing issuers to indicate if they are relying on the new 506(c) exemption.

(b) Final Amendments to Rule 144A

The SEC revised Rule 144A(d)(1) to allow securities sold pursuant to Rule 144A to be offered to investors who are not "qualified institutional buyers" (QIBs) as long as the ultimate sales are made to investors the issuer reasonably believes to be QIBs. Further, any ongoing offerings commenced prior to the effective date of the amendment will be able to rely on the amendment for any sales occurring after the effective date without disturbing the previously offered securities. The SEC also made clear that it does not believe a general solicitation in a Rule 506(c) or Rule 144A offering constitutes "directed selling efforts" under Regulation S[30] offerings.

27. 17 C.F.R. § 230.504, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=1cd83416656374944fb8dde50f93c7ac&node=17:3.0.1.1.12.0.46.179&rgn=div8.

28. 17 C.F.R. § 230.505, *available at* http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=1cd83416656374944fb8dde50f93c7ac&r=SECTION&n=17y3.0.1.1.12.0.46.180.

29. 17 C.F.R. § 239.500, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=9e91474befbd0fa8d6b82a747fa551e5&node=17:3.0.1.1.15.2.58.9&rgn=div8.

30. 17 C.F.R. § 230.902(c), *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=9b6a25c2baff9df5108490d1fb0b3387&node=17:3.0.1.1.12.0.50.202&rgn=div8.

(c) Final Rule 506(d)

Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[31] requires the SEC to adopt rules that would disqualify certain securities offerings from reliance on Rule 506 of Regulation D if so-called bad actors participate in the offerings. At its July 10, 2013, open meeting, the SEC adopted new Rule 506(d) to remove the protection of the Rule 506 safe harbor from offerings in which enumerated covered persons participate. The new rule became effective on September 23, 2013.

The disqualification provisions of Rule 506(d)(1) apply to the following "covered persons":

- the issuer and any predecessor of the issuer or affiliated issuer;
- any director, executive officer, other officer participating in the offering, general partner, or managing member of the issuer;
- any beneficial owner of 20 percent or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power;
- any promoter (as defined in Rule 405[32] under the 1933 Act) connected with the issuer in any capacity at the time of sale;
- any investment manager to an issuer that is a pooled investment fund;
- any person who has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with sales of securities in the offering (a compensated solicitor);
- any general partner or managing member of any such investment manager or compensated solicitor; or
- any director, executive officer, or other officer participating in the offering of any such investment manager or compensated solicitor or general partner or managing member of such investment manager or compensated solicitor.

Rule 506(d)(3) provides that the disqualification provisions do not apply to events that predate the affiliate relationship if the affiliated entity is not in control of the issuer or under the common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

The final rule includes eight categories of disqualifying events:

- criminal convictions in connection with the purchase or sale of a security, making of a false filing with the SEC, or arising out of the conduct of certain types of financial intermediaries;
- court injunctions and restraining orders in connection with the purchase or sale of a security, making of a false filing with the SEC, or arising out of the conduct of certain types of financial intermediaries;

31. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, *available at*: http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/html/PLAW-111publ203.htm.
32. 17 C.F.R. § 230.405, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=640255bdb2dbe4f6d5c9f69d73abd814&node=17:3.0.1.1.12.0.39.98&rgn=div8.

- final orders from the Commodity Futures Trading Commission, federal banking agencies, the National Credit Union Administration, or state regulators of securities, insurance, banking, savings associations, or credit unions that are based on fraudulent, manipulative, or deceptive conduct or bar the issuer from associating with a regulated entity, engaging in the business of securities, insurance or banking, or engaging in savings association or credit union activities;
- certain SEC disciplinary orders relating to brokers, dealers, municipal securities dealers, investment companies, and investment advisers and their associated persons;
- SEC cease-and-desist orders related to violations of scienter-based antifraud violations and violations of Section 5 of the Securities Act;
- SEC stop orders and orders suspending the Regulation A exemption;
- suspension or expulsion from membership in a self-regulatory organization (SRO) or from association with an SRO member; and
- U.S. Postal Service false representation orders issued within five years before the proposed sale of securities.

Rule 506(d)(2)(iv) creates an exception from disqualification for offerings where the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed because of the presence or participation of another covered person. In order to rely on the reasonable care exception, the issuer would need to conduct a factual inquiry, the nature and scope of which would vary based on the particular facts and circumstances. If the issuer is given reason to question the veracity of the responses to its inquiries, reasonable care would require the issuer to take further steps to provide a reasonable level of assurance that no disqualifications apply.

As proposed, under Rule 506(d)(2)(ii) the SEC may grant a waiver of disqualification if it is determined that the issuer has shown good cause. In addition to good cause, under Rule 506(d)(2)(iii), disqualification will not apply if the authority issuing the relevant judgment, order, or other triggering directive or statement determines and advises the SEC that disqualification from reliance on Rule 506 should not arise as a result.

Rule 506(d)(2)(i) provides that disqualification will not arise as a result of triggering events that occurred before the effective date of the final rule amendments. However, Rule 506(e) requires written disclosure to investors of matters that would have triggered disqualification if they had occurred before the effective date of the new disqualification provisions. Issuers should give reasonable prominence to the disclosure to ensure that information about preexisting bad actor events is appropriately presented in the total mix of information available to investors. If disclosure is required and not adequately provided to an investor, Rule 508[33] relief

33. 17 C.F.R. § 230.508, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=9b6a25c2baff9df5108490d1fb0b3387&node=17:3.0.1.1.12.0.46.183&rgn=div8.

for insignificant deviations from Rule 506 will be unavailable. For Rule 508 to apply, the failure to comply with a Regulation D[34] requirement must not pertain to a term, condition, or requirement directly intended to protect an offeree or purchaser; therefore, this condition of Rule 508 cannot be met where the required disclosure is not provided. Failure to furnish the required disclosure on a timely basis will not prevent an issuer from relying on Rule 506, if the issuer establishes that it did not know, and in the exercise of reasonable care could not have known, of the existence of the undisclosed matter or matters. The disclosure statement that is required to be furnished to investors does not involve submission of a form filed with the SEC and is not required to be presented in any particular format.

The bad actor disqualification provisions of Rule 506(d) and the mandatory disclosure provisions of Rule 506(e) will apply to each sale of securities made in reliance on Rule 506 after the amendments went into effect.

Sales of securities made before the applicable effective dates will not be affected by any disqualification or disclosure requirement, even if they are part of an offering that continues after the effective date. Only sales made after the effective date of the final rule amendments will be subject to disqualification and mandatory disclosure. Disqualifying events that occur while an offering is underway will be treated in a similar fashion. Sales made before the occurrence of the disqualification trigger will not be affected by it, but sales made afterward will not be entitled to rely on Rule 506 unless the disqualification is waived or removed or, if the issuer is not aware of a triggering event, the issuer can rely on the reasonable care exception.

(d) Proposals for Additional Rules and Disclosures

At the July 10, 2013, open meeting the SEC also proposed new rules designed to improve the SEC's monitoring capabilities over the private placement market and to further protect investors participating in offerings of non-public securities.

Specifically, the SEC proposed:

- amending Rule 503 of Regulation D to require the filing of Form D no later than fifteen calendar days prior to the first use of general solicitation in a Rule 506(c) offering and the filing of a closing Form D amendment within thirty calendar days after the termination of any Rule 506 offering.
- amending Form D to require additional information concerning all offerings conducted in reliance on Rule 506, such as identifying the types of accredited investors participating in the offering along with including information specific to Rule 506(c) offerings, such as the types of general solicitation used and the methods used to verify the accredited investor status of purchasers.

34. 17 C.F.R. § 230.500, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=9b6a25c2baff9df5108490d1fb0b3387&node=17:3.0.1.1.12.0.46.175&rgn=div8.

- amending Rule 507 of Regulation D to disqualify an issuer from relying on Rule 506 for one year for future offerings if the issuer, or any predecessor or affiliate of the issuer, did not comply within the last five years with all Form D filing requirements in a Rule 506 offering, subject to a thirty-day cure period.

(i) Proposed Rule 509

The SEC proposed a new rule, Rule 509, which would require issuers making a general solicitation in connection with the sale of non-public securities under Rule 506(c) to include certain legends in all written communicates connected to such offerings. Specifically, the legends would explain that the securities may be sold only to accredited investors, which for natural persons, are investors who meet certain minimum annual income or net worth thresholds; that the securities are being offered in reliance on an exemption from the registration requirements of the 1933 Act and are not required to comply with specific disclosure requirements that apply to registration under the 1933 Act; that the SEC has not passed upon the merits of or given its approval to the securities, the terms of the offering, or the accuracy or completeness of any offering materials; that the securities are subject to legal restrictions on transfer and resale and investors should not assume they will be able to resell their securities; and investing in securities involves risk, and investors should be able to bear the loss of their investment.

Further, certain investment funds, such as hedge funds, private equity funds, and venture capital funds, making such an offering would be required to include a legend stating that the securities offered are not subject to the protection of the Investment Company Act of 1940, as amended.[35] Any private funds making a general solicitation that includes performance data must include a legend stating that performance data represents past performance, past performance does not guarantee future results, current performance may be lower or higher than the performance data presented, that the private fund is not required by law to follow any standard methodology when calculating and representing performance data, and the performance of the fund may not be directly comparable to the performance of other private or registered funds.

Additionally, the proposed rule would require the legend to identify where investors may obtain current performance data. It would also require private funds that include performance data that does not reflect the deduction of fees and expenses in their written general solicitation materials to disclose that fees and expenses have not been deducted, and that if such fees and expenses had been deducted, performance may be lower than presented. Finally, an issuer would be disqualified from relying on Rule 506 for future offerings if it has been subject to any order, judgment, or court decree enjoining it for failure to comply with proposed Rule 509.

35. 15 U.S.C. §§ 80a-1–80a-64, *available at* http://www.sec.gov/about/laws/ica40.pdf.

(ii) Proposal to Amend Rule 156

The SEC seeks to amend Rule 156[36] under the 1933 Act to apply guidance contained in that rule to sales literature for private investment funds. Rule 156 provides guidance on the types of information in sales literature for registered investment companies that could be deemed misleading under the antifraud provisions of the federal securities laws. This proposal seems responsive to concerns raised by some registered mutual funds that they would be placed at a competitive disadvantage if private investment funds were permitted to advertise publicly without being held to the same disclosure standards.

(iii) Proposal for a Rule 510T

The SEC also proposed Rule 510T, which would require issuers on a temporary basis to submit any written general solicitation materials used in Rule 506(c) offerings to the SEC no later than the date of the first use of these materials. Issuers or their agents would be required to submit these materials through the SEC's website on a nonpublic basis and not via the EDGAR system. Under proposed Rule 510T, an issuer would be disqualified from relying on Rule 506 for future offerings if it has been subject to any order, judgment, or court decree evidencing a failure to comply with proposed Rule 510T. The proposed rule would expire two years after its effective date.

(iv) New Accredited Investor Standard

The SEC sought comment on the definition of an accredited investor as it relates to natural persons. Under current Rule 501, a natural person is accredited if he or she has (1) an individual net worth, or joint net worth with the person's spouse, that exceeds $1 million at the time of the purchase, excluding the value of the primary residence; or (2) income exceeding $200,000 in each of the two most recent years or joint income with a spouse exceeding $300,000 for those years and a reasonable expectation of the same income level in the current year. However, the dollar amounts in the current definition have not been amended or inflation-adjusted since the thresholds were first set in 1982. Thus, the SEC could consider increasing those thresholds if it determines the dollar amounts are no longer a reliable proxy for high net worth and financial sophistication. Section 413 of the Dodd-Frank Act limits the ability of the SEC to amend the net worth component of the "accredited investor" definition before July 2014.

(v) Work Plan to Monitor the New Market

The SEC proposed a work plan to monitor the new market created by Rule 506(c). Under this plan the SEC staff would:

- evaluate the range of purchaser verification practices used by issuers and other participants in Rule 506(c) offerings, including whether verification practices are excluding or identifying non-accredited investors;

36. 17 C.F.R. § 230.156, *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=5c636afeaec77ba13010ff43d3031d43&node=17:3.0.1.1.12.0.36.44&rgn=div8.

- evaluate whether the absence of the prohibition against general solicitation has been accompanied by an increase in sales to non-accredited investors;
- assess whether the availability of Rule 506(c) has facilitated new capital formation or has shifted capital formation from registered offerings and unregistered non-Rule 506(c) offerings to Rule 506(c) offerings;
- examine the information submitted or available to the SEC on Rule 506(c) offerings, including the information in Form D filings and the form and content of written general solicitation materials submitted to the SEC;
- monitor the market for Rule 506(c) offerings for increased incidence of fraud and develop risk characteristics regarding the types of market participants that conduct or participate in Rule 506(c) offerings and the types of investors targeted in these offerings to assist with this effort;
- incorporate an evaluation of the practices in Rule 506(c) offerings in the staff's examinations of registered broker-dealers and registered investment advisers; and
- coordinate with state securities regulators on sharing information about Rule 506(c) offerings.

3. Canadian Offering Exemption

In April 2013, the Ontario Securities Commission (OSC) issued an Order allowing certain foreign securities dealers to privately place foreign securities in Canada without the need for supplemental Canadian disclosure, commonly referred to as the Canadian Wrapper. Although the exemption has been granted by the OSC, the relief is available to issuers selling in all Canadian provinces and territories. This disclosure exemption became effective for those exempted securities dealers and their affiliates covered by the Order on June 22, 2013.

A Canadian Wrapper has been used to satisfy three Canada specific disclosure requirements that arise out of securities legislation in one or more provinces: (1) disclosure about whether an issuer or selling security holder is either a "connected issuer" or "related issuer" of an underwriter, similar to the conflicts of interest disclosure in the United States; (2) a description of the statutory rights of action available to investors in specific provinces if the offering document contains a misrepresentation; and (3) authorization to collect personal information of the purchasers to provide to regulators in certain provinces.

Pursuant to a separate letter released by the OSC director, the OSC acknowledged that notification of collection of investors' personal information applies only to investors who are individuals and not corporations or other institutions, effectively removing the need for this disclosure in those instances where securities are sold to institutions.

The relief granted pursuant to the Order is subject to several conditions:

- The offering must be primarily made outside of Canada.
- The issuer must be a foreign issuer that does not have its head office or principal office in Canada and may not be a Canadian reporting company or an "investment fund" as defined under Canadian law.

- Canadian purchasers are limited to only "permitted clients"[37] as defined under Canadian securities law.
- Prior to an exempted dealer's first reliance on the Order when selling to a particular purchaser, the exempted dealer must notify, as prescribed in the Order, the prospective purchaser and receive a signed acknowledgement and consent from the purchaser regarding the dealer's reliance on the exemption.[38]
- The exempted dealer must deliver information concerning the exempt distributions made in reliance on the Order to its principal regulator in Canada on a monthly basis.

In addition to the relief granted pursuant to the Order, the OSC commenced a rulemaking to amend the Ontario Prospectus and Registration Exemptions for offerings of "designated foreign securities."[39] The effect of this rulemaking would be to codify most changes introduced in the Order. Further, the OSC and other members of the Canadian Securities Administrators are considering amending the underwriting conflicts of interest disclosure requirements for offerings by foreign issuers as long as there is comparable alternative disclosure. Although Ontario is leading the effort to amend its disclosure requirements, other provinces including Nova Scotia, New Brunswick, and Saskatchewan have also proposed similar changes.

The exemption became effective on June 22, 2013, and it is slated to expire in June 2016. However, it is anticipated by that time the exemption will be permanently enacted by a formal rulemaking of each provincial securities regulator.

E. Announced Transactions

1. Avista Corp. and Alaska Energy and Resources Company

On November 4, 2013, Avista Corporation signed a merger agreement with Alaska Energy and Resources Company (AERC), a privately held company based in Juneau.[40] The merger agreement states that a merger subsidiary of Avista will merge with and into AERC with AERC surviving as a wholly owned subsidiary of Avista.[41] Avista will purchase AERC for $170 million of Avista's common stock. The purchase price is subject to adjustment for, among other things, assumption of AERC's debt and other closing costs.[42]

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37. A "permitted client" is similar to a QIB as defined in Rule 144A under the 1933 Act.
38. This is a one-time only requirement.
39. Proposed amendments are available at: http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20130425_45-501_rfc-pro-amend.htm.
40. Avista Corp., Form 8-K, dated Nov. 4, 2013, *available at* http://www.sec.gov/Archives/edgar/data/104918/000010491813000097/aercacquisition8-k.htm.
41. *Id.*
42. Press Release, Avista Corp., Avista Corp. to Acquire Alaska Energy Resources Company (Nov. 4, 2013), *available at* http://investor.avistacorp.com/phoenix.zhtml?c=97267&p=irol-newsArticle&ID=1872031&highlight.

Avista is an energy company based in Spokane, Washington, that generates, transmits, and distributes electricity and natural gas. Its operating utility division, Avista Utilities, provides electricity to 362,000 customers and natural gas to 322,000 customers. Its service territory consists of 30,000 square miles in Washington, Idaho, Oregon, and Utah.[43]

AERC has two subsidiaries, Alaska Electric Light and Power Company (AELPC) and AJT Mining. AELPC is the oldest regulated utility in Alaska and serves the City of Juneau. In 2012, its annual revenue was $42 million with a total base rate of $111 million. It serves 15,900 customers and has sixty full-time employees. AJT Mining is inactive but holds several mining properties.[44]

Among others, the transaction is subject to various regulatory approvals, including the Regulatory Commission of Alaska (RCA); the Washington Utilities and Transportation Commission; the Idaho Public Utilities Commission; the Public Utility Commission of Oregon; the Public Service Commission of the State of Montana; the Federal Energy Regulatory Commission (FERC); and the Department of Justice and the Federal Trade Commission (FTC), under the Hart-Scott Rodino Antitrust Improvements Act of 1976, as amended (HSR).[45]

On December 4, 2013, Avista, AERC, and Avista's merger subsidiary filed a joint application with the RCA requesting approval to complete the merger.[46] The merger agreement provides that either party may terminate the agreement if, subject to certain exceptions, the transaction is not consummated by December 13, 2014. The RCA has until June 2014 to approve or deny the application.[47]

2. Balfour Beatty Infrastructure Partners and Integrys Energy Group

On January 20, 2014, Balfour Beatty Infrastructure Partners (BBIP) agreed to purchase the Upper Peninsula Power Company (UPPCO) from Integrys Energy Group, Inc. for approximately $298.8 million, less certain cost adjustments.[48] BBIP will be purchasing all of UPPCO's electric distribution operations, except for UPPCO's interests in American Transmission Company.[49] Integrys stated that it agreed to sell the utility because the proceeds will enable it to fund generation and infrastructure requirements for its other subsidiaries without issuing new equity.[50] Integrys is expected to realize a one-time after tax gain of $0.60 per share after completion of the transaction.[51]

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43. *Id.*
44. *Id.*
45. Avista Corp. Form 8-K, *supra* note 40.
46. Regulatory Commission of Alaska, Notice of Utility Application (Dec. 11, 2013), *available at* http://rca.alaska.gov/RCAWeb/ViewFile.aspx?id=F2999EBD-2E56-4F83-848D-DE5AC6B5C7B6.
47. Regulatory Commission of Alaska, Docket U-13-197, *available at* http://rca.alaska.gov/RCAWeb/Dockets/DocketDetails.aspx?id=5374d75f-474d-4d67-88cd-f78c06ca7286.
48. *Integrys Energy Group Agrees to Sell Upper Peninsula Power Company to BBIP*, Bus. Wire, Jan. 20, 2014, *available at* http://www.businesswire.com/news/home/20140120005706/en/Integrys-Energy-Group-Agrees-Sell-Upper-Peninsula.
49. *Id.*
50. *Integrys Selling Michigan Utility to UK Firm*, Megawatt Daily (Jan. 22, 2014).
51. Thomas Content, *Integrys to Sell Upper Michigan Utility to British Investment Fund*, Milwaukee J. Sentinel, Jan. 20, 2014, *available at* http://www.jsonline.com/blogs/business/241172401.html.

The transaction requires approval of the Michigan PSC and FERC. The FTC granted early termination of the waiting period under HSR on March 14, 2014.[52]

Integrys, based in Chicago, is an energy holding company focusing on electric and natural gas operations and serves customers in Illinois, Michigan, Minnesota, and Wisconsin.[53] UPPCO serves approximately 52,000 customers in the Upper Peninsula of Michigan.[54] It owns 70 megawatts of hydroelectric generation in Michigan.[55]

BBIP is a British private equity fund focusing on infrastructure investments, such as utilities and other transport and energy assets, across the United States, Europe, and Canada.[56] Currently BBIP has approximately $469 million in committed investments.[57] The purchase of UPPCO is characterized as a long-term investment for BBIP and UPPCO will remain locally managed with its headquarters in Michigan.[58]

3. Fortis Inc. and UNS Energy Corp.

Fortis, Inc. announced on December 11, 2013, that it intends to acquire UNS Energy Corp. (UNS) for $60.25 per share for a total purchase price of $4.3 billion, including the assumption of approximately $1.8 billion of liabilities.[59] Fortis will purchase the UNS shares with cash and neither Fortis nor UNS will incur any debt or encumber any assets to complete this transaction.[60] The transaction has been approved by UNS's common shareholders.[61]

The transaction requires regulatory approval by FERC, the Arizona Corporation Commission (ACC), the Committee on Foreign Investment in the United States, and the FTC under HSR.[62] In their joint application to FERC, Fortis and its subsidiaries and UNS and its subsidiaries asked for expedited treatment. FERC issued its order approving the transaction on April 2, 2014.[63] The parties hope to close the transaction by the end of 2014.[64]

Fortis, based in Newfoundland, is the largest electric and gas utility in Canada, serving more than 2.4 million customers across Canada, the Caribbean,

52. ENERGY FIN. DAILY at 6, Mar. 21, 2014.
53. *Integrys Energy Group Agrees to Sell Upper Peninsula Power Company*, *supra* note 48.
54. *Integrys Selling Michigan Utility to UK Firm*, *supra* note 50.
55. *Id.*
56. *Integrys Energy Group Agrees to Sell Upper Peninsula Power Company*, *supra* note 48.
57. *Id.*
58. *Integrys Selling Michigan Utility to UK Firm*, *supra* note 50.
59. ENERGY FIN. DAILY at 1, Dec. 12, 2013.
60. Fortis Inc., FortisUS Inc., Color Acquisition Sub Inc., UNS Energy Corporation, Tucson Electric Power Company, UNS Electric, Inc., and UniSource Energy Development Company, Application for Authorization for Merger and Disposition of Jurisdictional Facilities, and Request for Waivers of Certain Filing Requirements and Expedited Treatment at 17, Feb. 7, 2014.
61. ENERGY FIN. DAILY at 1, Mar. 27, 2014.
62. ENERGY FIN. DAILY at 1–3, Dec. 12, 2013.
63. Federal Energy Regulatory Commission, Order Authorizing Disposition of Jurisdictional Facilities (Apr. 2, 2014) *available at* http://elibrary.ferc.gov/idmws/file_list.asp.
64. ENERGY FIN. DAILY at 1, Dec. 12, 2013.

and New York State.[65] It has assets valued at approximately C$17.90 billion and revenues totaling C$4.05 billion.

UNS, based in Tucson, is a utility holding company with two operating subsidiaries, Tucson Electric Power Company and UniSource Energy Services, Inc.[66] Through Tucson Electric Power Company, UNS serves approximately 422,000 customers, and it serves an additional 242,000 customers via UniSource Energy Services, Inc.

Fortis announced that UNS will remain based in Tucson under the same management with no immediate changes to employment levels at UNS or rates charged to customers.[67] Further, in an effort to improve UNS's balance sheet, Fortis has pledged to inject $200 million of equity capital into the company.[68]

4. MidAmerican Energy Holdings Company and NV Energy, Inc.

On December 19, 2013, MidAmerican Energy Holdings Company completed its merger with NV Energy, Inc. (NVE).[69] Under the terms of the merger, MidAmerican paid approximately $5.6 billion in cash for all the outstanding common stock of NVE. In order to pay the purchase price, MidAmerican issued $1 billion of common equity to its existing shareholders and $2.594 billion of junior subordinated debentures to certain subsidiaries of Berkshire Hathaway Inc., MidAmerican's parent company; and used $2 billion of cash, including proceeds from senior debt issued by MidAmerican in November 2013.[70]

MidAmerican and NVE received regulatory approval from the Public Utilities Commission of Nevada (PUCN) on December 16, 2013, and from FERC on December 19, 2013.[71]

In order to receive final regulatory approval from PUCN, MidAmerican and NVE agreed to a number of operational and financial conditions, including an agreement to provide a one-time bill credit to NVE's customers of approximately $20 million.[72]

NVE, while now a subsidiary of MidAmerican, will continue to operate as a locally managed company, serving approximately 1.3 million electric power and natural gas customers in Nevada.[73]

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65. ENERGY FIN. DAILY at 3, Feb. 20, 2014.
66. *Id.*
67. Eric Lindeman, *Canadian Giant Fortis to Buy Arizona Utilities for $4.3 Billion*, ENERGY FIN. DAILY at 2, Dec. 12, 2013.
68. *Id.*
69. MidAmerican Energy Holdings Company, Form 8-K, dated Dec. 19, 2013, *available at* http://www.sec.gov/Archives/edgar/data/1081316/000108131613000038/mehc121913form8-kclosing.htm.
70. *Id.*
71. ENERGY FIN. DAILY at 6–8, Dec. 20, 2013.
72. Press Release, MidAmerican Energy Holdings, MidAmerican Energy Holdings Company and NV Energy, Inc. Merger Complete (Dec. 19, 2013), *available at* http://www.midamerican.com/newsroom/aspx/news_print.aspx?id=667.
73. *Id.*

5. Entergy Corporation and ITC Holdings Corp.

State regulatory turmoil regarding the proposed spin-and-merge transaction between Entergy Corporation and ITC Holdings Corp. (ITC) eventually resulted in the parties agreeing to terminate pursuit of the transaction.

Entergy and ITC had encountered resistance to the proposed transaction from, among others, the staffs of the Arkansas Public Service Commission, Louisiana Public Service Commission, Mississippi Public Service Commission (MPSC), and Public Utility Commission of Texas. On October 31, 2013, ITC indicated that it was committed to pursuing the transaction, but that it had the right to withdraw if conditions imposed by regulators became too onerous.[74]

On December 10, 2013, the MPSC agreed with its staff's recommendation and voted unanimously to reject the proposed transaction.[75] One commissioner cited an increase in customer rates, the loss of jurisdiction to FERC over transmission cost of service, and lack of demonstrable quantitative or qualitative benefits to customers as factors leading to the MPSC's decision.[76]

Three days later, Entergy and ITC announced that they had "mutually agreed to end their pursuit of a spin/merger of Entergy's transmission business with ITC." On December 13, the companies terminated their merger agreement and filed to withdraw their applications for approval at FERC and Entergy's state regulators.[77] Entergy announced on December 19, 2013, that its transmission system had been integrated into the Midwest Independent System Operator regional transmission organization.[78]

6. TECO Energy, Inc. and New Mexico Gas Company

In May 2013, TECO Energy, Inc. and Continental Energy Systems, LLC entered into a stock purchase agreement providing for the acquisition by TECO of Continental's subsidiary, New Mexico Gas Company (NMGC) for $950 million, including assuming $200 million of NMGC's outstanding debt.[79] The merger will increase TECO's customer base by 509,000[80] and diversify its geographic footprint, which is currently centered primarily in Florida and the Southeast.

In connection with the stock purchase agreement, TECO filed an application for approval of the acquisition with the New Mexico Public Regulation Commission (NMPRC) in July 2013. At that time, the parties had anticipated closing in

74. Dan Testa, *ITC Committed to Entergy Deal, but Maintains Its Right to Exit*, ENERGY FIN. DAILY at 1, 4, Nov. 1, 2013.

75. The full text of the order is available at: http://www.psc.state.ms.us/InsiteConnect/InSiteView.aspx?model=INSITE_CONNECT&queue=CTS_ARCHIVEQ&docid=320246.

76. Housely Carr, *Entergy/ITC Spin-and-Merge Plan Rejected by PSC*, MEGAWATT DAILY, Dec. 11, 2013.

77. Press Release, Entergy, *Entergy, ITC Discontinue Pursuit of Transmission Spin/Merger* (Dec. 13, 2013), *available at* http://www.entergy.com/News_Room/newsrelease.aspx?NR_ID=2817.

78. *Id.*

79. Press Release, TECO Energy, Inc., TECO Energy Announces Agreement to Acquire New Mexico Gas Company (May 28, 2013), *available at* http://www.tecoenergy.com/news/article/index.cfm?article=722.

80. *Id.*

the first quarter of 2014. In January 2014, a procedural schedule, which is expected to result in the transaction closing in the third quarter of 2014, was adopted at the NMPRC.[81] The stock purchase agreement between TECO and Continental provides that the parties may terminate the agreement if the acquisition is not consummated by May 25, 2014, subject to an up to four-month extension to obtain required regulatory approvals.[82]

7. Fortis Inc. and CH Energy Group

As discussed in the 2013 edition of *Recent Developments*, in February 2012 Fortis announced an agreement to acquire CH Energy Group. On June 27, 2013, Fortis and CH Energy announced completion of the acquisition.[83] Completion followed by one day the issuance of a written order approving the transaction by the New York Public Service Commission (NYPSC), which was the last remaining regulatory approval required.[84] The NYPSC approved the transaction despite the recommendation of two administrative law judges (ALJs) in May 2013 that the transaction be rejected. The ALJs cited "unfavorable experiences" in prior takeovers of New York utility companies by foreign entities.

Subsequent to the issuance of the ALJs' decision, Fortis made concessions in addition to those contained in its January 2013 settlement with the staff of the NYPSC and certain intervenors in the NYPSC proceeding. Based on those concessions, which included extending an electric and natural gas distribution rate freeze to three years instead of one year, the NYPSC unanimously voted to approve the transaction on June 13, 2013.[85]

CH Energy and its principal subsidiary, Central Hudson Gas & Electric Corporation, are now subsidiaries of Fortis.

8. UIL Holdings and Philadelphia Gas Works Operations

On March 2, 2014, UIL Holdings Corporation, a natural gas and electric utility holding company, entered into a definitive asset purchase agreement to acquire certain assets and liabilities of Philadelphia Gas Works Operations (PGW), a municipally owned natural gas utility, from the City of Philadelphia.[86] For an initial purchase price of $1.86 billion, subject to adjustment, and the as-

81. TECO Energy, Inc., Form 8-K, dated Jan. 30, 2014, *available at* http://www.sec.gov/Archives/edgar/data/350563/000119312514027530/d665632d8k.htm.

82. TECO Energy, Inc., Form 10-Q for the quarterly period ended Sept. 30, 2013, *available at* http://www.sec.gov/Archives/edgar/data/96271/000119312513422692/d594449d10q.htm.

83. Press Release, CH Energy Group, Inc., Fortis Inc. and CH Energy Group Close Transaction (June 27, 2013), *available at* http://www.centralhudson.com/about_us/news/june27_13.html.

84. State of New York Public Service Commission, Joint Petition of Fortis Inc. et al. and CH Energy Group, Inc. et al. for Approval of the Acquisition of CH Energy Group, Inc. by Fortis Inc. and Related Transactions, CM 12-M-0192 (June 26, 2013), *available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A55ECCE9-C3B2-4076-A934-4F65AA7E79D1}.

85. Energy Fin. Daily at 4 (June 28, 2013).

86. Press Release, UIL Holdings Corporation, UIL Holdings to Acquire Philadelphia Gas Works Operations (Mar. 3, 2014), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=102834&p=irol-newsArticle_print&ID=1905166&highlight.

sumption of certain liabilities, UIL will purchase PGW's natural gas supply, distribution, liquefaction, and vaporization business and operations.[87] The transaction has been unanimously approved by UIL's board of directors.[88]

The transaction must be approved by the Pennsylvania Public Utility Commission and the Philadelphia City Council.[89] The asset purchase agreement is structured so that UIL may terminate the agreement if the Council has not approved the transaction by July 15, 2014; the agreement will terminate automatically if it is not approved by December 31, 2014.[90]

The acquisition will face other obstacles as well: PGW is a not-for-profit entity and does not have rates set by rate cases but rather rates that are based on cash-flows.[91] Further, the Utility Workers Union of America, Local 686, which services PGW, has opposed the merger.[92] However, as a part of the asset purchase agreement, UIL has agreed to retain PGW employees, forego any layoffs for three years, and employ at least 1,350 people in the City of Philadelphia.[93]

UIL, headquartered in New Haven, Connecticut, serves over 700,000 customers in New England and has $5 billion in assets. UIL is the parent company of the United Illuminating Company, the Southern Connecticut Gas Company, the Connecticut Natural Gas Corporation, and the Berkshire Gas Company.[94] PGW was founded in 1836 and distributes natural gas to approximately 500,000 customers in the City of Philadelphia.[95]

87. UIL Holdings Corporation, Form 8-K, dated Mar. 2, 2014, *available at* http://www.sec.gov/Archives/edgar/data/1082510/000119312514078861/d687617d8k.htm.

88. UIL Holdings to Acquire Philadelphia Gas Works Operations, *supra* note 86.

89. Sarah Smith, *UIL, Varied Stakeholders Prepare for Complicated Transition for PGW*, SNL FIN., Mar. 3, 2014).

90. UIL Holdings Corporation, Form 8-K, dated Mar. 2, 2014, *available at* http://www.sec.gov/Archives/edgar/data/1082510/000119312514078861/d687617d8k.htm.

91. Smith, *supra* note 89.

92. Sarah Smith, *Union Mounts Campaign Against Philadelphia Gas Works Sale*, SNL FIN., Mar. 13, 2014.

93. UIL Form 8-K, *supra* note 90.

94. UIL Holdings to Acquire Philadelphia Gas Works Operations, *supra* note 86.

95. *Id.*