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BROKER DEALER

FINRA Provides Guidance on Rules Governing Communications with the Public

The Securities and Exchange Commission approved a rule change by the Financial Industry Regulatory Authority pursuant to which National Association of Securities Dealers (NASD) Rules 2210 and 2211 and NASD Interpretive Materials 2210-1 and 2210-3 through 2210-8 are to be adopted as FINRA Rules 2210 and 2212 through 2216 (the Communications Rules). The Communications Rules become effective on February 4. To provide additional guidance on compliance with the Communications Rules, FINRA has published a set of questions and answers on its website. The questions and answers cover a number of topics, including internal communications, transitional filing issues, new member firms, retail structured products, recommendations and public appearances.

FINRA Regulatory Notice 13-03 is available here. FINRA Rule 2210 Questions and Answers are available here.

FINRA Requests Comment on Proposed Rule Requiring Disclosure of Conflicts of Interest in Recruitment Incentives

Member firms often offer financial incentives when recruiting registered representatives. The Financial Industry Regulatory Authority has stated that it believes such financial incentives raise conflicts of interest that often are not disclosed when registered representatives ask their former customers to transfer to their new firm. Thus, FINRA is seeking comment on a proposed rule that would require a recruiting member firm to make detailed disclosure of the recruitment incentives offered to a registered representative who has been recruited. Comments must be submitted to FINRA by March 5.

FINRA Regulatory Notice 13-02 is available here.

Proposed Rule Change to Amend FINRA Rule Regarding Investor Education and Protection Disclosures

The Financial Industry Regulatory Authority filed a proposed rule change to amend FINRA Rule 2267 to require a member firm to include a description of and link to FINRA BrokerCheck on its website, social media page and any comparable Internet presence. The BrokerCheck description and link would also need to be included on the website, social media page and any comparable Internet presence maintained by or on behalf of any person associated with a member that relate to the firm's investment banking or securities business. FINRA would provide members with the text description and web address format for the link to BrokerCheck. FINRA will publish a Regulatory Notice announcing the effective date of the proposed rule change no later than 60 days following approval by the Securities and Exchange Commission of the proposed rule. FINRA will provide guidance regarding the prominence and placement of the BrokerCheck description and link in such Regulatory Notice.

The FINRA Rule Filing is available here.

NYSE Eliminates Certain Equities Account Type Indicators

The New York Stock Exchange LLC and NYSE MKT LLC have eliminated certain equities Account Type Indicators (ATIs). As of October 15, 2012, member organizations were no longer required to use the eliminated ATIs. The exchanges have provided information regarding functional ATIs and related definitions, as well as updated order capacity codes and a guide to certain OATS reporting issues (Attachments). After February 1, 2013, member organizations must stop using the eliminated ATIs and must use only the functional ATIs.

NYSE Information Memo 12-25 is available here. Attachments to Information Memo 12-25 are available here.

LITIGATION

Second Circuit Holds Section 16(b) Inapplicable to Different Classes of Common Stock

The US Court of Appeals for the Second Circuit has held that Section 16(b) of the Securities Exchange Act of 1934 does not apply to a transaction where an insider buys and sells shares of different types of stock in the same company when those securities are separately traded, nonconvertible, and have different voting rights.

Defendant, a director of Discovery Communications, Inc., purchased Discovery's "Series A" stock and sold its "Series C" stock within a thirteen-day period in 2008. Plaintiff asserted a claim under Section 16(b), arguing that the defendant was required to disgorge his profits. The District Court dismissed the complaint.

In affirming the District Court opinion, the Second Circuit reasoned that Congress's use of the singular term "any equity security" in the statute supported an inference that transactions involving different equity securities cannot be paired. The Second Circuit rejected plaintiff's argument that the stocks were the same security because they were "economically equivalent." Instead, the court found that the shares were distinct in "substance" because Series A conferred voting rights and Series C did not. Additionally, the Second Circuit held that because the two securities were not convertible, the principle of "economic equivalence" was irrelevant and the securities could not be paired under Section 16(b).

Plaintiff also failed to persuade the court that his claim was viable because the two securities were "sufficiently similar." Although the court acknowledged the plausibility of this interpretation because Section 16(b) is not explicit that purchases and sales must be of stocks in the same class, it "decline[d] to go down this road absent SEC direction."

Gibbons v. Malone, No. 11-3620-cv (2d Cir. Jan 7, 2013).

Court of Appeals Affirms Validity of New York Choice-of-Law Provisions

The New York Court of Appeals has held that where a contract contains a New York choice-of-law provision and is otherwise subject to New York General Obligations Law Section 5-1401, New York substantive law will apply and the court need not conduct a conflict-of-laws analysis.

The parties in the case were Brazilian entities. Plaintiff purchased $14 million of defendant's global notes. The relevant guarantee contained a choice-of-law provision providing that it would be governed by New York law. Plaintiff commenced an action after interest payments ceased and it failed to receive payment of the global note principal. Defendant moved for summary judgment contending that New York's choice-of-law principles should apply to the guarantee, resulting in the application of Brazilian law which, defendant argued, would render the guarantee void. Defendant asserted that because the guarantee lacked an express exclusion of New York's conflict-of-laws principles, the court must conduct a conflicts analysis. Plaintiff also moved for summary judgment.

The New York Court of Appeals found that where a contract was governed by New York General Obligations Law Section 5-1401, which generally covers all commercial contracts involving not less than $250,000, and contains a New York choice-of-law provision, New York substantive law will apply even if the contract did not expressly exclude New York choice-of-law principles. Thus, the court can apply New York substantive law without

conducting a conflict-of-laws analysis. The court added that requiring a court to engage in a conflict-of-laws analysis despite the parties' expressed desire to apply New York law would frustrate the Legislature's goal of eliminating uncertainty regarding governing law.

IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A., No. 191, 2012 N.Y. LEXIS 3555 (December 18, 2012).

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