

BROKER-DEALER

FINRA New Rule 3241 Becomes Effective February 15

On February 15, Financial Industry Regulatory Authority (FINRA) new Rule 3241 — “Registered Person Being Named a Customer’s Beneficiary or Holding a Position of Trust for a Customer” — becomes effective. The new rule limits any associated person of a member firm who is registered with FINRA (each a “registered person”) from being named a beneficiary, executor or trustee, or to have a power of attorney or similar position of trust for or on behalf of a customer.

Under Rule 3241, all member firms must affirmatively address registered persons being named beneficiaries or holding positions of trusts for customers. The rule requires the member firm with which the registered person is associated, upon receiving required written notice from the registered person, to review and approve or disapprove the registered person assuming such status or acting in such capacity. The rule does not apply where the customer is a member of the registered person’s “immediate family.”

Rule 3241 provides that a registered person must decline:

1. being named a beneficiary of a customer’s estate or receiving a bequest from a customer’s estate upon learning of such status, unless the registered person provides written notice upon learning of such status and receives written approval from the member firm prior to being named a beneficiary of a customer’s estate or receiving a bequest from a customer’s estate; and
2. being named as an executor or trustee or holding a power of attorney or similar position for or on behalf of a customer unless:
 - a. upon learning of such status, the registered person provides written notice and receives written approval from the member firm prior to acting in such capacity or receiving any fees, assets or other benefit in relation to acting in such capacity; and
 - b. the registered person does not derive financial gain from acting in such capacity other than from fees or other charges that are reasonable and customary for acting in such capacity.

FINRA notes that to provide flexibility to member firms, Rule 3241 does not prescribe any specific form of written notice and instead permits a member firm to specify the required form of written notice for its registered persons. A member firm must (1) perform a reasonable assessment of the risks created by the registered person’s assuming such status or acting in such capacity, including, but not limited to, an evaluation of whether it will interfere with or otherwise compromise the registered person’s responsibilities to the customer; and (2) make a reasonable determination of whether to approve the registered person’s assuming such status or acting in such capacity, to approve it subject to specific conditions or limitations, or to disapprove it.

The rule also does not affect the applicability of other rules (e.g., FINRA Rule 2150 regarding improper use of customer securities or funds). FINRA notes that a registered person being named as a beneficiary or to a position

of trust without his or her knowledge would not violate the rule; however, the registered person must act consistent with the rule upon learning that he or she was named as a beneficiary or to a position of trust.

[Rule 3241 text.](#)

[FINRA's regulatory notice addressing the new rule.](#)

FINRA Proposes Amendments to Private Placement Filer Form

On January 27, FINRA proposed amendments to its Private Placement Filer Form (Filer Form), which members are required to complete upon submission of private placement filings under FINRA Rules 5122 and 5123.

The Filer Form has three main components: (1) the "Participating Member Information" section, which seeks information about the members that are selling the private placement; (2) the "Issuer Information" section, which captures basic information about the issuer; and (3) the "Offering Information" section, which seeks information about the offering. The proposed changes to the Filer Form would add or clarify questions or other information requested in the Offering Information and Issuer Information sections to address three key categories of offering information: (1) contingency offerings; (2) the disciplinary history of the issuer, its principals and related parties; and (3) the use of proceeds. The proposed changes would be as follows:

- **Contingency Offerings** - The proposed changes to the Filer Form would add three additional questions if the offering is a contingency: (1) a request for the member to provide the date by which the contingency must be met; (2) a question asking if there have been any changes to the original terms of the contingency during the course of the offering (e.g., extension of the date by which the contingency must be met); and (3) a question regarding whether "the subscription process involves your firm receiving or transmitting investor funds in the offering."
- **Disciplinary History** - The proposed changes to the Filer Form would add three additional questions if the issuer has disciplinary history: (1) the type of action or proceeding; (2) the approximate year that the event was initiated; and (3) the status of the event.
- **Use of Proceeds** - Additionally, the proposed changes to the Filer Form would reformulate the current question for use of proceeds by asking whether the issuer "intends to" use (rather than is "able to" use) offering proceeds to make or repay loans to, or purchase assets from, the listed persons.

FINRA also proposes to add a new question on whether the filing is subject to FINRA Rule 3280 for private securities transactions of an associated person. In addition, FINRA proposes updates to existing questions regarding a member's date of first sale or offer, the Securities Act registration exemptions that apply, and what type of documents are being filed with FINRA.

Comments on the proposed amendments must be submitted within 21 days following their publication in the Federal Register.

[The full text of the proposed amendments.](#)

SEC Requests Comment on Potential Money Market Fund Reform Options Highlighted in President's Working Group Report

On February 4, the Securities and Exchange Commission published a request for public comment (Comment Request) on potential reform measures to improve the resilience of money market funds, as highlighted in a report of the President's Working Group on Financial Markets issued in December 2020 (Report).

In the Report, the President's Working Group on Financial Markets noted that certain short-term funding markets experienced stress in March 2020 amid economic concerns related to the onset of the COVID-19 pandemic. Ultimately, the President's Working Group on Financial Markets concluded that more work is needed to reduce the risk that structural vulnerabilities in prime and tax-exempt money market funds will lead to or exacerbate stresses in short-term funding markets. The Report discusses various reform measures that policymakers could consider including (1) removal of the tie between Money Market Fund (MMF) liquidity and fee and gate thresholds; (2) reform of conditions for imposing redemption gates; (3) minimum balance at risk requirements; (4) money market fund liquidity management; (5) creating countercyclical weekly liquid asset requirements; (6) floating NAVs for all

prime and tax-exempt money market funds; (7) swing pricing requirement; (8) capital buffer requirements; (9) requiring liquidity exchange bank membership; and (10) potential new requirements governing sponsor support.

The SEC is requesting public comment on the Report, including the effectiveness of the previously-enacted money market fund reforms and of implementing the potential policy measures described in the Report.

The public comment period will remain open for 60 days following publication of the comment request in the Federal Register.

[The Comment Request, including the Report.](#)

2021 Report on FINRA's Examination and Risk Monitoring Program

On February 1, the Financial Industry Regulatory Authority (FINRA) published its 2021 Report on FINRA's Examination and Risk Monitoring Program (Report). The annual Report summarizes various findings and observations from recent FINRA examinations of its member firms on a range of topics and notes certain areas of the future focus of FINRA examinations in 2021. These included the following:

- **Regulation Best Interest (Reg BI) and Form CRS** – The Report notes FINRA's focus on assessing whether member firms have established and implemented policies, procedures, and a system of supervision reasonably designed to comply with Reg BI and Form CRS. The Report notes that in 2021, FINRA intends to expand the scope of Reg BI and Form CRS reviews and testing to effect a more comprehensive review of firm processes, practices and conduct.
- **Consolidated Audit Trail (CAT)** – As noted in FINRA's Regulatory Notice 20-31 ([Notice 20-31](#)), all member firms that receive or originate orders in National Market System (NMS) stocks, over-the-counter (OTC) equity securities or listed options must report to CAT. FINRA notes that, while it is in the early stages of reviewing for compliance with certain CAT obligations, member firms should review the list of recommended steps provided in Notice 20-31 in assessing the adequacy of their CAT compliance programs.
- **Cybersecurity** – The Report notes that member firms' ongoing and increasing reliance on technology for many customer-facing activities, communications, trading, operations, back-office and compliance programs — especially in our current remote work environment — requires them to address new and existing cybersecurity risks, including risks relating to cybersecurity-enabled fraud and crime. FINRA reminds firms to review cybersecurity programs for compliance with business continuity plan requirements, as well as the SEC's Regulation S-P Rule 30, which requires member firms to have policies and procedures addressing the protection of customer records and information. FINRA notes in its exam observations that issues occurred relating to (1) data loss prevention programs; (2) branch policies; (3) vendor controls; (4) training; (5) access management; (6) inadequate change management supervisions; and (7) limited testing and system capacity.
- **Communications with the Public** – The Report notes that FINRA continues to evaluate member firms for compliance with FINRA Rule 2210, which includes principles-based content standards that are designed to apply to ongoing developments in communications technology and practices. FINRA notes that it is increasingly focused on communications relating to certain new products and how member firms supervise, comply with recordkeeping obligations, and address risks relating to new digital communication channels. Specifically, the Report notes the focus includes risks associated with app-based platforms with interactive or "game-like" features that are intended to influence customers, their related forms of marketing, and the appropriateness of the activity that they are approving clients to undertake through those platforms. FINRA notes in its exam observations that issues occurred relating to (1) deficient digital assets communications; (2) misrepresentations in cash management accounts communications; (3) insufficient supervision and recordkeeping for digital communication; and (4) no written supervisory procedures (WSPs) and controls for communications that use non-member or "doing business as" names.
- **Best Execution** – The Report notes that FINRA conducted a targeted review of member firms that do not charge commissions for customer transactions ("zero commission" trading) to evaluate the impact that not charging commissions has or will have on member firms' order-routing practices and decisions, and other aspects of member firms' business. FINRA notes in its exam observations that issues occurred relating to (1) not comparing the quality of the execution obtained via firms' existing order-routing and execution

arrangements against the quality of execution they could have obtained from competing markets; (2) no review of certain order types; (3) no evaluation of required factors; (4) not considering and addressing potential conflicts of interest relating to routing of orders; and (5) not providing material disclosures in order-routing reports, such as the specific, material aspects of the non-directed order flow routed to firms' trading desks.

- **Variable Annuities** – The Report notes that FINRA continues to evaluate variable annuity exchanges under FINRA Rule 2330 and, when applicable, under Reg BI. In early 2020, FINRA engaged in an informal review of buyout WSPs, training, and disclosures for member firms whose customers were impacted by a recent announcement from an insurer with sizable variable annuity assets, stating it will terminate servicing agreements, cancel certain trail commissions for registered representatives, and provide buyout offers to its variable annuity customers. FINRA notes in its exam observations that issues occurred relating to (1) not addressing buyouts within firms' systems of supervision; (2) not reasonably supervising recommendations of exchanges that were inconsistent with the customer's objectives and time horizon; (3) not performing sufficient review of source of funds used to purchase new variable annuities; and (4) not conducting training for registered representatives and supervisors.

[Complete coverage of the topics covered in the Report.](#)

FINRA Modifies TRACE Dissemination Protocols for Specified Pool Transactions

On February 2, the Financial Industry Regulatory Authority (FINRA) issued a regulatory notice (Regulatory Notice 21-02) on modifications to its Trade Reporting and Compliance Engine (TRACE) dissemination protocols applicable to agency pass-through mortgage-backed securities and Small Business Administration (SBA)-backed asset-backed securities traded in specified pool transactions.

FINRA disseminates a Reference Data Identifier (RDID) for specified pool transactions. The RDID represents approximated values for underlying data elements, such as the original loan-to-value (LTV) ratio, original maturity and coupon, widely used to project cash flows and prepayment rates.

Beginning on May 17, FINRA is modifying the convention for rounding one underlying data element, the original LTV ratio, for purposes of the groupings that are represented by the RDIDs disseminated through TRACE for specified pool transactions.

LTV ratios will be segmented into eight categories between zero and 121+, and FINRA will show the LTV as the upper limit of the applicable category, as follows:

- for an LTV up to 20 percent, the LTV will be shown as 20 percent (e.g., an LTV of 12 percent will be shown as 20 percent);
- for an LTV between 21 percent and 40 percent, the LTV will be shown as 40 percent (e.g., an LTV of 21 percent will be shown as 40 percent);
- for an LTV between 41 percent and 60 percent, the LTV will be shown as 60 percent (e.g., an LTV of 60 percent will be shown as 60 percent);
- for an LTV between 61 percent and 80 percent, the LTV will be shown as 80 percent (e.g., an LTV of 70 percent will be shown as 80 percent);
- for an LTV between 81 percent and 93 percent, the LTV will be shown as 93 percent (e.g., an LTV of 90 percent will be shown as 93 percent);
- for an LTV between 94 percent and 100 percent, the LTV will be shown as 100 percent (e.g., an LTV of 100 percent will be shown as 100 percent);
- for an LTV between 101 percent and 120 percent, the LTV will be shown as 120 percent (e.g., an LTV of 105 percent will be shown as 120 percent); and

- for an LTV of 121 percent or greater, the LTV will be shown as 121+ (e.g., an LTV of 125 percent will be shown as 121+).

The amendment will become effective on May 17.

[Regulatory Notice 21-02.](#)

ANTITRUST

FTC Releases Revised Hart-Scott-Rodino Filing Thresholds for 2021

The Federal Trade Commission (FTC) recently announced new filing thresholds that will apply to mergers and acquisitions under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, as amended (the Act). These new thresholds will go into effect on March 4.

Under the revised notification thresholds, transactions valued above \$92 million will require HSR notification when they satisfy other requirements of the Act. This threshold is a decrease from the current threshold of \$94 million. The FTC adjusted the filing thresholds for larger transactions as well. The current \$188 million threshold will be decreased to \$184 million, and the current \$940.1 million threshold will be decreased to \$919.9 million. Under the new thresholds, the filing fee for notifiable transactions valued:

- 1) above \$92 million but less than \$184 million, remains at \$45,000;
- 2) above \$184 million but less than \$919.9 million, remains at \$125,000; and
- 3) above \$919.9 million remains at \$280,000.

Transactions valued between \$92 million and \$184 million also must satisfy the “size of person” test in addition to the “size of transaction” test for a filing to be required. The FTC also announced new size of person thresholds. Under the new thresholds, one party to the transaction must have net sales or total assets of at least \$18.4 million, and another party to the transaction must have net sales or total assets of at least \$184 million. Transactions valued greater than \$368 million under the HSR rules will require a filing regardless of the size of the persons involved.

[The FTC’s announcement on the revised thresholds.](#)

FTC and DOJ Temporarily Suspend Early Termination of Hart-Scott-Rodino Waiting Periods

HSR Early Terminations Suspended — On February 4, the Federal Trade Commission (FTC) announced that it was temporarily suspending the grant of Early Terminations of the 30-day Waiting Period for mergers and acquisitions that require notification under the Hart Scott Rodino Act. This is virtually unprecedented. It is also controversial. The suspension prompted a dissenting statement from two sitting FTC commissioners. The HSR statutory Waiting Period is 30 days from the date the parties to a transaction submit HSR notification reports to the FTC and Department of Justice (DOJ). During the Waiting Period, the parties are legally barred from closing the transaction while the FTC and DOJ do a cursory antitrust review of the deal. The Waiting Period is terminated early for a large proportion of HSR filings — often in as little as 10 days — where it is obvious that no antitrust issues are raised. Parties in time-sensitive deals frequently rely on early termination in setting a timeline for closing. The FTC announced that it was suspending Early Terminations so that it could review the processes and procedures by which such terminations are granted. In making the announcement, the FTC referred to the transition to the new presidential administration and the “unprecedented volume of HSR filings” that it has received in the new fiscal year. The announcement gave no date for the resumption of Early Terminations, although the FTC said the suspension would be brief. The announcement appears to formalize a *de facto* suspension of Early Terminations that began in mid-January. The only other time in recent memory when Early Terminations were suspended occurred in March 2020, at the beginning of the Covid lockdown, when the FTC had to shift to an electronic filing platform to permit parties to make HSR filings electronically and to permit the FTC and DOJ Staff to review them remotely.

[The FTC's announcement on the suspension.](#)

[The dissenting statement regarding the suspension.](#)

UK DEVELOPMENTS

FCA Updates Webpage on Operation of UK MiFIR Transparency Regime

On February 2, the UK Financial Conduct Authority (FCA) updated its webpage on its supervisory statement on the operation of the transparency regime under the retained EU law version of the Markets in Financial Instruments Regulation (UK MiFIR) following the United Kingdom's departure from the European Union (the Webpage).

In the Webpage, the FCA explains that UK firms will soon be capable of meeting their obligations under the share trading obligation on Swiss exchanges, and UK trading venues will be able to offer trading in Swiss shares. The FCA confirms how aspects of UK markets regulation will apply to Swiss shares that resume trading on UK trading venues.

The FCA advises that Swiss shares that resume trading on UK trading venues will be treated as if they are trading for the first time on a UK trading venue to calibrate the pre- and post-trade transparency regime. An estimate will be made of the relevant parameters based on the characteristics of the shares to apply from their first day of trading. These estimates will then be updated after six weeks based on data from the first four weeks of trading in the United Kingdom.

A similar approach will be applied for tick sizes, with an initial estimate updated after six weeks by a calculation based on data for the first four weeks of trading in the United Kingdom. These figures may result in different tick sizes than the ticks currently implemented for trading of these instruments on exchanges in Switzerland. UK trading venues will be authorized to use the minimum tick size that applies in Switzerland where that is smaller than the minimum tick size based on the figures for the average daily number of transactions that the FCA publishes through its Financial Instruments Transparency System.

The Webpage replaces similar statements made by the FCA in March and October 2019. The FCA advises that the current approach may be revised as market conditions develop.

[The Webpage.](#)

HMT Announces Buy-Now-Pay-Later Products to be Regulated by the FCA

On February 2, HM Treasury (HMT) announced that interest free buy-now-pay-later (BNPL) products will be regulated by the Financial Conduct Authority (FCA).

The announcement came following a recommendation from Christopher Woolard, the former FCA interim CEO, in light of his review of the unsecured credit market (the Woolard Review).

The Woolard Review identifies potential harms to consumers caused by BNPL products, which include the following:

- viewing BNPL products as a payment technology rather than credit;
- believing BNPL products are already regulated; and
- finding it difficult to make an informed decision as a result of the method BNPL products are promoted.

The FCA supports the Woolard Review and believes it will benefit consumers and the wider credit market.

The recommendation will be brought forward to Parliament to discuss with legislation to follow.

[HMT's announcement.](#)

For additional coverage on financial and regulatory news, visit [Bridging the Week](#), authored by Katten's [Gary DeWaal](#).

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