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Structured Thoughts

News for the financial services community.

IN THIS ISSUE:

Sales of VIX-Linked ETPs – Back to Basics for FINRA

FINRA used a misselling case to remind member firms of certain fundamentals, including the importance of implementing a new product approval process, reasonable diligence processes prior to making recommendations, suitability policies, training, supervisory procedures, and monitoring sales materials to ensure that these are fair and balanced.

In Regulatory Notice 17-32, FINRA takes a "back to basics" approach to sales of exchange-traded products ("ETPs") designed to track futures on the Chicago Board Options Exchange Volatility Index ("VIX"). FINRA focused on unsuitable sales of complex products to retail investors who may have purchased ETPs linked to VIX futures as "buy and hold" investments.[1]

FINRA has characterized ETPs linked to VIX futures indices as complex products.[2] FINRA again reminded firms that "recommendations [of complex products] to customers must be based on a full understanding of the terms, features and risks of the product, sales materials must be fair and accurate and firms must have reasonable supervisory procedures in place to ensure that these obligations are met."[3]

Complexities of VIX-Linked ETPs

There are several characteristics of ETPs linked to VIX futures indices that may not be well understood by a retail investor. Instruments linked to VIX futures indices are different than instruments linked to the performance of the VIX Index. While the VIX Index tends to rise while the stock market falls, thus possibly being useful as a hedge against a

[1] Regulatory Notice 17-32, "Volatility-Linked Exchange-Traded Products" (Oct. 16, 2017) ("Notice 17-32"), can be accessed here.
[2] *See* Regulatory Notice 12-03, "Heightened Supervision of Complex Products" (Jan. 2012), which is available here.
[3] *See* Notice 17-32.

falling equity market, ETPs linked to VIX futures indices may behave differently. This is because, in the process of rolling off expiring short-term contracts and replacing them with newer contracts with a later maturity date in order to maintain a constant maturity for included contracts, the VIX futures indices may pay more for the replacement contracts than the ones being sold. This cost to the VIX futures index results in a negative roll yield, lowering the index level. A futures market in which it costs more to replace a futures contract on the VIX with one of the same maturity is said to reflect a futures market in "contango."[4]

In a contango market, a VIX futures index will not correlate with the VIX Index. Consequently, an investor seeking the protection against a falling equity market associated with the VIX Index may not understand that an ETP linked to an index of VIX futures will not provide that protection. As an example, FINRA notes that "over a recent 12-month period, while the VIX was down around six percent, one volatility ETP tracking the short-term VIX futures index lost more than 70% of its value."[5]

FINRA's Expectations

FINRA reiterated its concerns with respect to complex products, asking member firms to consider the following with respect to recommendations and sales of ETPs linked to VIX futures indices:

- Are the guidelines for the heightened scrutiny and supervision for complex products discussed in Notice 12-03 being followed?
- Has the firm performed reasonable diligence such that the firm can make a suitable recommendation of the ETP?
- Is there a reasonable basis for believing that a recommendation of an ETP linked to a VIX futures index is suitable for a particular customer?
- Is the associated person recommending the product to the customer capable of explaining, at a minimum, the product's main features and associated risks?
- Are the sales materials fair and balanced?
- Does the firm have in place supervisory systems reasonably designed to achieve compliance with applicable securities laws and regulations, including the applicable FINRA rules?
- Have the registered representatives and supervisors been trained to understand the terms, features, and risks of the ETPs, as well as the factors that would make those products suitable or unsuitable for certain investors?[6]

Conclusion

Notice 17-32 is a loud and clear statement that FINRA will be on the alert for unsuitable recommendations of complex products, including sales of ETPs linked to VIX futures indices. Firms recommending and selling these products should ensure that they perform reasonable diligence on these products so that they can fulfill their obligations in respect of complex products outlined in FINRA Notice 12-03.[7]

Recent SEC and FINRA Actions Relating to Survivor's Options

Brief Overview

A seasoned investment banker established a hedge fund and solicited terminally ill patients to open brokerage accounts as joint tenants with rights of survivorship. The hedge fund used the brokerage accounts to purchase at a discount bonds and certificates of deposit (CDs) with a survivor's option feature. As readers of this publication know, a survivor's option is frequently found in many retail structured products, particularly structured CDs and certain "lightly structured" rate-linked

[4] In contrast, if it costs less to replace the existing contracts with new contracts of the same maturity, the market is said to be in "backwardation."
[5] Notice 17-31 at n.5.
[6] *See* Notice 17-32 at pp. 3-4.
[7] In a related enforcement action, a firm was found to be making unsuitable recommendations of ETPs linked to VIX futures indices. For example, sales were made to customers "with the mistaken belief that such products could be used as a long-term hedge on their customers' equity positions in the event of a market downturn." Notice 17-32 at n.7.

notes.[8] Upon the death of a terminally ill patient, the investment banker exercised the survivor's option by redeeming the relevant CDs or securities at par value, and assigned the profits to the hedge fund.

The Securities and Exchange Commission (SEC) filed charges against those behind this investment strategy for possible securities law violations. An SEC administrative law judge recently dismissed these charges, explaining that there was "nothing necessarily illegal about using, or even exploiting, a contractual loophole. There [was] also nothing illegal about profiting from the death of the terminally ill, even if some might view it as unsavory."[9]

As an update to our previous article,[10] this article describes the investment strategy, explains the contractual loophole, underscores how the relevant SEC and FINRA[11] rules were applied, and describes several potential survivor's option safeguards to issuers.

The Investment Strategy

Donald F. Lathen Jr.'s (Jay Lathen) novel investment strategy involved purchasing at a discount medium- and long-term bonds and CDs with a survivor's option, and exercising the option by redeeming these instruments upon their beneficial owner's death. A survivor's option, also known as a death put (or "estate option"), is "an optional redemption feature in a debt instrument that allows a beneficiary of a joint account to sell (or put) the instrument back to the issuer upon the death of a joint account owner. This feature requires the issuer … to repay the full principal amount of the investment prior to maturity upon the death of a beneficial owner, so long as certain requirements are met."[12]

Since a holder had to die to activate the survivor's option, Lathen solicited terminally ill patients with six months or less to live ("Participants") from hospices and from referrals from social workers. He paid each Participant $10,000 in cash to sign a Participant Agreement ("PA") and agree to open a joint tenancy brokerage account that would be funded by various individual investors. Each Participant would also issue in Lathen's favor a limited power of attorney ("POA") to open and manage the account under a joint tenancy with right of survivorship arrangement. This meant that, upon the death of a Participant, the rights to the account would vest solely to Lathen and not to the Participant's estate. Lathen made sure to disclose the investment strategy to the Participants, and encouraged them to ask questions before signing the PAs.

To scale up the investment strategy, Lathen created the hedge fund Eden Arc Capital Partners, LP (the "Fund") as a financing vehicle, and Eden Arc Capital Management, LLC as investment adviser to the Fund (the "Fund Adviser"). Lathen and the Fund entered into a discretionary line agreement to finance the investment strategy, with Lathen executing a promissory note in favor of the Fund with the accounts as collateral. The investment strategy and its regulatory risks were disclosed to Fund investors through the Fund's private placement memorandum.

Lathen also collected additional funds through margin loans from brokerage firms. He used all of the funds he obtained to purchase CDs and bonds in the secondary market at a discount, and awaited the Participants' deaths to trigger the survivor's option. Once a Participant died, Lathen would exercise the survivor's option by filing a claim with the applicable brokerage firm to redeem the relevant CDs and bonds at par value. Meanwhile, Lathen used the POA to freely and frequently transfer CDs and bonds between accounts, especially if a Participant recovered from an illness or if his or her death was no longer imminent. This allowed Lathen to obtain profits by being able to redeem the instruments as early as possible. He did not make his redemption requests at periodic intervals, and did not attempt to avoid scrutiny by the relevant issuers. In fact, Lathen kept the brokerage firms fully aware of the investment strategy, and provided them with all relevant documents and information to substantiate his claims. The brokerage firms, however, merely provided the issuers with what was required pursuant to the issuers' offering documents. Since the offering documents did not specifically require information regarding funding sources and side agreements in connection with the survivor's option, none of this information was volunteered by the brokerage firms to the issuers. A diagram is provided below to help illustrate the investment strategy.

[8] *See* Building a Better Survivor's Option, 6 Structured Notes 4-5 (2015), available here.
[9] *In the Matter of Donald F. ("Jay") Lathen, Jr., Eden Arc Capital Management, LLC, and Eden Arc Capital Advisers, LLC*, SEC Administrative Proceeding File No. 3-17387, Initial Decision, August 16, 2017, at p. 62, available here.
[10] SEC Challenges Use of Survivor Options, 7 Structured Notes 2 (2016), available here.
[11] *Dept. of Enforcement v. C.L. King & Associates and Gregg Alan Miller*, FINRA Disciplinary Proceeding No. 2014040476901, Extended Hearing Panel Decision, September 6, 2017 ("FINRA Ruling"), available here.
[12] FINRA Ruling, at p. 5.

On August 15, 2016, the SEC instituted administrative and cease-and-desist proceedings against Lathen, the Fund, and the Fund Adviser ("Respondents") for possible securities law violations against the issuers of the securities. The SEC alleged that the Respondents defrauded the issuers by failing to disclose Lathen's side agreements with the Participants. If proven true, it would have the effect of misleading the issuers to believe that Lathen and the Participants were indeed legitimate owners of the bonds and CDs, and were entitled to exercise the survivor's option. A year later, SEC Administrative Law Judge Jason S. Patil dismissed all charges (the "SEC Ruling")[13] primarily due to the Respondents' lack of intent to defraud, and effectively ruled in favor of the legality of Lathen's taking commercial advantage of the contractual provision.

Contractual "Loophole" on Issuers' Survivor's Option

The issuers' offering documents "did not specifically request information regarding sources of funding for the bonds, confirmation of access to brokerage accounts, evidence of future property interests in bond proceeds, or the existence of any side agreements between joint account holders with respect to the [bonds and CDs]."[14] There was no required relationship between the deceased beneficial owners and the surviving owners making a redemption request. The bonds and CDs were offered for sale to retail investors, non-retail investors, and institutions alike.

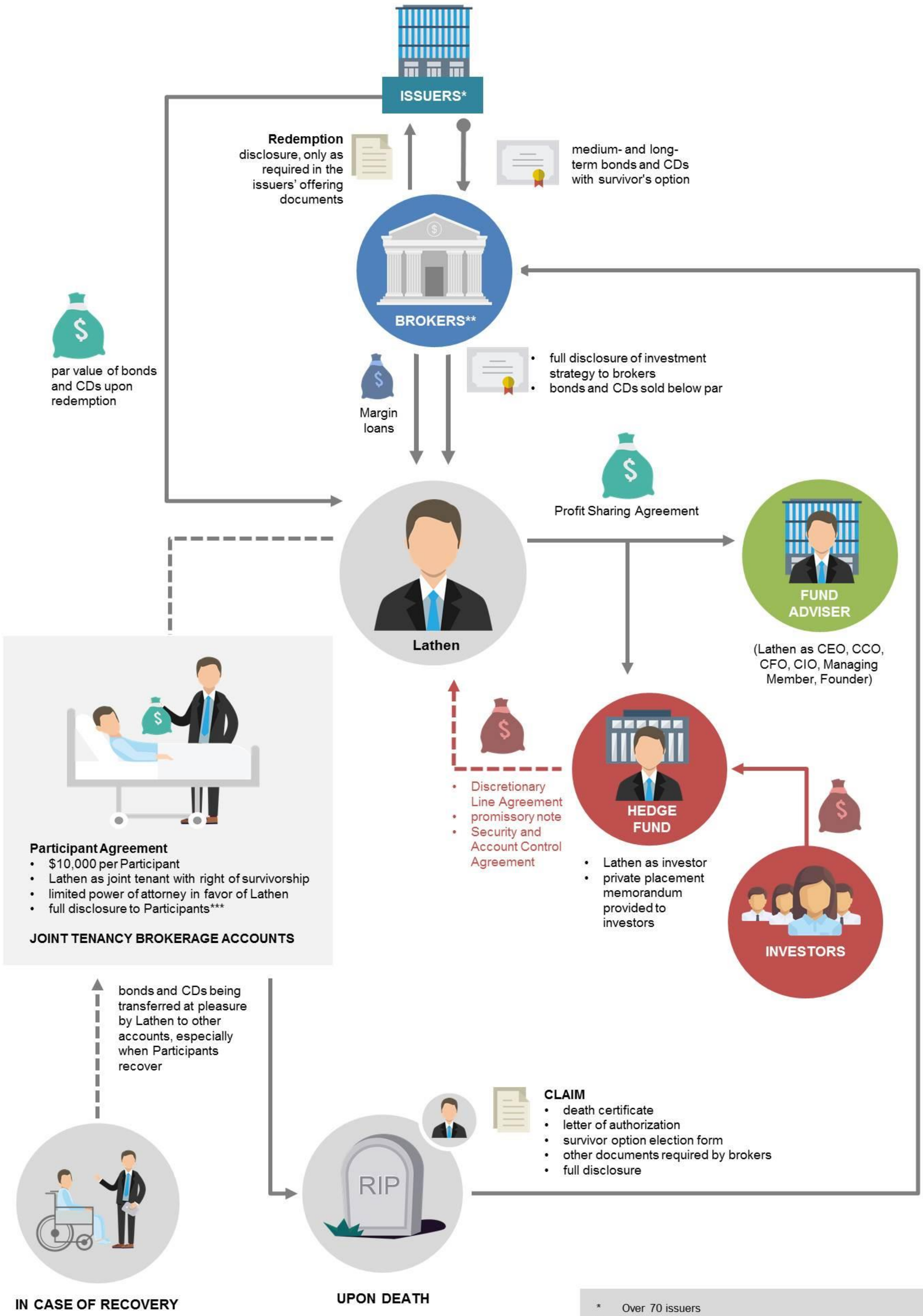
Lathen was able to take advantage of this contractual loophole by working closely with, and revealing all details of the investment strategy to, his legal teams. Lathen was assured by his lawyers not only of his legal standing to exercise the survivor's option, but also that he had a legal basis for not being prevented from redeeming the bonds and CDs despite potential regulatory risks.

Participants were aware of the investment strategy when they voluntarily entered into the PAs. Each Participant agreed with Lathen, as Fund nominee, to open an account under a joint tenancy with right of survivorship arrangement. Every Participant signed a POA to cede complete account control to Lathen. The POA permitted Lathen and the Fund Adviser to open, manage, handle and direct the account in the Participant's name, either individually or jointly; transfer funds and securities into and out of the account; buy, sell, exchange, convert, tender, trade, lend, and otherwise dispose of or acquire any securities in the account; pledge and grant a security interest in the joint accounts and the Participant's interest therein; execute agreements relating to the joint accounts on behalf of the Participant; and sign the Participant's name to any assignments in connection with the account.[15] The POA enabled Lathen to buy bonds and CDs in the Participant's name and his name, without needing any prior consent from the Participant. Lathen could, and in fact did, sign on Participant's behalf to purchase bonds and CDs, open the account, transfer some or all of the account balances and assets as Lathen deemed appropriate. The PA basically vested legal standing in Lathen as joint tenant, and on a Participant's death, would make Lathen the owner of the account, because of his right of survivorship.

[13] *See* footnote 8.
[14] SEC Ruling, at p. 14.
[15] FINRA Ruling, at p. 10.

Investment Strategy

simplified diagram



* Over 70 issuers
** 5 brokerage firms
*** 50-60 terminally ill Participants with 6 months or less to live

Application of SEC Rules

After analyzing the investment strategy, SEC ruled that the Respondents did not willfully violate the antifraud provisions of the Securities Act or the Exchange Act.

- The Exchange Act's Section 10(b) and Rule 10b-5 prohibit the use or employment of any manipulative or deceptive device in connection with the purchase or sale of any security. The prohibition includes "(1) employing any device, scheme, or artifice to defraud; (2) making material misstatements of fact or statements that omit material facts; or (3) engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[16]

- The Securities Act's Section 17(a) prohibits, in the offer or sale of any securities, "(1) employing any device, scheme, or artifice to defraud; (2) obtaining money or property by means of material misstatement of fact or statements that omit material facts; or (3) engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."[17]

These provisions were applied in the SEC Ruling because the documents that Lathen submitted to brokerage firms to support the redemption were treated by the SEC as Lathen's indirect statements to the issuers. However, the SEC Ruling clarified that there would be no violation of these provisions, unless the misstatement or omission was material and with *scienter* (or intent to defraud).

- Lathen made no material misrepresentation of beneficial ownership. Lathen did not materially misrepresent the Participants' beneficial ownership over the bonds and CDs. According to the PAs, the Participants were to receive additional funds if Lathen predeceased them, and were not restricted to withdraw funds from the account.

- Lathen made no material misrepresentation on joint tenancy. A joint tenancy is "an estate held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and creating in each joint tenant a right of survivorship."[18] Unless the PAs and Lathen's agreement with the Fund prevented the creation of joint tenancy, the presumption arising from the accounts under a joint tenancy with a right of survivorship arrangement remained effective.

- Lathen had no scienter. Lathen did not act with intent to defraud, because he fully disclosed the investment strategy to investors, Participants, and brokerage firms. His redemptions with the issuers were made in the ordinary course of business, without any intention to avoid any scrutiny.

The SEC likewise ruled that the Respondents did not violate the Advisers Act's custody provisions.[19] The Advisers Act's Section 206(4) prohibits an investment adviser from "engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative."[20] There was no violation because, although the Fund was entitled to profits from the accounts, the accounts themselves did not belong to the Fund, but were owned by Lathen and the Participants.

Application of FINRA Rules

On the other hand, in a separate but related case filed before FINRA, a respondent brokerage firm servicing the investment strategy (the "Broker"), and its anti-money laundering compliance officer, were penalized for negligent misrepresentations and omissions in connection with the investment strategy.[21]

- The Broker was negligent in describing Participants as joint tenants, and for not providing copies of the PAs to the issuers. FINRA Rule 2010 provides that "[a FINRA] member, in the conduct of its business, shall observe high

[16] SEC Ruling *citing* 15 U.S.C. §78j(b).
[17] SEC Ruling *citing* 15 U.S.C. §77q(a).
[18] *Island Fed. Credit Union v. Smith*, 875 N.Y.S.2d 198, 200 (App. Div. 2009) (quoting 24 N.Y. Jur. 2d Cotenancy & Partition §16).
[19] *See* SEC Ruling, at p. 3 (referring to "Section 206(4) of the Advisers Act and Rule 206(4)-2 thereunder").
[20] 15 U.S.C. §80b-6(4).
[21] *See* footnote 3.

standards of commercial honor and just and equitable principles of trade."[22] FINRA ruled that the PAs were material in determining whether Participants had beneficial ownership of the accounts.[23] The Broker should have provided copies of the PAs to the issuers, in order for the latter to make their own independent assessment as to whether the Participants were indeed beneficial owners of the bonds at the time of their deaths. Because of the Broker's representation and failure to provide copies of the PAs, the Broker was able to negligently redeem the bonds on behalf of Lathen and the Fund Advisor in violation of FINRA Rule 2010.[24]

- The Broker failed to establish and maintain a bond redemption supervisory system and procedures. FINRA Rule 3110(b) requires each FINRA member to "establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules."[25] The Broker violated this rule when, despite having no experience in handling the novel investment strategy, it failed to establish or maintain any procedures in processing the redemption of bonds.

Practical Tips for Issuers

In order to avoid potential abuse of survivor's option provisions, issuers may wish to consider changes to the survivor's option provisions along the following lines:

- Define "beneficial ownership." The term "beneficial ownership" can go beyond distinguishing the real owner of the underlying interest in the security from the broker holding it.[26] The account holder can be defined as a person who owns and will ultimately benefit from the instrument up to the point of death. The holder must have the right to receive the proceeds from the sale of the bond and from the principal of the instrument.

- Limit the survivor's option to initial issuances. An issuer may extend the survivor's option only to those who directly purchased the instrument in the initial offering, and not in the secondary market.

- Establish a longer holding period. An issuer should require a longer holding period (i.e., six months to one year) as a condition for the option's effectiveness. Extending this period will discourage to some extent the purchase of these instruments by an individual with an already short remaining life expectancy.

- Impose redemption conditions. An issuer should also stipulate that the survivor's option may only be exercised by the decedent's survivor or family members by blood or marriage.

- Maintain one standard survivor's option provision. With a standard survivor's option provision, an issuer may save on costs in enforcing it by setting up one process for all redemption requests. The conditions precedent in the exercise of the option will be uniform across all redemption requests.

FINRA Mark-Up Rules and Offerings to Advisory Accounts

Introduction

In February 2017, FINRA adopted its amendments to the confirmation requirements of Rule 2232. The new rule, which becomes effective in May 2018, requires broker-dealers to disclose the amount of their mark-ups or mark-downs in trades with retail customers in corporate debt securities, if the broker-dealer also executes an offsetting principal trade in the same security on the same trading day.

[22] *See* here.
[23] FINRA Ruling, at p. 22.
[24] As a consequence of having violated Securities Act sections 17(a)(2) and (3).
[25] *See* here.
[26] *See* SEC Ruling, at p. 42.

We discussed the application of Rule 2232 to the structured products market and other securities in the September 14, 2016 issue of this publication.[27] In this article, we discuss how the rule impacts certain initial offerings of structured products that involve sales made at different prices to advisory accounts.

Rule 2232 and Fixed Price Offerings

A key exception to the disclosure requirement is set forth in Rule 2232(d). The disclosure need not be provided for bonds that are acquired by a FINRA member in a fixed price offering, and sold to retail investors at the same offering price on the same day the member acquired the bonds.

The majority of structured note sales are conducted in this manner. Since purchasers pay the same amount for the bonds (that is, usually par), and the underwriter's profit (the commission or spread) is set forth on the cover page of the prospectus, the broker-dealer's profit is easy to determine. Accordingly, no new disclosures are required in this situation.

Variable Price Re-offers

At the other end of the spectrum are variable price re-offerings. In these transactions, different investors may pay different purchase prices for the notes during the offering period. In addition, the broker-dealer's commission for each sale may vary. Since the difference between the broker's purchase price and the investor's purchase price may not be possible to calculate from the prospectus, Rule 2232(d) does not provide an exception in this case, and the new disclosures are required.

Fixed Discount from Purchase Price/Fixed Discount to Underwriting Discount

In some situations, an offering may be structured so that most investors pay par, and the bonds are sold with the indicated underwriting discount. However, some bonds may be sold at a fixed lower price, and a fixed lower underwriter discount. This may be the case if, for example, the offering is structured with a specified volume discount, and/or if there is a fixed discount on the purchase price and underwriting discount when sales are made to advisory accounts.

In this case, as in the case of a typical fixed price offering, providing additional disclosure about the mark-up on a brokerage statement would appear to have no value to retail investors. These investors can determine the broker's mark-up, if any, based upon the information in the prospectus.

Advisory Sales with Variable Underwriting Compensation

There is more ambiguity in a situation where advisory accounts may pay different prices, especially where the relevant broker-dealer's compensation may also vary. For example, in many offerings involving advisory accounts, the investors' purchase prices are set forth as an expected range from par. In addition, the lead underwriter's compensation in respect of these sales may be set forth in the prospectus as a range, or as a maximum amount, as may be the case for the selling concessions received by any relevant selling group members.

For retail accounts under these circumstances, the prospectus may provide an approximate sense of the broker-dealer's mark-up for the sale; however, the precise amount may be impossible to determine from the prospectus. It may be more appropriate for the broker-dealer making the sale to the retail investor to add the disclosure required by Rule 2232. This disclosure would help address the goals of the Rule:

> "FINRA believes this additional pricing information will better enable customers to evaluate the cost and quality of the services firms provide by assisting customers in monitoring current same-day prices a firm and a customer pays or receives in connection with a transaction. The proposal will provide customers with pricing information that customers cannot currently obtain through TRACE data. FINRA further believes this type of information will promote transparency into firms' pricing practices and encourage communications between firms and their

[27] *See* here.

> customers about pricing of their fixed income transactions. This proposal also may provide customers with additional information that may assist them in detecting practices that are possibly improper, which would supplement FINRA's own surveillance and enforcement program."[28]

Accordingly, even though an offering of this kind may not be a variable price offering in the typical sense, the new disclosures may be relevant in this situation as well.

SEC Announces Efforts to Protect Retail Investors and to Take on Cyber Threats

In a September 25, 2017 press release (which may be found here, the SEC announced two new initiatives from its Enforcement Division:

- the establishment of a retail strategy task force targeting issues directly affecting retail investors; and
- the creation of a "cyber unit" that will focus on targeting cyber-related misconduct.

Retail Strategy Task Force

This new task force will develop initiatives relating to the protection of retail investors, including unsuitable structured product sales and "pump-and-dump" schemes.

The SEC indicated that the task force will apply the lessons learned from prior cases, and leverage the SEC's data analytics and technology to identify large-scale misconduct that affects retail investors. The task force will include enforcement personnel from around the U.S., and will work with staff across the SEC, including from the SEC's National Exam Program and its Office of Investor Education and Advocacy. The new task force is the latest step in the SEC's long running focus on how improper sales of complex products and other practices can harm individual investors.

In remarks on October 26, 2017, the SEC's Co-Director of the Division of Enforcement, Stephanie Avakian, noted that:

- the retail ambit includes not only items such as Ponzi schemes and microcap or offering fraud, but is also focused on "conduct that occurs at the intersection of investment professionals and retail investors";
- the enforcement staff sees extensive and widespread examples of misconduct, such as:
  - problems in the sale of structured products to retail investors, including a failure to fully and clearly disclose fees, mark-ups, and other factors that can negatively impact returns;
  - recommending and trading in wholly unsuitable strategies and products, including investors buying and holding products such as inverse ETFs for long-term investment;[29]
- the task force's mandate will include a focus on investor education and outreach; and
- the focus on retail investors does not mean that the SEC will reduce its scrutiny of large Wall Street institutions, and the task force will focus on market participants of all sizes.

Cyber Unit

This new unit will target cyber-related misconduct, including:

- Market manipulation schemes involving false information spread through electronic and social media;

[28] FINRA Regulatory Notice 14-52, available here.
[29] On this point, please see the related article above in this issue.

- Hacking to obtain material non-public information;
- Violations involving distributed ledger technology and initial coin offerings;
- Misconduct perpetrated using the “dark web”;
- Intrusions into retail brokerage accounts; and
- Cyber-related threats to trading platforms and other critical market infrastructure.

The creation of this unit reflects the SEC’s continuing concerns about how cyber crimes can impact both institutions and retail investors, as discussed in more detail in Chairman Clayton’s September 20, 2017 public statement on cyber security.

Structured Products Magazine Conference

This year, Morrison & Foerster once again sponsored the Structured Products Magazine/Incisive conference. A more detailed summary of the conference is available in Incisive’s Risk publication here.

The conference attracted a broad cross section of industry participants, including product structurers and marketers, in-house legal and compliance personnel, and regulators. The keynote remarks, which were delivered by Peter Driscoll, Director of the Office of Compliance Inspections and Examinations (“OCIE”) of the SEC, not only set the tone for the day but also provided insight into the new direction of the SEC’s Enforcement Division. As we note in this issue, the Enforcement Division and OCIE have indicated a renewed focus on the retail investor. Mr. Driscoll provided important insights regarding OCIE’s approach to broker-dealer examinations and the Office’s interest in retail structured products. Mr. Driscoll noted OCIE’s enhanced capabilities to manage and review big data sets and the extent to which these technological advances were being used in examinations. Later in the day, during a regulatory and enforcement panel, Reid Muoio from the SEC’s Enforcement Division also alluded to these capabilities and their deployment in enforcement matters. Many of the regulators present acknowledged that there had been significant improvements in the quality of the disclosures relating to structured products offerings. However, regulators advised market participants that continued vigilance was needed relating to possible misselling, as well as to problematic practices like churning and reverse churning. Regulators continued to encourage more rigorous training for registered representatives marketing and selling structured products to retail investors.

The conference featured a number of panels relating to legal and regulatory developments, including topics previously addressed in our *Structured Thoughts* newsletter, such as the new T+2 settlement rules, LIBOR alternatives, FINRA’s mark-up rules, the European Benchmarks Regulation and its extraterritorial effect, the impact of MiFID II, and the new bail-in rules for Canadian banks.

Representatives from various banks provided insights on the structured products market. Data furnished by *Prospect News* shows that in 2017, through September 15, there have been 9,334 SEC registered notes, raising $35.18 billion, compared to last year’s 9,363 deals, which raised $38.72 billion and 8,570 deals, which raised $44.12 billion in 2015. The average deal size has continued to inch down, given the absence of big block trades. In 2017, through September 15, average deal size was $3.77 million, compared to $4.14 million in 2016 and $5.15 million in 2015. *Prospect News* also reported a weighted average maturity for notes of 3.30 years in 2017, through September 15, compared to 2.98 years in 2016 and 3.31 years in 2015.

Throughout the day, participants discussed market trends, including the trend toward smaller deal sizes arising from reverse inquiry and other customized offerings, and the challenges associated with handling a higher volume of these offerings. Participants also discussed innovations in the market, including structured UITs and new distribution models, including the emergence of various “platforms” that might allow issuers and their affiliated broker-dealers to penetrate further into advisory channels.

***GlobalCapital* has named us Global Law Firm of the Year at its 2017 Global Derivatives Awards for the second year in a row.**

For the third year in a row, *GlobalCapital* named us the Americas Law Firm of the Year at its 2017 Americas Derivatives Awards.

We have again been named Best Law Firm in the Americas by StructuredRetailProducts.com at the 2017 StructuredRetailProducts and Euromoney Americas Wealth Management and Derivatives Conference.

When it comes to advising financial institutions, whether it's bank regulatory advice, debt or equity offerings, derivatives, securitization, or structured products, Morrison & Foerster leads the way.

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Join Our *Structured Thoughts* LinkedIn Group

Morrison & Foerster has created a LinkedIn group, *StructuredThoughts.*
The group serves as a central resource for all things *Structured Thoughts*. We have posted back issues of the newsletter and, from time to time, will disseminate news updates through the group.

To join our LinkedIn group, please click here and request to join, or simply email Carlos Juarez at cjuarez@mofo.com.

For more updates, follow Thinkingcapmarkets, at our Twitter feed: www.twitter.com/Thinkingcapmkts.

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