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# REVERSE inquiries

*Structured and market-linked product news for inquiring minds.*

## 2019 FINRA Priorities Letter

On January 22, 2019, FINRA issued its 2019 Risk Monitoring and Examination Priorities Letter[1] (the "Letter"), which includes matters relevant to structured products. The Letter highlights online distribution platforms and regulatory technology as new priorities for FINRA in 2019. The Letter also points to suitability concerns and protection of senior investors as areas on which FINRA will continue to focus during compliance examinations.

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### ONLINE DISTRIBUTION PLATFORMS

FINRA observed that some firms that are involved in the distribution of securities pursuant to Rule 506(c) and Regulation A under the Securities Act may be owned by entities that are not broker-dealers, but may engage broker-dealers as selling agents or brokers of record, or to perform specific functions, such as custodial, escrow, back office and financial technology-related functions.[2] FINRA will evaluate these firms' reasonable basis and customer-specific suitability analyses, anti-money laundering compliance, and offering documents and communications with the public. It will also assess how firms address the risk of sales to non-accredited investors and non-compliant escrow arrangements (for Regulation D offerings) and the risk of excessive or undisclosed compensation arrangements between firms and the issuers (for Regulation A offerings).

### REGULATORY TECHNOLOGY

FINRA will seek to understand how member firms use various innovative regulatory technology tools in addressing their obligations and will consider the policies that address supervision of outside providers, third-party vendor management, safeguarding of customer data and cybersecurity risks.

### SUITABILITY

In its January 22, 2019 podcast,[3] FINRA mentioned that it will evaluate how firms are discharging their suitability obligations and risk disclosure obligations when recommending products, with a special focus on specific areas. FINRA's new areas of focus are (1) deficient quantitative suitability determinations or related

[1] Available at https://goo.gl/tzgzNX.
[2] *Id.* at 2.
[3] Podcast: "The Annual Priorities Letter: A Fresh Take," January 22, 2019, *available at* https://goo.gl/MwQTmg/. Resource speakers were Bari Havlik, FINRA's executive vice president of Member Supervision; Steve Polansky, a senior director in Member Supervision; and Gene DeMaio, a senior vice president of options regulation and the trading and financial compliance exam program.

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supervisory controls, making sure that firms have ways and compliance tools designed to detect excessive trading, excessive commissions, trading losses, etc., (2) overconcentration in illiquid securities and (3) recommendations to purchase share classes that are not in line with the customer's investment time horizon or objectives.

**Senior Investors**

In its podcast, FINRA also mentioned that it will review how firms are protecting senior investors (as well as those retired or retiring) from fraud, sales practice abuses and financial exploitation.[4] FINRA expects to see firms employ supervisory systems to scrutinize such accounts where a registered representative serves in a fiduciary capacity (including those who hold power of attorney, or act as trustee or co-trustee). For firms using a registered representative in a fiduciary capacity, they should provide proof of prior notification and approval for such arrangement, proof on how they are monitoring the representative's activities and proof of how the representative is acting in the best interest of the client. Last, FINRA will also review a firm's reasonable efforts to obtain the name of a trusted contact. It will look at the processes that the firm uses to obtain this information.

### OTHER ITEMS

FINRA also discussed these priority issues in its podcast:

- *Fixed income mark-up disclosure*. FINRA will review mark-up or mark-down disclosures on fixed income transactions for compliance with the amendments to FINRA Rule 2232 (Customer Confirmations).
- *Supervision of digital assets business*. FINRA will review how firms apply (and comply with) the applicable securities laws and regulations and related supervisory, compliance and operational controls to mitigate the risks associated with their digital asset activities.
- *Best execution.* FINRA will review whether firms fail to use reasonable diligence in assuring that their customer order flow is directed to the best market given the size and types of transactions, the terms and conditions of orders and other factors.[5]

## Nevada Proposes Uniform Fiduciary Rules in Response to Legislation

In late January 2019, the Nevada Securities Division issued proposed fiduciary duty rules in response to state legislation adopted in 2017, which extends the fiduciary obligation to include broker-dealers and investment advisers.

[4] *See* FINRA Rule 2165 (Financial Exploitation of Specified Adults) and FINRA Rule 4512 (Customer Account Information).
[5] *See* FINRA Rule 5310 (Best Execution and Interpositioning).

The proposed rules would impose a fiduciary duty on broker-dealers and investment advisers when they: (1) provide investment advice to clients, (2) perform discretionary trading, (3) maintain assets under management, (4) act in a fiduciary capacity toward the client and (5) disclose fees or gains through the completion of any contract and through the term that services are engaged. Under the proposed rule, broker-dealers and investment advisers are presumed to act as fiduciaries.

The proposed rules would create a narrow "episodic fiduciary rule exemption," which would release financial professionals from the fiduciary duty initially imposed on them once the client receives the advice, the transaction is completed and the required fee disclosures are made. This exemption only applies to certain one-time transactions initiated by clients. Notably, dual-hatted investment advisers and their representatives cannot rely on this exemption.

The proposed rules would define investment advice broadly to encompass many common brokerage practices but do not define "best interest." The proposed rules also enumerate certain conduct that would constitute a breach of the fiduciary duty, and carve out conduct that is not *per se* a violation. Last, the proposed rules would reserve to the Nevada regulator the authority to conform its rules with federal rules to some extent.

Other states have also recently considered fiduciary rules for broker-dealers and other financial professionals. For example, Maryland has introduced its own fiduciary rule as a broader consumer protection bill titled "Financial Consumer Protection Act of 2019." The language is similar to Nevada and would give the Maryland regulators wide latitude to craft regulations.

Supporters praised the expansiveness of the proposed state rules. The financial industry, on the other hand, has long opposed state-level regulation of a fiduciary standard. In response to the Maryland bill, the CEO of SIFMA stated: "The promulgation of standard of conduct laws and rules at the state level … while well intentioned will result in a patchwork of conflicting conduct standards, resulting in investor confusion, and ultimately less access to information and choice of products for investors."

State fiduciary rules, if promulgated, will likely face legal challenges. Critics argue that the state-level fiduciary rules are preempted by Section 913 of the Dodd-Frank Act, which charges the SEC with rule-making authority on fiduciary duty. Critics also argue that the state rules would inevitably impose additional or different books and records requirements, thus violating Section 103 of the National Securities Markets Improvement Act of 1996.

On the federal level, the SEC has proposed Regulation Best Interest, which would require brokers to put clients' financial interests ahead of their own and requires them to mitigate financial conflicts. The SEC plans to issue a final rule this year.

## 'All' is not what it seems in the world of credit default swaps

Two recent decisions of the Credit Derivatives Determinations Committees (DCs) on both sides of the Atlantic highlight the difficult path that DC members have to tread between faithfully interpreting the definitions and meeting the expectations of market participants. These decisions demonstrate that the DCs continue to give


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more weight to the perceived effectiveness of the product than to the strict legal interpretation of the contract. Participants in CDS markets, as well as investors in credit-linked notes and other obligations linked to credit derivatives, can perhaps take some comfort from this, although predicting the outcome of future determinations remains a hazardous occupation.

## THE DETERMINATIONS COMMITTEES

By way of background, the DCs were established by the International Swaps and Derivatives Association, Inc. (ISDA) in 2009 to make market-wide determinations in respect of standardised credit default swap (CDS) contracts. There are DCs in five geographical regions, with the EMEA (Europe) and Americas region being by far the most active owing to the majority of widely traded reference entities being established in these regions. Each DC comprises representatives from ten of the largest CDS dealer firms selected based on trading volumes and five representatives from sell-side firms selected randomly from eligible firms. In each case, membership is voluntary and member firms are required to abide by the DC's rulebook, including policies and procedures to identify and manage conflicts of interest. Each DC is required to make determinations on whether credit events and certain other events affecting CDS contracts have occurred by interpreting the ISDA 2014 Credit Derivatives Definitions (and its earlier incarnation) and applying them to publically available information provided to the DC for the purposes of the relevant determination. The determinations of the DC are hardwired into all standardised CDS contracts and so are binding on all market participants. In October ISDA divested itself of the day-to-day running of the DCs, which is now administered by DC Administration Services, Inc.

Most determinations are required to be made by an 80% supermajority of the fifteen member committee and if that majority is not achieved are referred to 'external review,' which is essentially an expedited arbitration process involving a panel of three independent adjudicators making a final ruling by applying English law (or New York law in the case of the Americas DC).

Despite facing numerous difficult decisions, the DCs have historically made virtually all determinations unanimously with the external review process only ever having previously been used twice by the Americas DC and once by the EMEA DC in their ten year history. In the latter case in 2016, we at Mayer Brown acted as joint advocate for eleven of the DC firms, successfully arguing that no governmental intervention credit event occurred with respect to the Portuguese Bank Novo Banco when the Bank of Portugal took the unusual decision to re-transfer certain bonds back to Banco Espírito Santo that it had originally transferred to Novo Banco in connection with the resolution of Banco Espírito Santo.

In the Novo Banco case,[6] the external review panel (comprising a former English Court of Appeals judge and two eminent Queens Counsel) favoured a narrow interpretation of the term "any event which has an analogous effect [to a mandatory exchange]" found in the relevant definition holding that the re-transfer of the bonds fell outside of that definition. The decision cited established English case law that provisions of standard contracts should, as far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability so that parties know where they stand. Despite hearing arguments that the determination of a credit event would produce a sensible and practical commercial result consistent with the

[6] *See:* https://www.cdsdeterminationscommittees.org/documents/2016/02/nb-er-decision.pdf.

overall structure of the definitions, the panel relied solely on the construction of the relevant provisions of the contract in making its determination without any regard to the commercial purpose of the CDS contracts or any impact that the panel's decision may have on the protection of buyers and sellers. The panel also stated that is was "dangerous" to imply a value impairment requirement into the definition and that it was "equally dangerous to introduce an uncertain test of impairment which is not expressly stated."

In contrast, the recent determination of the Americas DC in the Sears case gave considerable weight to the perceived business purpose sought by the drafters of the definitions, and the determination of the EMEA DC in the Ziggo case required the DC to imply terms into the definitions in order to reach a commercially acceptable result.

## THE SEARS CASE

The rare external review process was invoked for the fourth time in December in connection with the bankruptcy of Sears Roebuck Acceptance Corp., a US department store chain. The DC had already determined that a bankruptcy credit event occurred in respect of Sears CDS. However, an issue arose as to which obligations of Sears would be used in the auction process to determine the pay-out on those CDS contracts. The issue was an important one because the fewer obligations that qualified for the auction, the more likely it became that the auction final price might be driven up by buy orders submitted as part of the auction process (reducing the potential pay-out for the buyers of the CDS protection).

Specifically the determination related to whether two syndicated leveraged loans that were assignable with the consent of the loan agent only to certain eligible assignees constituted "consent required loans" for the purposes of the definitions. The DC's original decision was almost evenly split, with seven members (Barclays, Citibank, Credit Suisse, Goldman Sachs, JP Morgan, Elliott and PIMCO) arguing that the fact that the loans could be assigned to the eligible assignees was sufficient to find that they were "capable of being assigned" for the purposes of the definition, with the remaining eight (Bank of America, BNP Paribas, Societe Generale, Deutsche Bank, Mizuho, Alliance Bernstein, Citadel and Cyrus Capital) arguing for a narrower interpretation of the definition that would require the loans to be assignable to anyone with consent.

The external review panel (comprising Andy Brindle, a former head of credit derivatives at JP Morgan, Jeffrey Golden, a veteran derivatives lawyer, and Charles Whitehead, a Cornell law professor) unanimously held that a New York court would view the loans as capable of being assigned "even though the limitations… have the practical effect of narrowing (but not eliminating altogether) the universe of possible assignees."[7] The panel did, however, recognise that such restrictions could be sufficient to cause an obligation to fail the test if they were "so commercially unreasonable as to effectively block an instrument from being capable of being assigned."

Although the panel stated at the outset of its analysis that a New York court would enforce a contract "as written without reference to extrinsic or parol evidence unless a party seeking to go beyond the four corners of the written agreement establishes that its material terms are ambiguous" and agreed with counsel for both sides of the argument that the words of the definition were "clear and not ambiguous when given their plain meaning," the panel still chose to apply a test based on "a market participant cognizant of industry practices,

[7] *See:* https://www.cdsdeterminationscommittees.org/documents/2018/12/external-review-panel-decision-december-21-2018.pdf.

usages and customs." In contrast to the general reluctance of New York courts in recent Lehman litigation to hear evidence on the legislative history of ISDA documentation, the panel's decision went into considerable detail on the history of the definitions and market practices in the CDS market.

In stark contrast to the Novo Banco external decision, the panel also gave considerable weight to "the business purpose sought to be achieved by the drafters of the ISDA standard documentation," concluding that the "commercial objectives that animated the drafting of the definitions to be in no small part to grow the CDS marketplace and not overly restrict the participants that would find it of use in their investing and hedging strategies." They went on to cite the commercial objective to cast a wide net to ensure greater liquidity of the CDS product through greater deliverability to avoid situations where no deliverables are available and to reflect a more complete view of the recovery rate of credit instruments issued by the reference entity when settling the CDS.

Although the decision reached by the panel is likely the correct one within the four corners of the contract, the approach taken, citing numerous examples of commercial practice and legislative history in support of the decision, raises serious questions as to the degree to which the DCs are (and will in future determinations be) influenced by such factors. In particular, how will the DC reconcile the position where a conflict arises between the commercial purpose of the CDS market and the ordinary legal interpretation of the contract? The Ziggo case provided a clue as to what the answer to that question might be.

## THE ZIGGO CASE

In January, the EMEA DC was required to make a determination as to whether there was a successor reference entity for CDS contracts written on Ziggo Bond Finance B.V., a financing vehicle of a Dutch telecoms company. The company had transferred all of its obligations under its outstanding bonds to another group company, Ziggo Bond Company B.V., in March 2018. This transfer would normally lead to a determination by the DC that the company assuming those obligations had become the replacement reference entity for the purposes of all the outstanding CDS contracts. However, in order to ensure that CDS contracts written before and after the transfer remain fungible, the ISDA definitions provide that the transfer must be brought to the DC's attention (via a request for a resolution) within 90 days. In this case no such request was made, and Ziggo was subsequently acquired by a third entity, VodafoneZiggo Group BV, in December and thereafter ceased to exist.

In circumstances where a succession is not caught within 90 days, the usual result would be that the relevant CDS contracts would remain written on the original entity. In this case, that would have meant that protection buyers would continue to pay a premium for the life of the contract with no prospect of ever realising their protection as the reference entity no longer exists. However, in response to a similar situation in 2012 involving CDS written on Unitymedia, a German cable TV company, where an obligation transfer was also missed in the 90-day window, the drafters of the 2014 definitions included an exemption from this 90-day lookback rule for "universal successors" in circumstances where "one entity assumes *all of the obligations*… of the reference entity" (emphasis added) and where the reference entity has ceased to exist or is in the process of being dissolved.

This provision of the 2014 definitions was based on the concept of universal succession under English law. Although English companies cannot merge into each other, English law recognises certain foreign law

processes whereby in one legal act a succeeding entity assumes all of the obligations of the original entity and the original entity ceases to exist as a separate corporate entity. However, in the case of Ziggo, the transfer of its obligations under the bonds and the cessation of the company's existence occurred nine months apart and involved a transfer to one entity and a merger into another. Moreover, during this nine month period, the DC found evidence that the company may have remained liable for certain tax and expenses payables which, unlike the bonds, were not assumed by Ziggo Bond Company B.V. As noted above, the 2014 definitions require "all of the obligations" to be assumed.

Nevertheless, 14 members of the DC (with Credit Suisse as a rare dissenting voice) determined that Ziggo Bond Company B.V. was the successor by virtue of this universal successor exemption. In their accompanying explanatory statement,[8] the DC stated that "while the [English law] concept was the genesis of the provision included in the 2014 definitions, the concept was not simply imported, and the DC was of the view that Universal Successor should be interpreted in accordance with the wording of the 2014 Definitions."

In interpreting the requirement in that wording that "all of the obligations" must be assumed, the DC held that "all obligations" was not to be interpreted as "all or substantially all obligations" [which term is used elsewhere in the definitions], and the drafting objective of referring to "all obligations" was to avoid uncertainty in determining what amount would constitute "substantially all." However, the DC went on to state "although the requirement was for an assumption of *all* obligations, if the remaining obligations were immaterial or negligible then *they should properly be disregarded*; the outcome of the Successor determination should not be different merely because of immaterial or negligible obligations." They cite no authority for that proposition, nor give any indication of what the threshold should be for immaterial or negligible obligations. Indeed, they concede that "this interpretation was probably different to the English legal meaning of universal succession" but then attempt to justify implying this materiality threshold into the definition by referring to the fact that another part of the definition expressly contemplates that the reference entity may continue to exist for a period of time after the transfer (which English law does not recognise as part of the test).

As with the decision of the external review panel in the Sears case, it seems likely that commercial considerations played a part in the outcome of the Ziggo determination. Many market participants would of course argue that both outcomes are sensible and that the DC process should give more weight to the intended purpose of the product than a court might, and try to avoid outcomes that might be perceived as unfair or bizarre. However, for lawyers tying to provide guidance to their clients on the interpretation of their contracts, weaving contract law with the emerging CDS lore presents a significant challenge.

[8] *See:* https://www.cdsdeterminationscommittees.org/documents/2019/01/emea-dc-statement-ziggo-bond-finance-b-v-january-21-2019.pdf.

# Refresher: Know Your Distributor

At the beginning of 2018, FINRA released its Regulatory and Examination Priorities Letter, in which fraudulent activities continued to be a major area of focus. Structured products have always been subject to heightened supervision by the SEC and FINRA due to their complexity. A broker-dealer of structured products could be held liable for an untrue statement of a material fact or an omission of a material fact in the offerings distributed by that broker-dealer. Section 11 of the Securities Act of 1933 (the "Securities Act") covers such misstatements or omissions in registration statements, while Section 12 covers the offering or sale of securities by means of a prospectus. Other sources of liabilities include the anti-fraud provisions of the federal securities laws: Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder, Section 17 of the Securities Act and Rule 10b-10 of the Exchange Act, under the last of which a broker-dealer has the duty to disclose material information relating to the nature of its relationship with a customer. Rules 15c1-5 and 15c1-6 under the Exchange Act require a broker-dealer to disclose in writing to the customer if it has any control, affiliation or interest in a security it is offering or in the issuer of the security.

In order to establish a due diligence defense against civil liabilities under Section 11 of the Securities Act, a broker-dealer of structured products needs to prove that under the circumstances the statement in question was made, it was not misleading, or they have "exercised reasonable care," and did not or could not have known of the misstatement or omission. In addition, prior to making a recommendation with respect to a debt security, FINRA expects brokers to assess the credit quality of an issuer, and to ensure that its registered representatives are duly advised of that assessment, and any changes to it.

Here are some practical guides for broker-dealers to establish a due diligence defense and to assess issuer credit quality.

Broker-dealers that are in privity of contract with the issuer (i.e., an underwriting or distribution agreement) will have a variety of contractual rights that help them to assess the issuer. The broker-dealer receives representations and warranties from the issuer under the applicable agreement about its business and finances, and the adequacy of the disclosures in the offering documents, which are typically "brought down" at the time of each offering. The agreement will also entitle the broker to periodic comfort letters, legal opinions and officer's certificates. The broker will maintain a file containing the periodic bring-down documents that it receives under the program agreement or similar documents.

If the dealer becomes aware of any event that would cause the documents to contain a material misstatement or omission, it should notify the issuer. In the case where the dealer is an affiliate of the issuer, there should be an agreement by the issuer to correct the documents.

Additional procedures, including for broker-dealers that do not have a direct contractual agreement with the issuer, such as broker-dealers that are purchasing structured products under a dealer agreement with an issuer's affiliated broker-dealer, may include:

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- Maintaining a summary of the termination provisions in the distribution agreement;
- Scheduling periodic or quarterly business due diligence calls with the issuer, or participating in any periodic or quarterly business due diligence calls arranged by the issuer;
- Reviewing the issuer's periodic filings with the SEC, including its Form 10-Ks, Form 10-Qs and proxy statements filed with the SEC;
- Establishing an alert system to track the issuer's press releases, earnings releases, any ratings agency actions, any significant acquisitions/dispositions, any management changes or any other events triggering a Form 8-K filing;
- Regularly conducting due diligence on the distributors/broker-dealer network used in connection with the relevant program or offering;
- Monitoring the issuer's credit rating and CDS spreads; and
- Listening to the issuer's earnings calls and reviewing the issuer's investor presentations made publicly available.

These procedures are all designed to help ensure that a broker can assess an issuer's credit quality, and the accuracy of its disclosures. In addition, particularly if the broker's view of the issuer's credit quality or prospects decrease, it must ensure that any such conclusions are properly conveyed to its sales force, so that these conclusions can help inform any recommendations that are made as to that issuer's securities. Brokers will maintain a system to inform their registered representatives of these changes.

A variety of additional steps may be appropriate, depending upon the circumstances. For example, the broker may wish to consider whether changes in the issuer's disclosure documents for the offering are advisable. If the broker on-sells the products to other brokers, it may wish to ensure that those third-party brokers are aware of the relevant changes (which they may well be, due to their own similar practices). In some cases, more significant steps may be appropriate, including contacting individual offerees to ensure that they are aware of the relevant changes and are still interested in participating in the transaction, reviewing the issuer again under the broker's new product approval committee process, or even postponing or cancelling the proposed offering or offerings.

## Announcements

**Capital Markets Tax Quarterly.** Mayer Brown's Capital Markets Tax Quarterly provides capital markets-related US federal tax news and insights. In our second issue, we look at Q4 2018.

**LinkedIn Group.** Stay up to date on structured and market-linked products news by joining our new LinkedIn group. To request to join, please email reverseinquiries@mayerbrown.com.

**Suggestions?** *REVERSEinquiries* is committed to meeting the needs of the structured and market-linked products community, so you ask and we answer. Send us questions that we will answer on our LinkedIn anonymously or topics for future issues. Please email your questions or topics to: reverseinquiries@mayerbrown.com.

## Upcoming Events

***REVERSEinquiries* Workshop Series: Structured UITs and Repack Structures**

Join us for this REVERSEinquiries Workshop on **Monday, March 4, 2019** at Mayer Brown's New York Office. *Registration: 8am; Program: 8:30am – 9:45am ET.* **Click here to RSVP.**

Offering exposure to structured product-like returns in different wrappers or through repackaging vehicles raise a number of concerns. We will discuss, among other things:

- UIT basics and structured UITs,
- Investment Company Act and tax issues arising in connection with UITs,
- Alternative repack structures,
- Volcker Rule, Investment Company Act and commodity pool issues arising in connection with repack structures, and
- Tax structuring considerations with repack structures.

Save the dates for our entire 2019 REVERSEinquiries Workshop series. For more information, please e-mail REVERSEinquiries@mayerbrown.com.

- April 29, 2019
  **Certificate of Deposit Programs and Brokered CD Programs**
- June 13, 2019
  **New Product Governance and Post-Sale Reviews**
- October 17, 2019
  **ETNs and Daily Redeemable Notes**
- November 14, 2019
  **Platforms and Securities Law and Commercial Considerations**

*Our REVERSEinquiries Workshops are limited to 40 participants; Press is not permitted.*

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