MAYER | BROWN

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REVERSE inquiries

Structured and market-linked product news for inquiring minds.

In This Issue

The SEC Adds Its Voice to the LIBOR Chorus

In a public statement dated July 12, 2019, the Securities and Exchange Commission's ("SEC") Divisions of Corporation Finance, Investment Management and Trading and Markets, and the Office of the Chief Accountant, encouraged market participants to begin the transition away from U.S. dollar LIBOR, which is expected to cease publication in 2021.[1] The SEC's public statement is significant in that it adds the voice of a non-bank regulator to the discussion on replacing LIBOR. As noted by the SEC, the upcoming LIBOR discontinuance "may present a material risk for certain market participants, including public companies, investment advisers, investment companies and broker-dealers."

Prior to the SEC's public statement, the Alternative Reference Rates Committee ("ARRC"), a group convened by the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York, has been the main source of guidance to market participants in the areas of loans, derivatives and floating rate notes based on U.S. dollar LIBOR. To a casual observer, it might have appeared that the concerns were being voiced mainly by banking regulators and that the potential risks relating to the cessation of U.S. dollar LIBOR were confined to the financial services industry. The Division of Corporation Finance stated that the "companies most frequently providing LIBOR transition disclosure are in the real estate, banking, and insurance industries," but also encouraged every company, if it has not done so already, to begin planning for the transition away from LIBOR.

The Division of Corporation Finance focused on disclosure of risks and events that a reasonable investor would consider important to an investment decision. Disclosure relating to the expected LIBOR discontinuance could be triggered by risk factor disclosure requirements (Item 105 of Regulation S-K and Item 3.D of Form 20-F), management's discussion and analysis (Item 303 of Regulation S-K and Item 5 of Form 20-F), board risk

[1] The Public Statement is available at: https://bit.ly/2Yy6U1E.

oversight (Item 407(h) of Regulation S-K) and the financial statements. An issuer should keep investors informed about the progress toward risk identification and mitigation, and the anticipated effects on the issuer, if material.

The Division of Trading and Markets addressed the effect that a LIBOR discontinuation would have on broker-dealers, central counterparties and exchanges, noting that these parties may:

- issue instruments or be party to transactions, including derivative transactions, referencing LIBOR;
- own investments that reference LIBOR or make a market in instruments that reference LIBOR;
- have LIBOR-based hedges in place;
- underwrite, place or advise on the issuance of instruments referencing LIBOR;
- recommend investments in LIBOR-based securities, including to retail investors; and
- have listing and clearing standards that do not contemplate a LIBOR replacement benchmark.

The Office of the Chief Accountant highlighted the effect that a transition away from LIBOR could have on the accounting and financial reporting for:

- modifications of terms within debt instruments;.
- hedging activities;
- inputs in valuation models; and
- potential income tax consequences.

Replacement rate neutrality. The SEC, after noting that the secured overnight financing rate ("SOFR") has been proposed as a replacement for U.S. dollar LIBOR, mentioned that some market participants are also considering other U.S. dollar reference rates for certain instruments and that it does not endorse the use of any particular reference rate. This is an interesting contrast to previous statements by the ARRC, which strongly supports the use of SOFR to replace LIBOR. The SEC also said that the Staff "is monitoring whether the adoption of a variety of replacements rates for USD LIBOR instead of the emergence of a dominant successor could limit the effectiveness of all replacement benchmarks."

FINRA Reminds Firms of Their TRACE Reporting Obligations

The Financial Industry Regulatory Authority, Inc. ("FINRA") recently issued a Trade Reporting Notice[2] to remind firms they must report any transaction in a "TRACE-Eligible Security" unless an exception applies. A "TRACE-Eligible Security" generally means a debt security that is denominated in U.S. dollars: (1) issued by a U.S. or foreign private issuer, and, if a "restricted security," sold pursuant to Securities Act Rule 144A; (2) issued or guaranteed by an executive agency or a government-sponsored Enterprise; or (3) a U.S. Treasury Security. Structured products issued by a bank also are generally TRACE-Eligible Securities.

[2] The FINRA notice can be found here: https://bit.ly/3120cmd.

FINRA noted that exclusive reliance on the TRACE master security list is insufficient to comply with the reporting obligations because there are circumstances where a member firm transacts in a security that is inactive in the TRACE system or has been removed from TRACE. Accordingly, member firms should have systems or process in place to determine whether a transaction is reportable regardless of whether a security is included the TRACE security master list. In addition, FINRA emphasized that the reporting obligations are independent from the notice requirement imposed on managing underwriters involved in a distribution or offering. FINRA urged member firms to contact Market Operations to add a TRACE-Eligible Security to the TRACE security master list and report the transaction.

Brokerage Firm Granted Summary Judgment in Reverse Convertible Notes Class Action

On July 11, 2019, the U.S. District Court for the District of Minnesota granted a brokerage firm ("Broker") motion for summary judgment in a class action filed by customers alleging the loss of approximately $1.1 million from the purchase of reverse convertible notes ("RCNs"). Investors claimed that Broker was subject to but failed to abide by FINRA regulations in the sale of the RCNs, thereby making Broker liable for breach of contract.

The class action specifically concerned one FINRA rule and three FINRA Notices to Members ("NTMs"), including Rule 2111, NTM 5-59, NTM 10-09 and NTM 12-03. FINRA Rule 2111(a), also known as the "suitability" rule, provides that FINRA-regulated brokers "must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer." NTM 5-59, NTM 10-09 and NTM 12-03 provide guidance as to how Rule 2111 should apply to the sale of structured products. At the motion to dismiss stage of the case, the Court found that the plaintiffs stated a plausible breach of contract claim. However, in light of evidence gathered during discovery, the Court determined that the plain language of an account opening agreement did not require Broker to abide by Rule 2111 and the relevant FINRA guidance. Consequently, Broker could not be held liable for breaching a non-existent contractual duty.

FDIC Eases Requirements on Deposit Tracking

The Federal Deposit Insurance Corporation (the "FDIC") has detailed rules relating to account identification and recordkeeping in order to facilitate the determination of who is entitled to FDIC insurance payments in the event of the failure of an insured institution. Accordingly, insured institutions are required to collect and maintain the information necessary to allow the FDIC to promptly determine who is entitled to deposit insurance coverage. The FDIC also has additional requirements for insured institutions with more than 2 million deposit accounts. The information and recordkeeping requirements applicable to these large insured institutions include specific guidelines for maintaining the information necessary to allow the FDIC to promptly determine the deposit insurance coverage of each of their depositors, including assigning unique identifiers to each account holder, any beneficial owner that is not also the account holder for the applicable deposits, and each grantor and beneficiary for certain applicable accounts, and these large insured institutions are required to maintain IT systems capable of calculating the FDIC insurance available to each depositor based on the FDIC's deposit insurance rules. The additional requirements for large institutions were introduced in November 2016, and the FDIC recently announced changes designed to address issues raised during the implementation process. These changes include an optional one year extension to the original compliance deadline of April 1, 2020 and a 24-month grace period to return to compliance following a merger transaction as well as technical modifications and updates to alternative record keeping requirements for certain institutions and accounts.

The FDIC also recently announced an update to the requirements to establish joint ownership of a deposit account (and therefore qualify for separate FDIC insurance coverage) applicable to all FDIC-insured institutions. Previously, each co-owner was required to complete a deposit account signature card (commonly referred to as the "signature card requirement"). The FDIC will now allow the signature card requirement to be satisfied and joint-ownership to be established based on information included in the deposit account records that demonstrates access or usage by each co-owner. Certificates of deposit will remain exempt from the signature card requirement under the revised rule.

Additional information, including the full notices, is available here: https://bit.ly/2LQ4RnI.

FINRA Increases Margin Requirements for ETNs and Options on ETNs

In Regulatory Notice 19-21, FINRA announced that exchange-traded notes ("ETNs") will now be treated differently than investment grade debt securities under the maintenance margin requirements of FINRA Rule 4210(c).[3] That rule requires strategy-based accounts to maintain equity equal to 25% of the current market value of all margin securities long in the account, and the greater of 5% of the principal amount or 30% of the current market value of the debt securities short in the account. Debt securities, which include ETNs, are margin securities.

FINRA Rule 4210(e)(2)(C) provides some exceptions, allowing reduced margin requirements for investment grade debt securities, listed non-equity securities and other margin non-equity securities. ETNs are within those exceptions, because they are listed on a national securities exchange and their issuers typically are rated investment grade.

FINRA noted some concerns about ETNs, and also compared them to non-structured debt securities and exchange-traded funds ("ETFs"):

- Holders of ETNs are subject to the credit risk of the issuer and the performance of the underlying reference asset;
    - Holders of ordinary debt are subject to issuer credit risk and, to some extent, interest risk;
- ETNs are unsecured debt, with no ownership interests in the underlying reference asset;

[3] Regulatory Notice 19-21 is available at: https://bit.ly/2Zknd3t.

  - ETF owners hold an equity share of the ETF, which represents an ownership interest in the underlying portfolio of assets; and

- ETNs generally have an early issuer call right, which causes the return on an ETN to further diverge from that of an ETF on the same underlying index.

Consequently, FINRA will no longer allow ETNs to be within the exceptions provided by FINRA Rule 4210(e)(2)(C) for ETN positions in strategy-based accounts. Under FINRA Rule 4210, ETNs will now be subject to:

- An initial maintenance margin requirement of 25% of the current market value of ETNs held long in an account, and 30% of the current market value for ETNs held short; and
- An initial and maintenance margin requirement on listed options of ETNs of 20% of the underlying current market value of the ETN, and a minimum margin requirement of 10% of the underlying current market value of the ETN, in each case for purposes of the listed options and warrants requirements chart in Rule 4210(f)(2)(E)(i).

FINRA also increased the margin requirements (including day trading requirements) for leveraged ETNs and their associated uncovered options by a factor commensurate with their leverage. This approach is consistent with that taken by FINRA in Regulatory Notice 09-53 with respect to leveraged ETFs.

FINRA Sanctions a Brokerage for Failure to Reasonably Supervise Securities Transactions

On July 2, 2019, FINRA announced that it had imposed sanctions on a broker-dealer ("Dealer") for supervisory failures.[4] The sanctions, which totaled greater than $880,000, included approximately $558,000 in restitution to customers whose accounts were excessively traded by a former registered representative of the firm who was previously barred by FINRA in a separate disciplinary action.

FINRA determined that between January 2012 and March 2017, Dealer failed to review certain automated trade alerts for its registered representatives' trading activity, including alerts identifying excessive trading. Dealer failed to detect that the former representative excessively traded securities in the accounts of 14 customers, which generated more than 150 alerts for potentially excessive trading. FINRA found that Dealer received but did not review the alerts. In particular, the former registered representative excessively traded securities in accounts of two retired women, one of whom had a net worth of less than $500,000 and the other having a net worth of less than $1 million.

Dealer's actions constituted a failure to establish and maintain a supervisory system, and a failure to enforce written supervisory procedures, as required by FINRA Rule 3110. The excessive trading in customers' accounts also violated FINRA Rule 2111, in that Dealer did not have a reasonable basis to believe that a recommended securities transaction was suitable in light of the customer's investment profile, and a series of recommended

[4] The FINRA action can be found at: https://bit.ly/2GBHqdK.

securities transactions, when taken together, were excessive, the level of trading was inconsistent with the customer's investment profile and the Dealer exercised control over the customer's account.

This serves as a reminder that FINRA remains focused on excessive trading violations.

Reminder: The EU Prospectus Regulation is effective – key legal facts

The EU Prospectus Regulation ("PR") came into effect on July 21, 2019. As a result, public offers or admissions to trading on EU regulated markets of equity or debt securities are only possible on the basis of a new prospectus that complies with the PR and the recently published level 2 measures (Commission Delegated Regulation (EU) 2019/979 and 980).

What does this mean for issuers active in the EU markets?

We have summarized some of the key legal facts that will help in the transition to the new regulation below:

- ***Immediate application and grandfathering***: The PR is applicable with regard to new prospectuses as well as marketing materials (including oral marketing statements) even in cases where the offer was originally made before July 21, 2019. Prospectuses approved in the EU prior to July 21, 2019 are subject to grandfathering until their expiration under the EU Prospectus Directive ("PD"). However, it should be noted that legacy registration documents cannot be used in combination with a PR-compliant prospectus.
- ***Key changes to prospectus content***: The minimum content requirements for issuer and securities disclosures remain essentially unchanged. However, there have been changes to applicable prospectus types, like the new EU growth prospectuses. In addition, the PR no longer differentiates between corporate issuers and financial institutions with respect to debt issuances. One key change is the new summary format. There is a strict limitation on the length of the summary (in general only seven pages) and some of the content and the structure of the summary has been predetermined by the PR. Another key area is risk factors. EU regulatory authorities will base their reviews on guidelines by ESMA, which are expected to be published shortly. These guidelines in particular focus on more concise and – in particular – specific risk factors for the issuer and the securities. Accordingly, regulators will likely expect material changes to existing risk disclosures. These new requirements might affect risk disclosures in financial statements where they are incorporated into a base prospectuses without any changes.
- ***Important changes for retail structured notes platforms***: Existing retail structured notes platforms, which usually use the base prospectus format, will be affected as the regulators will increase their focus on (i) a transparent and clear structure for the base prospectus (including the length of the base prospectus) and (ii) the use of plain language. Clearer disclosure about the different securities and payout structures are expected by ESMA. This might require material revisions to existing base prospectuses or even newly prepared disclosures. Issuers may need to increase the number of base prospectuses in order to capture the full product spectrum of an issuance platform.

- ***Approval procedures***: Approval procedures are still subject to a maximum review period of 10 business days (which, under the PR, excludes Saturdays). It remains to be seen to what extent the regulators are prepared to commit to certain timetables. In particular, within the first year of the transition, issuers should expect several rounds of comments by the regulators. In addition, the approval procedure will require the delivery of metadata to the competent authority.
- ***What about Brexit?*** It should be noted that grandfathered PD as well as new PR prospectuses approved in the United Kingdom may no longer be used in the EU following Brexit. Approval of new prospectuses in other EU member states should therefore be considered.

Many EU market participants have already prepared for the transition and started to re-draft their base prospectuses. The German BaFin regulators will accept new PR prospectuses for approval from July 21, 2019 only. In addition, the EU regulators will adjust to the new review process over time and their views and approaches might continue to develop in unanticipated ways. BaFin just recently held a workshop for the market highlighting the importance of a diligent approach to the new law. Market participants should plan for a sufficient period of time for the review process by the regulator - which might take several weeks – and material changes to the content of existing base prospectuses.

Insurance Company Buyers of Structured Notes Should Consider Proposed NAIC Amendments

Recently, the National Association of Insurance Commissioners ("NAIC") Valuation of Securities (E) Task Force received a memo from the Director of the NAIC Securities Valuation Office ("SVO"), recommending an amendment to the filing exemptions that would require principal protected notes that insurance companies purchase to be submitted to the SVO for analysis. Currently, principal protected notes are eligible for a filing exemption and benefit from the same credit rating that would be applicable to the note issuer's senior unsecured debt obligations without having to undergo a separate review or analysis. The SVO memo is available here: https://bit.ly/2YtE46J. The memo makes clear that the SVO is concerned about the exposure provided through such a note to the underlying reference asset, which may be an asset class that may be subject to different risks than those associated with a rated fixed rate bond and may raise concerns for the insurance company buyer and its regulators. The NAIC Valuation of Securities (E) Task Force will have its first opportunity to consider the SVO's recommendation at its meeting on August 4, 2019. Under NAIC policy, any change in SVO filing exemptions will involve an opportunity for interested parties to comment. We will continue to monitor developments in this area.

Clayton Comes Out Swinging Against Critics of Regulation Best Interest

In a speech on July 8, 2019, SEC Chair Jay Clayton responded to criticism of Regulation Best Interest, setting out his arguments in a concise, step-by-step rebuttal.[5]

After a brief summary of Regulation Best Interest ("Reg. BI"), the Form CRS relationship summary, the clarification of a registered investment adviser's ("RIA") fiduciary duty (the "Fiduciary Interpretation") and the interpretation of the "solely incidental" prong of the broker-dealer exclusion under the Investment Advisers Act of 1940 (the "Advisers Act"), Chair Clayton got down to the business at hand:

"Let me now address some of the commentary, or, more specifically, the criticism and misinformation, I alluded to at the outset. I believe that much of this criticism—which is focused broadly on the extent of the investor protections under Reg. BI and our Fiduciary Interpretation—is false, misleading, misguided, and unfortunately, in some cases, is simply policy preferences disguised as legal critiques."

Complaint No. 1: The standard of conduct imposed on broker-dealers by Reg. BI will not do enough to protect retail investors.

Chair Clayton Response: In a swift one-two punch, Chair Clayton emphasized that Reg. BI substantially enhances the standard of conduct for broker-dealers by (1) establishing a standard of care for transaction-based advice that draws upon principles underlying the investment adviser fiduciary duty, and (2) being workable for broker-dealers. Under Reg. BI, (1) whether a retail investor chooses a broker-dealer or an investment adviser (or both), the recommendation or advice is required to be in the best interest of the retail investor and cannot place the interests of the firm or the financial professional ahead of the interests of the retail investor, and (2) the ability to choose between a broker-dealer transaction-based model and an investment adviser portfolio-based model—and choose among the various iterations and combinations of each—will be preserved.

Complaint No. 2: Reg. BI doesn't eliminate all conflicts of interest.

Chair Clayton Response: Calling this criticism "misguided," Chair Clayton acknowledged that there are conflicts of interest inherent in all principal-agent relationships, and the broker-customer relationship and the investment adviser-client relationship are no exception. However, Reg. BI recognizes that these conflicts exist, and requires that firms address those conflicts.

Complaint No. 3: Reg. BI fails because "best interest" is not defined and it doesn't require the broker-dealer to recommend the "best" security.

Chair Clayton Response: Reg. BI takes a principles-based approach, rather than a prescriptive approach, in determining what is in the best interest of the retail customer. Whether a broker-dealer has acted in the retail customer's best interest will turn on an objective assessment of the facts and circumstances. Neither broker-dealers nor investment advisers are required to recommend the "best" security, something that may only be known in hindsight.

[5] Chair Clayton's speech is available at: https://bit.ly/32UdlKo.

Complaint No. 3: The fiduciary interpretation weakens the existing RIA fiduciary duty by not requiring RIAs to "put clients first."

Chair Clayton Response: "This claim is flatly wrong." The critics are again swinging at air here, in that the Fiduciary Interpretation reaffirms the existing fiduciary protections under the Advisers Act, as stated by the U.S. Supreme Court in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). The core principle has always been that the adviser must at all times serve the best interest of its client and not subordinate its client's interest to its own, which principle the Fiduciary Interpretation reaffirms.

Complaint No. 4: The fiduciary interpretation weakens the existing RIA fiduciary duty by not requiring RIAs to avoid all conflicts.

Chair Clayton Response: "There is no legal or regulatory basis for this claim." Chair Clayton explained that some critics cited an instruction in Form ADV, adopted by the SEC in 2010, as the basis for a "no conflicts" requirement for RIAs. However, this would be a fundamental change from the existing legal standard for an RIA's fiduciary duty, as stated in *SEC v. Capital Gains*.

Complaint No. 5: The standards of conduct under Reg. BI and the Fiduciary Interpretation can be satisfied by disclosure alone.

Chair Clayton Response: Forcing the critics into a corner, Chair Clayton said that this claim "reflects a fundamental misunderstanding of how the independent component obligations of Reg. BI operate and a misconception of the investment adviser's fiduciary duty."

In order to satisfy the General Obligation of Reg. BI, a broker-dealer must satisfy all four of the component obligations, not just the Disclosure Obligation.[6] To satisfy the Conflict of Interest obligation, conflicts will, in many case, have to be mitigated. In some cases, they will have to be eliminated. Even if a conflict can be addressed through disclosure, including the Care Obligation, which applies to all recommendations, whether a broker-dealer has disclosed, mitigated or eliminated the conflict of interest.

RIAs have an obligation to act in the best interest of the client, which encompasses a duty of care and a duty of loyalty. The duty of care cannot be satisfied by disclosure alone.

Complaint No. 6: Reg. BI is deficient because it does not require broker-dealers to monitor a customer's account or impose an ongoing duty.

Chair Clayton Response: Chair Clayton called this argument "fundamentally flawed" and reflecting a misunderstanding of how federal law applies. One of Reg. BI's goals is to preserve access to different types of services, and investor choice. Forcing broker-dealers to provide ongoing monitoring services lessens choice and increases investor costs. More fundamentally, imposing an ongoing monitoring requirement on broker-dealers would subject the broker-dealer to regulation as an RIA and also vitiate the "solely incidental" prong of the broker-dealer exclusion under the Advisers Act.

Complaint No. 7: Form CRS will not address investor confusion regarding the differences between broker-dealers and RIAs.

[6] For a more detailed discussion of Reg. BI, please see our legal update at: https://bit.ly/2Osrlxc.

Chair Clayton Response: Chair Clayton deflected this shot by pointing to the extensive feedback, investor testing and SEC Staff expertise involved in creating Form CRS and the enhancements to the form made after the proposing release. Investors are confused about the roles of broker-dealers and RIAs; Form CRS is a substantial improvement over existing retail disclosures. According to Chair Clayton, Form CRS provides an unprecedented level of transparency and comparability across SEC-registered RIAs, broker-dealers and dual registrants.

Conclusion

Chair Clayton, by a knockout.

For the second year in a row, Mayer Brown has been named Americas Law Firm of the Year (Overall) at *GlobalCapital*'s Americas Derivatives Awards.

Mayer Brown has also been shortlisted for *GlobalCapital*'s upcoming Global Derivatives Awards in the Global Law Firm of the Year (Overall), European Law Firm of the Year (Transactions), and European Law Firm of the Year (Regulatory) categories.

Many thanks to *GlobalCapital* magazine for this recognition and to our clients for their trust in us and continued support.

Events

SAVE THE DATE

Bloomberg/Structured Products Association Structured Products Summit

October 8, 2019

Registration: 8:00AM – 8:30AM
Panels: 8:30AM – 5:00PM
Reception: 5:00PM – 7:00PM

Join Bloomberg, the Structured Products Association and Mayer Brown on October 8th to hear from industry leaders on the latest developments in the structured products market and predictions for 2020 and beyond. This event will include a series of panels, keynote presentations, and opportunities to network with your peers.

Location:
Bloomberg L.P.
731 Lexington Ave
New York, NY 10022

Registration opens soon. For more information, please contact bmcnelis@mayerbrown.com.

The ***REVERSEinquiries*** **Workshop Series** will be back in the fall with webinars on New Product Governance and Post-Sale Reviews, ETNs and Daily Redeemable Notes, and Platforms and Securities Law and Commercial Considerations. For more information, or to be added to our mailing list, e-mail REVERSEinquiries@mayerbrown.com.

ANNOUNCEMENTS

Capital Markets Tax Quarterly. Mayer Brown's Capital Markets Tax Quarterly, provides capital markets-related US federal tax news and insights.

In our latest issue we look at Q1 2019.

LinkedIn Group. Stay up to date on structured and market-linked products news by joining our 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.

The Free Writings & Perspectives, or FW&Ps, blog provides news and views on securities regulation and capital formation. The blog provides up-to-the-minute information regarding securities law developments, particularly those related to capital formation. FW&Ps also offers commentary regarding developments affecting private placements, mezzanine or "late stage" private placements, PIPE transactions, IPOs and the IPO market, new financial products and any other securities-related topics that pique our and our readers' interest. Our blog is available at: www.freewritings.law.

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