

REVERSEinquiries

Structured and market-linked product news for inquiring minds.

Accredited Investor Definition Expanded

On August 26, 2020, the Securities and Exchange Commission (the "SEC") adopted amendments to the definition of "accredited investor" and related amendments to the definition of "qualified institutional

buyer."¹ "Accredited investor" is defined in Rule 501(a) of the Securities Act of 1933 (the "Securities Act"), and "qualified institutional buyer" is defined in Rule 144A under the Securities Act. The amendments add new categories of natural persons and additional entities, as further discussed in our Legal Update.²

These changes are particularly important for structured products issuers such as national banks. Offers and sales of securities of national banks are subject to the Part 16 Securities Offering Disclosure Rules of the Office of the Comptroller of the Currency ("OCC"). Part 16.6, in particular, which provides an exemption from registration with the OCC for offerings of non-convertible debt, limits sales to accredited investors and in \$250,000 minimum denominations. Consequently, offerings under Part 16.6 tend to be aimed solely at institutional accredited investors rather than accredited investors who are natural persons. These offerings may now include additional categories of potential offerees.

Because Part 16.6 is so limited in its scope of offerees, national banks may also offer and sell securities under Part 16.7 of the Securities Offering Disclosure Rules, which provides an exemption from OCC registration for offerings conducted in reliance on Regulation D under the Securities Act, with no minimum denomination requirement. These offerings also tend to be directed to institutional accredited investors, but may include some accredited investors who are natural persons. In either case, the pool of potential investors has been expanded.

SEC Amends Requirements for Statistical Disclosures for Bank and Savings and Loan Registrants, Formerly Guide 3

On September 11, 2020, the SEC adopted amendments to the requirements for statistical disclosures that bank and savings and loan registrants provide to investors. The rules rescind Industry Guide 3, Statistical Disclosure

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¹ Release 33-10824 (Aug. 26, 2020) is available at: <https://bit.ly/3hTpXxk>.

² The Legal Update is available at: <https://bit.ly/2G1gCGa>.

by Bank Holding Companies (“Guide 3”); codify certain Guide 3 disclosures into a new Subpart 1400 of Regulation S-K; eliminate other Guide 3 disclosures that overlap with other SEC disclosure requirements, U.S. Generally Accepted Accounting Principles (GAAP) or International Financial Reporting Standards (“IFRS”); and add certain credit ratio disclosure requirements. According to the SEC, the rules aim to streamline compliance efforts and decrease reporting burdens for registrants and to enhance comparability among issuers. The changes also form part of the SEC’s Division of Corporation Finance’s (“CorpFin”) disclosure effectiveness initiative. These changes will affect the annual reports and the registration statements of issuers of structured products in the United States and, therefore, may be of interest to our readers.

For more information, read our [Legal Update](#) and listen to our [Global Financial Markets webcast](#).

Regulation S-K Amendments Affect Risk Factors

On August 26, 2020, the SEC adopted amendments to Regulation S-K that are intended to modernize business, legal proceedings and risk factor disclosures.³ According to the SEC, the amendments are designed to update rules to account for developments since they were first adopted or last amended and to improve the readability of disclosures for investors while discouraging repetition and disclosure of immaterial information and simplifying compliance for reporting companies. These amendments become effective 30 days after the adopting release is published in the *Federal Register*.

The amendments include changes to the certain items of the Business section, as well as the Legal Proceedings disclosure requirements. Importantly for our readers, the SEC also has revised Item 105 of Regulation S-K (Risk factors) to address its concerns about the lengthy and generic nature of current risk factor disclosure. The amendments require a risk factor summary of not more than two pages if the risk factor discussion exceeds 15 pages. Most risk factor sections included in periodic reports and/or in registration statements exceed 15 pages.

The risk factor summary must contain a series of concise bulleted or numbered statements summarizing the principal factors that make an investment in the company or offered securities speculative or risky and has to appear in the forepart of the prospectus or annual report, as applicable. The summary does not have to contain all of the risk factors described in the full risk factor discussion. Companies may prioritize certain risks in, and omit others from, the summary.

Read our [Legal Update](#) for additional analysis.

Additional Guidance on Regulation Best Interest

Regulation Best Interest (“Reg BI”) requires broker-dealers and their associated persons who are natural persons to act in the best interest of their retail customers when making a recommendation. On August 4, 2020, the SEC’s Division of Trading and Markets staff (“Staff”) provided additional guidance in complying with Reg BI,⁴

³ Available at <https://bit.ly/3cp97oD>.

⁴ Available at <https://bit.ly/2UzzaRM>.

particularly with respect to the definition of “retail customer,” the disclosure obligation as it relates to the use of the term “advisor” or “adviser” and the care obligation.

RETAIL CUSTOMER

- A regulated financial services industry professional, acting in a personal capacity for her or his own account, who receives from a broker-dealer a recommendation of a securities transaction or investment strategy involving securities is considered a “retail customer” for purposes of Reg BI. Although the recipient of such recommendation is a regulated financial services industry professional, it would not excuse a firm from complying with Reg BI because the recipient would be a natural person receiving and using the recommendation for personal, family, or household purposes.

DISCLOSURE OBLIGATION

- A broker-dealer that is not also a registered investment adviser may not use the term “adviser” or “advisor” in its firm’s “doing business as” marketing or legal name.
- Financial professionals of a broker-dealer that is dually-registered as an investment adviser, including those who are not also supervised persons of an investment adviser, may use or distribute firm materials that generally describe its financial professionals as “financial advisors” or by another general title using the term “adviser” or “advisor.” The use of such language, by itself, would not presumptively violate the capacity disclosure requirement under the Disclosure Obligation. However, when making a recommendation, they must make full and fair disclosure of all material facts relating to the scope and terms of the relationship with a retail customer, including the capacity in which they are acting with respect to the recommendation. Hence, a financial professional who is not also a supervised person of an investment adviser would not be permitted to use her or his own materials that refer to herself or himself as an “adviser” or “advisor” notwithstanding her or his firm’s registration status.
- Financial professionals of a standalone broker-dealer (i.e., not dually registered as an investment adviser) may not use or distribute firm materials, such as marketing materials that generally refer to its financial professionals using the terms “advisers” or “advisors.” However, where a financial professional is also a supervised person of an investment adviser, such individual may use her or his own materials (or materials prepared by the registered investment adviser) that refer to herself or himself as an “adviser” or “advisor.”
- A broker-dealer, whether standalone or dually registered as an investment adviser, may use or distribute issuer-prepared materials, such as a prospectus that generally refers to financial professionals using the terms “advisers” or “advisors,” without violating the capacity disclosure requirement under the Disclosure Obligation. When making a recommendation, however, these financial professionals must make full and fair disclosure of all material facts relating to the scope and terms of the relationship with a retail customer, including the capacity in which they are acting with respect to the recommendation.
- As to an associated person of a broker-dealer who also offers services on behalf of a bank (“dual-hatted broker-dealer-bank employee”), Reg BI would not apply when a dual-hatted broker-dealer-bank employee is acting in the capacity of a bank employee. Reg BI applies only when a broker-dealer is making a recommendation in the capacity of a broker-dealer. However, if a dual-hatted broker-dealer-bank employee is providing a recommendation to a retail customer in her or his broker-dealer capacity,

the use of the name or title “adviser” or “advisor” violates the Disclosure Obligation unless such individual is also a supervised person of an investment adviser.

CARE OBLIGATION

- Where a customer holds securities in a brokerage account (for which she has paid transaction-based compensation, including commissions, markups, and upfront sales loads), a dually-registered financial professional in her broker-dealer capacity may not recommend that she roll over or transfer such assets from her brokerage account to an advisory account where she will be charged an ongoing assets-under-management fee, unless the financial professional has a reasonable basis to believe that the recommendation is in the retail customer’s best interest at the time of the recommendation and does not place the financial professional’s financial or other interest ahead of the interest of the retail customer. Factors to consider are the potential risks, rewards, and costs of a particular security or investment strategy, in light of the particular retail customer’s investment profile.⁵
- In determining the capacity in which a dually-registered financial professional offering both advisory and brokerage accounts is making a recommendation, the facts and circumstances test should be applied and these factors, among other factors, should be considered: the type of account, how the account is described, the type of compensation and the extent to which the dual-registrant made clear to the customer the capacity in which it was acting. Where a dually-registered financial professional may not yet know and has not clearly disclosed the capacity in which he or she is acting to a potential retail customer, the financial professional should assume that both Reg BI and the Investment Advisers Act of 1940 (the “Advisers Act”) would apply, and the account recommendation generally should be evaluated under both Reg BI and the Advisers Act. Nevertheless, a dual-registrant is considered an investment adviser solely with respect to those accounts for which a dual-registrant provides investment advice or receives compensation that subjects it to the Advisers Act, and Reg BI would not apply in this situation even if the retail customer has a brokerage relationship with the dual-registrant or the dual-registrant executes the transaction in its brokerage capacity.

Refresher: Index License Agreements



Index-linked products are a mainstay of the structured products market, and issuers routinely negotiate and enter into license agreements with index sponsors in connection with these products. Given recent regulatory attention to indices and the increasing use of proprietary indices, we revisit below key considerations when preparing or negotiating index license agreements.

SCOPE OF LICENSE AGREEMENTS

Parties. Either the issuer or the issuer’s affiliated broker-dealer may enter into the license agreement with the index provider, and often multiple affiliates may be a party to the license agreement. The potential use of the

⁵ For a discussion of an investment adviser’s fiduciary duty, which would apply to a financial professional acting in the capacity of an investment adviser, see Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019) [84 FR 33669 (July 12, 2019)] at 33670-78.

index should be considered to determine which entities will need to be party to the agreement: Will the issuer distribute notes linked to the index through several underwriters? Will the underwriter distribute notes linked to the index issued by several different issuers? Which parties will need index data in order to make payment or pricing calculations?

Products. A license agreement will specify the products that may be issued referencing the index. A license agreement may cover a single issuance, a particular product type (e.g., multiple issuances based on a specified structure), or it may cover an entire product line (e.g., notes, CDs, etc.). A license agreement may also specify a geographic limit on use (usually determined based on the offering wrapper). The same license agreement may also cover OTC derivative instruments, which may be used for the issuer's hedge. Parties should consider their potential future issuance plans in determining the desired scope of a license agreement.

Indices. An index provider may license either a single index or it may prefer "bundling" several indices together. Where a license agreement contemplates multiple indices, it is common to use a schedule to allow indices to be added or removed during renewals without renegotiating the main agreement.

Data. In addition to licensing the use of an index and the related trademarks, an index provider may also provide data related to the index, including component information and real time index levels. Data provisions may also include back-tested data, especially with respect to newly launched indices, or the right to publish or disclose the index data that is provided to the licensee in connection with the products that are issued. The right to use derived data can also be included in a license agreement where the licensee wishes to design a product using its own modified index or strategy based on the licensed index.

Exclusivity. Index license agreements for novel indices may also include exclusivity provisions, granting the licensee the exclusive right to use an index or the exclusive right to use the index for a particular category of structured products. These provisions may also include a convertibility feature wherein the licensee may choose to waive exclusivity in exchange for reduced licensing fees.

REQUIRED DISCLOSURES

License agreements will outline the required statements regarding the ownership of the index and the index trademarks that will appear in the offering documentation as well as required statements disclaiming liability of the index provider. Some license agreements will include specific language, while others will include only the substantive requirements for the disclosures. Regardless of whether the disclosure requirements are outlined or specific language is provided, licensees should consider the planned offering documentation and whether any short "quick glance" marketing documents or term sheets will be used. Important negotiation points, depending on the planned offering documentation, include both the ability to use a shortened version of extensive required disclosures and the ability to make minor modifications to conform the required disclosures to the applicable documents (i.e., modifying language to reflect defined terms or multiple product types).

INDEMNITY PROVISIONS

A license agreement should clearly outline the liability of both parties, including the related indemnity, with respect to any index-linked products.

Indemnification of the Index Provider. The index provider is generally indemnified for any suits brought by investors in the applicable index-linked products. However, suits where the investor damages are related to index data or calculation errors or corrections may be carved out from the general indemnity.

Indemnification of the Licensee. The index provider is responsible for the ownership of the intellectual property that it is licensing under the agreement. Accordingly, a licensee should negotiate for indemnification in the event of any suits from third parties regarding the use of the index or related trademarks.

REVIEW RIGHTS

It is not uncommon for index providers to request prior review of any offering documents. However, licensees should consider whether this will be feasible in the context of the planned issuance timing. Form language that is approved prior to the first issuance (or contained within the license agreement) is often an acceptable alternative to prior review of offering documents, though some index providers may request that they are also provided the relevant offering documents for subsequent review to ensure compliance with the agreed language.

ONGOING REPRESENTATIONS AND REGULATORY CONCERNS

As mentioned in the introduction, there has been increased regulatory attention on reference indices. Europe's Benchmark Regulation is now effective, and, while the United States has not implemented any similar comprehensive rules, there have been calls for additional SEC regulation (discussed in greater detail [here](#)). Accordingly, new license agreements will include clauses related to maintaining the regulatory status of the index. These clauses include, depending on the circumstances, provisions related to index provider compliance with applicable regulatory requirements and limiting licensee use to activities which will not result in the index becoming subject to additional regulatory requirements or oversight. These provisions are in addition to the standard representations regarding maintaining the independence of the index by maintaining appropriate index governance, oversight and audit procedures and using third party pricing information.

Index licensees should also consider ongoing representations from the index provider regarding the publication of an updated methodology in the event of any changes to the calculation of the index and notice requirements regarding any such changes or methodology updates or disruptions or corrections to previously published levels.

FEE ARRANGEMENTS

Various fee arrangements are used in connection with index licenses depending on the provider and the planned use by the licensee, including both flat fee and volume-based fee models. Flat fee arrangements, which allow unlimited use for a specified period of time, are more likely to be available for custom or less-frequently used issuances. Most of the frequently used benchmark indices are only available to license under volume-based fee structures. Volume based fee arrangements can be based on either the number of issuances or the total notional, and break-points or an initial flat fee are also common in such arrangements. Depending on the licensee's future plans, the licensee may want to consider building in the ability to renew at the current fee arrangement to lock-in their current licensing rates.

Upcoming Events

- **REVERSEinquiries Workshop: Issuing Credit Linked Notes**

October 13, 2020 | [Register here](#)

For many years, credit linked notes have been a popular way for financial institutions to manage their credit risk exposures and for investors to access credit markets. Recently, we have seen renewed interest in these products from our financial institution clients. During our webinar, our London- and New York-based Structured Products team members will discuss the features and documentation of these products and some common legal and regulatory issues that arise.

- **Structured Products Association 17th Annual Conference**

October 15, 2020 | [Register here](#)

Please join us for the Structured Products Association's 17th Annual Conference, co-hosted by Nasdaq and Mayer Brown. For more information, see page 8.

- **SIFMA Annual Meeting 2020: The Virtual Capital Markets Conference**

October 19-20, 2020 | [More information here](#)

Mayer Brown is proud to sponsor SIFMA's Annual Meeting 2020, which provides a virtual forum for market participants to stay connected. This two-day event will gather financial industry leaders, regulators and policymakers to discuss issues critical to the strength, effectiveness and resiliency of our capital markets.

- **PLI Fund Finance 2020**

November 11, 2020 | [Register here](#)

Lawrence Hamilton will speak on the panel entitled *Overview of Collateralized Fund Obligations and Principal Notes*, discussing structuring considerations; transaction benefits for sponsors and general partners; and NAIC outlook

IN CASE YOU MISSED IT...

ESG Developments in Financial Services (July 2020)

[Listen to this Global Financial Markets call.](#)

REVERSEinquiries Workshop: Issuing Structured Products into the EU after Brexit (June 2020)

[Watch this webinar.](#)

REVERSEinquiries Workshop: Sustainability & Structured Products (May 2020)

[Watch this webinar.](#)

Structured Products Association 17th Annual Conference

Please join us on October 15 for the Structured Products Association's 17th Annual Conference, co-hosted by Nasdaq and Mayer Brown. For more information, see our agenda below. [To register, click here.](#)

SPA 2020 AGENDA – OCTOBER 15, 2020

10:30 am - 10:35 am	Introduction/welcome
10:35 am - 11:25 am	<p>The impact of COVID on the structured products market.</p> <p>During this panel discussion, we will cover:</p> <ul style="list-style-type: none"> • Overall volumes; • Product features, including underlyings, principal versus nonprincipal protection, new themes; • Wrapper trends: notes, CDs, UITs, separately managed accounts; • ETN related issues; and • Disclosure questions: risk factor disclosure pros and cons, EIV disclosures.
11:25 am - 11:35 am	Break
11:35 am - 12:25 pm	<p>Indices, Fixed Index Annuities and Legal and Regulatory Considerations</p> <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p><i>11:35 am – 11:45 am</i></p> <p>Interview of Efram Slen of Nasdaq by Keith Styracula, Founder of the Structured Products Association, on index trends.</p> </div> <p>11:45 am – 12:25 pm</p> <p>Panel discussion on indices, fixed index annuities and legal and regulatory considerations, topics include:</p> <ul style="list-style-type: none"> • Legal considerations relating to index composition, index rules, discretion; • Tax concerns relating to basket notice and discretion; • Licensing indices to annuity providers—the business and legal considerations; and • Registered index linked annuities
12:25 pm - 12:35 pm	Break
12:35 pm - 1:10 pm	<p>Distribution trends and developments</p> <p>During this panel discussion, we will cover:</p> <ul style="list-style-type: none"> • Trends affecting distribution through private wealth and RIA channels; • Distribution to affiliated RIAs and to discretionary accounts; • Platform related developments; • Reg BI and its effect on distributors;

	<ul style="list-style-type: none"> • Technology related developments; and • Work from home, transitioning to the office & addressing FINRA and SEC compliance and enforcement challenges.
1:10 pm - 1:15 pm	Break
1:15 pm - 1:40 pm	Views on International Impact of COVID and Global Trends Affecting Structured Products
1:40 pm - 2:30 pm	<p>Bank regulatory, derivatives and tax related developments</p> <p>During this panel, we will discuss:</p> <ul style="list-style-type: none"> • The ISDA Protocol and ISDA amendment; • The state of SBSB registration and regulation; • The Volcker Rule covered fund amendments; and • Tax developments and tax policies that may change with a new administration.
2:30 pm - 2:55 pm	ESG Themes
2:55 pm - 3:05 pm	Break
3:05 pm - 3:55 pm	<p>Other Legal Developments</p> <p>During this session, we will discuss:</p> <ul style="list-style-type: none"> • Changes to the accredited investor definition; • The ARCC and FRNs; • Addressing legacy FRNs; • Early feedback from the SEC and FINRA on Reg BI; and • Tax implications of IBOR transition.
3:55 pm - 4:00 pm	Wrap Up



MAYER BROWN'S IBOR TRANSITION RESOURCES

The final countdown to the LIBOR cessation date has begun. With fewer than 500 days left until December 31, 2021, rely on Mayer Brown to assist you.

With our global presence, deep knowledge of the affected markets and products, participation in trade and industry groups and considerable experience in using technology solutions (including artificial intelligence and other technology-assisted review tools), Mayer Brown is uniquely positioned to advise financial institutions and other affected market participants.

Our [IBOR Transition Task Force](#), composed of nearly 100 partners globally, is perhaps the best reflection of our strength and depth.

Below we provide a sampling of our resources:

[IBOR Transition Digest](#): A compendium of global regulatory and market news as well as insights on the complex issues confronting financial market participants as they transition from LIBOR and its variants to replacement benchmark interest rates.

[IBOR Transition Webinar Series](#): Detailed discussions and insights—in 30 minutes or less—on a range of topics from setting and executing an effective IBOR Transition strategy to assessing the impact of IBOR issues on specific financial products.

Subscribe on:   

Recent publications, include:

Recent webinars, include:



[FINRA LIBOR Phase-Out Preparedness Survey](#) (August 2020)



[LIBOR Transition: Issues impacting Floating Rate Notes, Preferred Stock, Depository Shares, and Capital Securities \(Part 5.1 & Part 5.2\)](#) (August / September 2020)



["Comparable" Alternative Reference Rates to LIBOR: The Low Bar for Official Designation, the Much Higher Hurdle of "Fit for Use" and Implementation for Market Participants](#) (August 2020)



[Issues impacting Floating Rate Notes, Preferred Stock, Depository Shares, and Capital Securities: Part 1](#) (August 2020)



[IBOR Transition: It's Later Than You Think!](#) (August 2020)



[It's later than you think! \(Part 1 & Part 2\)](#) (August 2020)



We are collaborating with [Morae Global Corporation](#), a leading provider of legal and compliance technology solutions, to assist clients in the transition from the IBORs to alternative risk-free reference rates. To more effectively serve our client, Mayer Brown has teamed up with Morae, to offer clients data analytics and remediation, technology enablement, repapering and program management capabilities.

Our firm and our partners are ranked as leaders for capital markets, structured finance and securitization, derivatives, structured products, financial services and bank regulatory, litigation, and tax by:



"Esteemed firm with excellent securitisation, structured finance and derivatives capital markets practices. Regularly sought after for advice on cross-border and transatlantic securitisation and structured finance transactions"



"A strong global reach allows the team to handle cross-border cases with ease, while the presence of several former regulatory officials provides insight into the most cutting-edge matters."



"The firm routinely leads on cross-border offerings from the US but it can also draw on its extensive network of offices for support on complex, multi-jurisdictional transactions... Among its industry sweet spots, the group is most prominent in the financial services..."



"Mayer Brown has leading structured finance, project development and project finance practices, as well as additional strengths in debt and equity capital markets."

Question? Please contact Marlon Paz, mpaz@mayerbrown.com, or see our [Global IBOR Transition Task Force contacts](#).

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Mayer Brown is pleased to have been named the European Law Firm of the Year – Transactions for *GlobalCapital's Global Derivatives Awards 2020*.

This follows our win as US Law Firm of the Year – Transactions for *GlobalCapital's Americas Derivatives Awards 2020*. We would like to thank *GlobalCapital* for its continued recognition and thank our friends and our colleagues for their trust in our work and practice.

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 cover US Tax Relief for COVID-19; Proposal to Reactivate the New York Stock Transfer Tax; IRS Delays Certain QI Certifications Due in 2020; US v. Bittner; and IRS Releases Final and Proposed Anti-Hybrid Tax Regulations.

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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