Corporate & Financial Weekly Digest

Posted at 1:43 PM on October 29, 2010 by Robert L. Kohl

FINRA Revises Policy on Free Writing Prospectuses

Co-authored by Palash Pandya

The Financial Industry Regulatory Authority recently issued Regulatory Notice 10-52, which states that any free-writing prospectus (FWP) distributed by a broker-dealer in a manner reasonably designed to lead to a "broad unrestricted dissemination" as described in Rule 433(d)(1)(ii) of the Securities Act of 1933, is subject to the provisions of NASD Rules 2210 and 2211. FINRA's prior interpretation in 2006 had excluded such FWPs from the provisions of NASD Rules 2210 and 2211.

NASD Rules 2210 and 2211 establish standards for the content of communications with the public by broker-dealers and include principal review and filing requirements with FINRA. NASD Rule 2210(b)(1) requires a registered principal of the broker-dealer to review and approve each advertisement and item of sales literature before it is distributed. NASD Rule 2210(c)(2) requires that firms file advertisements and sales literature regarding securities of certain entities, such as registered investment companies and public direct participation programs, with FINRA within 10 business days of first use.

FINRA states that it is following guidance provided by the Securities and Exchange Commission as to the scope of the term "broad unrestricted dissemination." The SEC has noted that examples of broad unrestricted dissemination of an FWP by a broker-dealer would include posting an FWP on an unrestricted website or releasing it to the media. A posting of an FWP to a restricted website or an FWP sent directly to the broker-dealer's customers, regardless of the number of customers, does not constitute a broad unrestricted dissemination.

FINRA notes that if an FWP is distributed by a broker-dealer in a manner that is not reasonably designed to lead to its broad unrestricted dissemination, the exemptions from the provisions of NASD Rules 2210 and 2211 will continue to apply.

Read more.

Katten Muchin Rosenman LLP
Charlotte Chicago Irving London Los Angeles New York Washington, DC