

## **SEC Expands Scope of FINRA Review for Company-Related Actions**

Rule 6490, effective September 27, 2010, expands the regulatory and investigative reach of the Financial Industry Regulatory Authority (“FINRA”) with respect to issuers of over-the-counter securities. Issuers and their counsel are urged to be mindful of the new filing fees, forms, and deadlines created by the rule, as well as the enhanced scrutiny their notice submissions may face.

FINRA is charged, in part, with handling certain functions of the over-the-counter (“OTC”) securities market. These functions include operating the OTC Bulletin Board quotation service and processing notices of issuer actions such as mergers, acquisitions, dissolutions, name or trading symbol changes, bankruptcies, distributions, stock splits, rights offerings, and other company-related actions (each a “Company-Related Action”). Once such a notice is received, FINRA announces the action on its Daily List, establishes the ex-date for distributions, and adjusts the trading price as necessary.

FINRA’s authority to perform these ministerial functions flows primarily from Securities Exchange Act Rule 10b-17 and FINRA’s Uniform Practice Code. But neither Rule 10b-17 nor the Practice Code grant FINRA jurisdiction over issuers or the right to impose listing standards for securities, limiting its ability to act quickly when fraudulent activities are being carried out through notices of Company-Related Actions. This is remedied by Rule 6490, which allows FINRA to investigate suspect requests for Company-Related Actions and grants FINRA staff the discretion to deny requests that are incomplete or contain indicators of potential fraud. It also sets forth a fee schedule and new notice requirements for Company-Related Actions, of which OTC issuers should be aware.

Factors that may be considered by FINRA staff in a request to process documentation are explicitly listed to the following:

1. FINRA staff reasonably believes the forms and all supporting documentation, in whole or in part, may not be complete, accurate, or submitted with proper authority.
2. The issuer is not current in its reporting obligations, if applicable, to the SEC or other regulatory authority.
3. FINRA has actual knowledge that parties related to the Company-Related Action are the subject of pending, adjudicated or settled regulatory action or investigation by a regulatory body, or civil or criminal action related to fraud or securities law violations.
4. A government authority or regulator has provided information to FINRA, or FINRA has actual knowledge, indicating that persons related to the Company-Related Action may be potentially involved in fraudulent activities related to the securities market and/or pose a threat to public investors; or
5. There is significant uncertainty in the settlement and clearance process for the security.

Of equal import are the administrative procedures imposed by Rule 6490. Issuers are now required to submit notice of Company-Related Transactions at least 10 days prior to the record date. A late notification will result in a steep escalation of filing fees, from \$200 for an on-time filing to a maximum of \$5,000 for a late filing. The rule also authorizes FINRA to request other documents that may be necessary to verify the information issuers list on their submissions. If in FINRA's judgment the request is deficient, fraudulent, or otherwise not in the best interest of the public markets, it may deny the submission and request additional information. The issuer then has 90 days to respond before the submission is deemed to have lapsed.

Issuers and their representatives are advised to be mindful of FINRA's new filing forms, fees, and oversight capabilities. Additional guidance is available at the below websites.

<http://www.finra.org/Industry/Regulation/Notices/2010/P121990>

<http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p121988.pdf>