Research Black-Out Restrictions for Initial and Secondary Offerings by FINRA Member Firms under FINRA Rule 2241

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The following is a discussion of the research "black-out" restrictions under FINRA Rule 2241 in connection with an initial or secondary offering of securities by a FINRA member firm.

Restrictions on the Distribution of Research under FINRA Rule 2241

FINRA Rule 2241(b) requires a FINRA member to adopt policies and procedures designed to prohibit the member from distributing research regarding an issuer if the member is acting as an underwriter or dealer with respect to an initial public offering ("IPO") or a secondary offering by the issuer, subject to certain exceptions. The same rule also restricts a research analyst associated with the member from making a public appearance with regard to the issuer's securities.

(1) *Initial Public Offerings* – A FINRA member firm acting as an underwriter or dealer of an IPO is prohibited from publishing or distributing research or making a public appearance relating to the issuer for 10 days following the date of the offering.

(2) *Secondary Offerings* – A member firm acting as a manager or co-manager of a secondary offering or is prohibited from publishing or distributing research or making a public appearance regarding the issuer for three calendar days following the date of the offering.

The relevant offering date for purposes of the 10 and three-day restrictions is the later of the effective date of the U.S. registration statement, if any, or the first date the securities are *bona fide* offered to the public. The latter term refers to the date the securities are actually offered to the public, as opposed to an earlier date on which the offering might have commenced in the technical sense (*e.g.*, the effective date of a registration statement or the date on which offers were made to only a limited number of prospective investors).

The black-out restrictions do not apply to the publication or distribution of research or to making a public appearance following the IPO or secondary offering of the securities of an Emerging Growth Company.[1]

[1] The term Emerging Growth Company means an issuer that had total annual gross revenues of less than $1,000,000,000 (as such amount is indexed for inflation every 5 years by the U.S. Securities and Exchange Commission (the "Commission") to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of (A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 (as such amount is indexed for inflation every five years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more;(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933;(C) the date on which such issuer has, during the previous three-year period, issued more than

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Exception for Significant News or Events

The black-out restrictions do not prevent the member firm from publishing research or a research analyst from making a public appearance concerning the effects of "significant news or a significant event" regarding the issuer, provided that the publication or appearance is approved beforehand by the firm's legal or compliance personnel. In accordance with FINRA guidance provided in Notice to Members 02-39 (July 2002), "significant news or significant event" refers to any news or event that would have a "material impact on, or that is expected to cause a material change to, the subject company's operations, earnings or financial condition." The exception generally permits research on extraordinary news or events that would ordinarily trigger the filing of Form 8-K by the issuer with respect to the information, such as the rejection of a patent or drug application, a labor strike, resignation of a chief executive officer or chief financial officer, or a publicly-announced investigation into company activities by a regulator. Events within the issuer's control, such as the offering of securities to investors, generally would not be significant; however, an extraordinary market occurrence, internal condition or other event necessitating the offering might be. A routine earnings announcement by the issuer would not be considered significant news or a significant event notwithstanding the filing of an 8-K with respect to the announcement, unless the occasion is used to relate other information of an extraordinary nature. *See* Notice to Members 04-18 (March 2004).

Exception for Qualified Research in Connection with a Secondary Offering

Another exception exists to the three-day black-out period with respect to secondary offerings permits member firms to publish research pursuant to Rule 139 under the Securities Act of 1933, as amended (the "Securities Act"), concerning issuers with "actively traded securities" (as defined in Regulation M), and to follow for public appearances by research analysts concerning such issuers.

(1) *Actively Traded Securities* – A company's securities are considered "actively-traded" under Regulation M if the securities have a worldwide average daily trading volume of at least U.S. $1 million and are issued by an issuer whose common equity securities have a public float value of at least U.S.
$150 million (provided that the securities are not issued by the distribution participant or an affiliate).[2]

(2) *SEC Rule 139* – FINRA Rule 2241(b)(I)(iii) incorporates Rule 139 by reference to permit the publication of *issuer specific research reports* and *industry reports* on qualified issuers if the research is distributed in the regular course of business and certain other conditions are met.[3]

(a) *Issuer Specific Research Reports (Rule 139(a)(1))* – In order to qualify for the exception for issuer specific reports, the issuer must be a qualified U.S. reporting company or foreign private issuer. The U.S. reporting company must meet the registration requirements of

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$1,000,000,000 in non-convertible debt; or (D) the date on which such issuer is deemed to be a "large accelerated filer," as defined in section 240.12b–2 of title 17, Code of Federal Regulations, or any successor thereto.

[2] The phrase "common equity securities" includes the equivalent type of stock of a foreign issuer for purposes of the calculation of average daily trading volume. *See* Frequently Asked Questions About Regulation M, Division of Market Regulation: Staff Legal Bulletin No. 9; Revised September 10, 2010.

[3] Under Rule 139, certain research is deemed not to constitute an "offer" to sell securities subject to a distribution for purposes of the prospectus delivery requirements under Section 5 of the Securities Act.

Form S-3 or F-3 and either: (i) the issuer must meet the minimum float requirements of such forms (currently, U.S. $75 million); or (ii) the issuer must be a "well-known seasoned issuer" as defined in Rule 405 under the Securities Act (generally an issuer with U.S. $700 million in worldwide float);[4] The company must have filed all periodic reports required during the preceding 12 months on Forms 10-K, 10Q and 20-F. The foreign private issuer must meet all of the registration requirements of Form F-3 (other than the reporting history provisions)[5] and satisfy the U.S. $75 million public float threshold of Form F-3. In addition, the company's equity securities must trade on a designated offshore securities market, as defined in Rule 902(b) under the Securities Act,[6] or have a worldwide market value of its outstanding common equity held by non-affiliates of U.S. $700 million or more.

The publication or distribution of the report may not represent the initiation or re-initiation of coverage of the issuer. Therefore, there must be at least one previous report on the subject company (or one report in resumption of coverage). However, the previous research report does not have to have covered the same securities that are the subject of the registered offering.

(b) *Industry Reports (Rule 139(a)(2))* – In order to qualify for the exception for industry reports, the issuer must be a reporting company pursuant to Section 13 or Section 15(d) of the Exchange Act[7] or a foreign private issuer meeting the conditions described above. In addition, the report must contain similar information on a substantial number of issuers in the industry (or contain a list of securities currently recommended by the firm) and the analysis on the issuer subject to distribution must have no greater prominence in the report than that given to other issuers. The firm must publish or distribute research in the regular course of its business and, at the time of publication of the industry report, must include similar material about the issuer or its securities in similar reports.

For both issuer specific research reports and industry reports, the issuer may not be, and it or its predecessors may not have been over the previous three years, (1) a blank check company,[8]

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[4] To qualify as a well-known seasoned issuer, the issuer must have either U.S. $700 million of worldwide public common equity float or have issued U.S. $1 billion of non-convertible securities, other than common equity, in registered offerings for cash, in the preceding three years, among other requirements. *See* Rule 405 under the Securities Act.

[5] The conditions for filing a Form F-3 registration statement include: (1) filing in a timely manner all reports required to be filed in the year (and any portion of a month) immediately preceding the filing of the registration statement; (2) neither the registrant nor any of its consolidated or unconsolidated subsidiaries have, since the end of their last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to Section 13(a) or 15(d) of the Exchange Act: (a) failed to pay any dividend or sinking fund installment on preferred stock; or (b) defaulted (i) on any installment or installments on indebtedness for borrowed money, or (ii) on any rental on one or more long term leases, which defaults in the aggregate are material to the financial position of the registrant and its consolidated and unconsolidated subsidiaries, taken as a whole; (3) if the registrant is a successor registrant, it shall be deemed to have met conditions (1) and (2) above if: (a) its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state or other jurisdiction of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or (b) all predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession. *See* General Instructions I.A.2-4 of Form F-3.

[6] "Designated offshore securities market" under Rule 902(b) includes various identified non-U.S. stock exchange and other foreign securities exchange and non-exchange markets designated by the Commission.

[7] There is no requirement that the reporting company meet any public float test as there is for issuer specific reports.

[8] The term "blank check company" is defined in Rule 419(a)(2) under the Securities Act (17 C.F.R. § 230.419(a)(2)) as a company that: (1) is a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person; and (2) is issuing "penny stock," as defined in Rule 3a51-1 under the Securities Exchange Act of 1934.

(2) a shell company[9] (other than a business combination related shell company) or (3) an issuer for an offering of penny stock.[10]

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Please contact us if you have any questions or would like more information on the material discussed in this memorandum.

[9] The term "shell company" is defined in Rule 405 under the Exchange Act (17 C.F.R. § 230.405) as a registrant, other than an asset backed issuer as defined in Item 1101(b) of Regulation AB (17 C.F.R. § 229.1101), that has: (1) no or nominal operations; and (2) either: (a) no or nominal assets; (b) assets consisting solely of cash and cash equivalents; or (c) assets consisting of any amount of cash and cash equivalents and nominal other assets.

[10] The term "penny stock," defined in Rule 3a51-1 under the Exchange Act (17 C.F.R. § 240.3a51-1), generally refers to stock with a value of less than U.S. $5 per share or stock from an issuer with less than U.S. $5 million in net tangible assets if it has been in business less than three years and less than U.S. $3 million in net tangible assets if it has been in business for three years or more.