

CORPORATE AND SECURITIES LAW ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

FINRA Reverses Policy to Regulate Free Writing Prospectuses

November 16, 2010

The Financial Industry Regulatory Authority, Inc. ("FINRA") recently issued Regulatory Notice 10-52, Free Writing Prospectuses (the "Notice"), which provides that the content, principal review and applicable filing requirements of NASD Rule 2210, Communications with the Public ("Rule 2210"), and NASD Rule 2211, Institutional Sales Material and Correspondence ("Rule 2211"), are now applicable to any free writing prospectus which is distributed by a broker-dealer in a manner that is reasonably designed to lead to its "broad unrestricted dissemination."¹ Prior to the issuance of the Notice, free writing prospectuses were not subject to the provisions of Rule 2210 and Rule 2211.²

The full text of the Notice is available [here](#).

What is a Free Writing Prospectus?

Since the Securities Offering Reform of 2005,³ the free writing prospectus has served as an important vehicle through which broker-dealers may market and sell registered securities as well as educate investors about an associated public offering. Specifically, a free writing prospectus is any written communication, including an electronic communication, that constitutes an offer to sell or a solicitation to buy securities in a registered offering by means other than a prospectus that meets the statutory requirements of the Securities Act of 1933, as amended. Examples of communications which may constitute free writing prospectuses include, but are not limited to, live television or radio programs, press releases, audiotapes,

¹ FINRA stated in the Notice that it explicitly adopts the guidance previously issued by the Securities and Exchange Commission ("SEC") regarding the meaning of the term "broad unrestricted dissemination." Specifically, the SEC stated in the Securities Offering Reform of 2005 that examples of broad unrestricted dissemination of a free writing prospectus include (i) the posting of a free writing prospectus on an unrestricted Web site or hyperlinks from an unrestricted Web site to information that would be a free writing prospectus or (ii) issuing a press release that constitutes a free writing prospectus regarding the issuer or the associated offering. Conversely, the SEC stated that a broker-dealer would not make a broad unrestricted dissemination if a free writing prospectus is posted to a restricted Web site (e.g., password protected) or sent directly to customers, regardless of the number of customers.

² See Letter from Lisa C. Horrigan, Assistant General Counsel, NASD, to Eileen Ryan, Vice President and Associate General Counsel, Securities Industry Association, and Sarah Starkweather, Regulatory Counsel, The Bond Market Association (August 1, 2006), available [here](#).

³ Securities Offering Reform, Securities Act Release No. 33-8591, Securities Exchange Act Release No. 34-52056 (July 19, 2005), 70 Fed. Reg. 44,722 (Aug. 3, 2005), available [here](#).

videotapes, facsimiles, Internet Web sites, pre-recorded "blast" voice messages and electronic mail.

Why did FINRA Issue the Notice?

FINRA recently discovered (i) sales materials which were being used by broker-dealers that were in "serious non-compliance" with the content standards of Rule 2210 and (ii) regulatory inconsistencies in the application of Rules 2210 and 2211 to communications that presented similar investor protection concerns. Accordingly, broker-dealers should be cognizant of FINRA's intent to more proactively protect investors by attempting to ensure that communications with the public are fair, balanced and not misleading.

What is the Practical Impact of the Notice?

The content, principal review and applicable filing requirements of Rules 2210 and 2211 will immediately apply to all free writing prospectuses. Because the Notice contains no "grandfather" provision, broker-dealers should analyze in an expeditious manner all free writing prospectuses that were being disseminated in a broad unrestricted manner as of the date of the Notice to ensure that they comply with the provisions of Rules 2210 and 2211.

Going forward, broker-dealers should more closely monitor for compliance all materials which are used to market and sell registered securities that are (i) posted to or hyperlinked from unrestricted Internet Web sites and (ii) broadly disseminated to unrestricted audiences.

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The Corporate Finance/1933 Act Subgroup of Bass, Berry & Sims PLC monitors and advises on developments relating to corporate finance matters including initial public offerings, follow-on public offerings, Rule 144A offerings and private placements of equity and debt securities. If you have any questions regarding the issues addressed in this *Corporate and Securities Law Alert*, or if you would like to set up a meeting with us and your management team or board of directors regarding these developments, please feel free to communicate with any of the attorneys in our Subgroup listed below or your regular contacts in our Corporate and Securities Group.

| | | |
|--------------------------|--------------|--|
| John A. Good | 901-543-5901 | jgood@bassberry.com |
| Laura R. Brothers | 615-742-7705 | lbrothers@bassberry.com |
| Helen W. Brown | 901-543-5918 | hwbrown@bassberry.com |
| Wes Scott | 901-543-5983 | wscott@bassberry.com |

Bass, Berry & Sims PLC Corporate and Securities Group

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150 Third Avenue South, Suite 2800 • Nashville, TN 37201 • (615) 742-6200

The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103 • (901) 543-5900

1700 Riverview Tower • 900 South Gay Street • Knoxville, TN 37902 • (865) 521-6200