ACA
COMPLIANCE GROUP

3RD QUARTER 2009

BDQUARTERLY

"…[We found] that despite numerous credible and detailed complaints, the SEC never properly examined or investigated Madoff's trading and never took the necessary, but basic, steps to determine if Madoff was operating a Ponzi scheme."

— Testimony of Written Testimony of H. David Kotz, Inspector General of the Securities and Exchange Commission, before the U.S. Senate Committee on Banking, Housing and Urban Affairs, September 10, 2009

Update on the FTC's Red Flags Rule

As the ever-changing deadline for compliance with the Federal Trade Commission's Red Flags Rule approaches yet again, it appears that hope for another reprieve is fading. On August 19th, FINRA and FTC representatives presented a webinar that provided answers to many (though not all) of the long outstanding questions about who is covered by the rule.

Broker-dealers that are required to implement identity theft programs should plan to have them up and running by November 1st. FINRA representatives on the webinar indicated that examiners will begin checking for Red Flags Rule compliance as soon as the rule goes into effect.

As a brief refresher, the Red Flags Rule requires financial institutions and creditors that maintain covered accounts to adopt and implement written policies and procedures designed to prevent, detect, and mitigate identity theft. The definition of "financial institution" includes banks, (CONTINUED)

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credit unions, and other businesses that directly or indirectly hold transaction accounts for consumers. The term "transaction account" is generally defined as an account permitting check writing or other forms of payment to third parties. The term "creditor" is broadly defined to include anyone who regularly extends, renews, or continues credit or regularly arranges for the extension, renewal or continuation of credit. A "covered account" is defined as either 1) an account designed to permit multiple payments or transactions that is maintained primarily for personal, family, or household purposes, or 2) any other account for which there is a reasonably foreseeable risk to customers or the firm from identity theft.

Any brokerage account for an individual will be deemed a "covered account," so introducing and clearing firms offering these types of accounts to individuals must comply with all requirements of the Red Flags Rule.

So who is actually covered by the Red Flags Rule? The answer largely depends on the type of account and the type of customer. For starters, broker-dealers offering services exclusively to institutional customers will not be covered by the rule. Accounts for institutions do not meet the definition of "transaction accounts," which is limited to individual consumers, so firms providing such accounts are not financial institutions under the Red Flags Rule. Even with respect to broker-dealers that frequently provide margin accounts or other credit facilities, in which case they would be deemed creditors, FTC and FINRA representatives on the webinar consistently agreed that institutional accounts normally do not pose a "reasonably foreseeable risk" of identity theft. Additionally, absent unusual circumstances (such as an actual case of identity theft against an institutional customer), institutional accounts would not be deemed to be "covered accounts."

Any brokerage account for an individual will be deemed a "covered account," so introducing and clearing firms offering these types of accounts to individuals must comply with all requirements of the Red Flags Rule. A broker-dealer providing margin accounts or other credit facilities will generally be considered a creditor. Both the introducing and clearing firms in this arrangement will be creditors, since the introducing firm has "arranged" for the credit. A broker-dealer providing an account that permits payment to third parties, such as an account with check writing or credit/debit card privileges, will also be deemed a financial institution. Again, both the introducing and clearing firms would likely be covered.

In the case of non-individual, non-institutional accounts, the broker-dealer will need to determine whether there is a "reasonably foreseeable" risk of harm from identity theft. Accounts established for the benefit of a specific individual or group will probably be deemed to pose such a risk.

For non-institutional accounts, the analysis is more complicated, but becoming clearer. Broker-dealers that do not maintain "transaction accounts" for their customers, such as private placement distributors, application-way mutual fund dealers, or mergers and acquisitions shops will not be considered financial institutions. As long as they do not extend credit to their customers, they should not be covered.

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FTC and FINRA representatives on the webinar strongly encouraged the use of the template identity theft procedures provided on the FINRA website (see www.finra.org/customerprotection/redflags). These procedures must be customized to the specific needs of each firm. The FINRA representatives indicated that examiners will be looking for "effort" as they do their first reviews of Red Flags Rule compliance, so it is critical that compliance personal be particularly thoughtful in drafting policies that address the particular risks to their customers.

FINRA Takes Aim at Foreign Finder Relationships

Broker-dealers that have made transaction-based payments to foreign companies pursuant to FINRA's foreign finder exemption have seen an increasing amount of regulatory scrutiny.

NASD Rule 1060 permits transaction-related compensation payments to non-registered *foreign persons* who are engaged in investment banking or securities business as long as they meet the provisions enumerated in the Rule (see below). Broker-dealers that fail to meet the Rule's provisions may need to register foreign persons as "foreign associates," which triggers additional supervision and registration requirements.

In particular, FINRA is scrutinizing broker-dealers that make referral payments to foreign financial companies rather than to foreign persons, which in turn may make indirect payments to the foreign unregistered persons that service customer accounts. The foreign persons service customer accounts by maintaining customer information, providing trading instructions, and facilitating continuing account maintenance. Broker-dealers believe that this scenario is a common industry practice and is within the Rule's provisions because: (1) payments are made to foreign companies and not the foreign persons servicing the customer accounts; and (2) broker-dealers have received trading authorization from the beneficial owner for the foreign person to service the account. ACA expects the industry to send interpretive letters requesting guidance from FINRA on this controversial issue.

FINRA's concerns may relate to whether "foreign finders" are overstepping their bounds by doing more then simply referring customer accounts to U.S. broker-dealers, thus subjecting them to "foreign associate" status. In order to qualify for a foreign finder, the sole involvement of the foreign person receiving the transaction-related compensation must be limited to the initial referral of non-U.S. customers to the member. On the other hand, a "foreign associate" may act in any registered capacity on behalf of the member,. A number of firms have indicated that FINRA has made requests for detailed written statements describing the person(s) that are responsible for servicing customer accounts that are referred by foreign companies. In some situations, FINRA has *strongly* urged broker-dealers to register the foreign persons who are receiving direct or indirect payments, as "foreign associates."

Foreign Finder Requirements:

NASD Rule 1060 provides exemptions from registering "foreign finders" as associated persons who are engaged in the investment banking (CONTINUED)

or securities business and receive transaction-related compensation, provided that:

1. The broker-dealer has assured itself that the non-registered foreign person who will receive the compensation (the "finder") is not required to register in the U.S. as a broker-dealer nor is subject to a disqualification, and has further assured itself that the compensation arrangement does not violate applicable foreign law;
2. The finders are foreign nationals (not U.S. citizens) or foreign entities domiciled abroad;
3. The customers are foreign nationals (not U.S. citizens) or foreign entities domiciled abroad transacting business in either foreign or U.S. securities;
4. The customers receive a descriptive document, similar to the solicitor's disclosure document provided to investment advisory clients pursuant to the Advisers Act, that discloses the compensation to be paid to the finders;
5. Customers provide written acknowledgment to the U.S. broker-dealer of the existence of the compensation arrangement and that such acknowledgment is retained and made available for inspection by FINRA;
6. Records reflecting payments to finders are maintained on the broker-dealer's books and actual agreements between the member firm and persons compensated are available for inspection by FINRA; and
7. The confirmation of each transaction indicates that a referral or finders fee is being paid pursuant to an agreement.

Foreign Associates:

NASD Rule 1100 permits broker-dealers to register certain persons working in foreign offices as "foreign associates" without requiring a qualification examination, provided that each associated person is registered with FINRA. In order to classify a person as a "foreign associate," the broker-dealer must file a Form U4 and attest that the person is not disqualified from registration with FINRA. Further, all "foreign associates" must be supervised in accordance with the FINRA By-Laws and rules, which would require registering foreign branch office locations, conducting branch office inspections, requiring continuing education and training, and supervising employee activities.[1]

TIP! ACA recommends that compliance officers conduct an internal review to ensure compliance with the foreign finder exemption. Among other things, ACA recommends that broker-dealers:

- Identify all payments (directly or indirectly) to foreign persons or foreign companies for the referral of foreign customers;
- Reconcile all payments to foreign finder agreements and customer compensation disclosures;
- Interview foreign personnel (e.g. new accounts, operations, and trading) to identify all account services conducted by foreign persons that may trigger registration; and
- Escalate all concerns to senior management.

Broker-dealer's found not to be in compliance with NASD Rule 1060 will likely be forced to register "foreign finders" as "foreign associates." In addition, firms may be subject to disciplinary actions and be in jeopardy of violating their membership agreements.

1– FINRA restricts the number of newly registered branch offices and registered persons involved in sales per year for each broker-dealer. See NASD IM-1011-1, *Safe Harbor for Business Expansions.*

Annual Audited Financial Statements Alert

ACA has learned that some broker-dealers may face challenges complying with Securities Exchange Act of 1934 ("Exchange Act") Rule 17a-5(d)(4) based on incorrect advice provided by their auditors. Pursuant to Rule 17a-5(d)(4), a broker-dealer's annual audited financial statements must include a reconciliation between the Exchange Act Rules 15c3-1 and 15c3-3 computations in the audit report and the most recent FOCUS filing.

This reconciliation has been a routine part of broker-dealer audit reports for many years, but some broker-dealers reportedly have been advised by their auditors not to include the required reconciliation in situations where they had included one in the past.

ACA has also been informed that multiple broker-dealers have failed to include an opinion from their auditor covering their SIPC annual general assessment reconciliation. Exchange Act Rule 17a-5(e)(4) requires filing of the reconciliation and accompanying opinion unless SIPC is collecting only the minimum assessment. As discussed in the ACA Compliance Alert dated August 3, 2009, SIPC is now collecting revenue-based assessments from its members to recapitalize its reserve fund. The required auditor's opinion likely caught a number of broker-dealers and their auditors off guard.

After identifying these deficiencies on multiple filings, FINRA has engaged in discussions with one or more significant audit firms regarding correction of these oversights. As you prepare your annual financial statements to file with FINRA and the SEC, you should confirm that the SIPC annual general assessment and audit report-FOCUS reconciliation have been filed correctly.

In Case You Missed It!

Regulatory Notice 09-53

Increased Margin Requirements for Leveraged Exchange-Traded Funds and Associated Uncovered Options.

Effective December 1, 2009, FINRA is implementing increased customer margin requirements for leveraged ETFs and uncovered options overlying leveraged ETFs, in accordance with NASD Rule 2520 and Incorporated NYSE Rule 431.

Leveraged ETFs are a special type of ETF that attempt to achieve returns that are more sensitive to market movements than their non-leveraged siblings. A leveraged bull ETF fund might, for example, attempt to achieve daily returns that are *2 times or 3 times* in excess of the daily S&P 500 return, negating the need to apply margin. FINRA recently reminded firms of their sales practice obligations with respect to leveraged and inverse (returns correlate to the inverse of a particular index or benchmark) ETFs, including informing customers of the fact that most of these funds are designed to achieve their stated performance only on a daily basis.

NASD Rule 2520(f)(8)(A) and Incorporated NYSE Rule 431(f)(8)(A) permit FINRA, in response to market conditions, to prescribe higher initial and maintenance margin requirements. (CONTINUED)

In view of the increased volatility of leveraged and inverse ETFs compared to their non-leveraged counterparts, FINRA believes higher margin levels are appropriate.

Specifically, FINRA is increasing the maintenance margin requirements for leveraged and inverse ETFs and associated uncovered options by a factor commensurate with their leverage. FINRA is also increasing the maintenance margin requirements for listed and over-the-counter uncovered options on leveraged ETFs in a similar fashion. The new margin requirements are described in the notice with examples.

Regulatory Notice 09-51

SEC Approves Amendments Relating to Recordkeeping and the Unsolicited Customer Order Exception of Exchange Act Rule 15c2-11.

Effective September 21, 2009, broker-dealers are required to create a contemporaneous record of certain customer and order information demonstrating eligibility for the unsolicited customer order exception of Exchange Act Rule 15c2-11 when the firm is relying on such exception.

Specifically, contemporaneous with the receipt of any unsolicited customer order or indication of interest, firms are now required to record the following details:

- The identity of the associated person who receive the unsolicited customer order or indication of interest directly from the customer, if applicable;
- The identity of the customer;
- The date and time the unsolicited customer order or indication of interest was received; and
- The terms of the unsolicited customer order or indication of interest that is the subject of the quotation (e.g., security name and symbol, size, side of the market, the duration, and price)
- To the extent a firm is displaying a quote representing an unsolicited customer order or indication of interest that was received from another broker-dealer, the firm is nevertheless required to create a contemporaneous record of:
  - The identity of the person from whom information regarding the unsolicited customer order of indication of interest was received, if applicable;
  - The date and time the unsolicited customer order or indication of interest was received by the firm displaying the quotation; and
  - The terms of the unsolicited customer order or indication of interest that is the subject of the quotation.

The firm displaying the unsolicited customer order or indication of interest may rely on the information provided by the routing firm if the member firm has a reasonable basis for believing that the information is valid.

New FINRA Rules

Effective October 19, 2009, FINRA is adopting NASD Rule 2820 as FINRA Rule 2320. In adopting the new rule, FINRA will now require firms to determine and keep records of the value of non-cash compensation received from offerors in all cases (as opposed to NASD Rule 2820, which required firms to provide and keep records for the value of non-cash compensation only “if known”). Firms are permitted to estimate the (CONTINUED)

actual value of non-cash compensation for which a receipt (or similar documentation) assigning a value is not available.

As of September 25, 2009, FINRA Rule 2263 has been amended to require firms to provide each associated person with arbitration disclosures whenever an associated person is required to manually sign a new or amended Form U4, or to otherwise provide written acknowledgment of an amendment to the Form U4.

Did You Know…

Regulatory Fee Increases

FINRA License and Assessments Alert – FINRA has announced that individual registered representative assessments will double next year to a fee of between $130 and $150. Firm assessments will be recalculated based on the average assessments paid over the past three years, which may mean an increase for firms that otherwise experienced a decrease in gross revenue in the past year.

MSRB Annual Fee – As of October 1, 2009, the annual fee for a broker-dealer will be $500, a $200 increase over last year's fee.

Annual Financial Audit Reminder

On January 8, 2009, FINRA notified member firms that the Public Company Accounting Oversight Board ("PCAOB") registration relief expired on December 31, 2008. If your firm has not yet engaged a PCAOB registered auditor, you should start seeking one. Fiscal year 2009 audits and all subsequent years will have to be conducted by a PCAOB registered auditor.

Limited Representative — Investment Banker Registration

The Limited Representative - Investment Banking Qualification Examination, designated as the Series 79, was finally approved by the SEC in July and announced in Regulatory Notice 09-41. Pursuant to NASD Rule 1032(i), associated person activities that trigger the need for the Series 79 registration include:

- Advising on or facilitating debt or equity offerings through private placement or public offering that includes origination, underwriting, marketing, structuring, syndication, and pricing of suction securities, and managing the allocation and stabilization activities of such offerings; or
- Advising on or facilitating mergers and acquisitions, tender offers, financial restructurings, assets sales, divestitures or other corporate reorganizations or business combination transactions, including but not limited to rendering a fairness, solvency or similar opinion.

How does the new registration apply to you?

- Existing registered representatives who hold the Series 7 or equivalent registration may opt-in to the Series 79 from November 2, 2009 thru May 3, 2010 (the "opt-in period"), provided they are engaged in investment banking activities. Please note that no associated persons of a firm will be eligible to opt-in unless the firm's current Form BD indicates that the firm engages in (CONTINUED)

investment banking activities. In order to opt-in, firms need to submit an amended Form U4 and request the Limited Representative—Investment Banking Registration.

- New employees can still take the Series 7 exam or equivalent exam during the opt-in period. After the candidate has passed the Series 7 exam or equivalent exam, the employee should submit an amended Form U4.

- General Securities Principals who supervise investment banking activities have the same six month window to opt-in. The Series 79 will now be available as a prerequisite for the General Securities Principal examination (Series 24). However, such principals will be limited to supervising the activities set forth in NASD Rule 1032(i).

Revised Form U4 Disclosure Questions are Due November 14, 2009

On May 13, 2009, the SEC approved FINRA's proposed amendments to Forms U4 and U5. The amendments include the following new questions:

- Customer Disputes: Form U4 Questions 14I(4) and 14I(5) and Form U5 Questions 7E(4) and 7E(5) require reporting of sales practice violations alleged in customer-initiated arbitrations and litigation against an individual, even if that individual is not a named as a party in the proceeding.

- Regulatory Actions: Form U4 questions 14C and 14E require firms to provide a "yes" or "no" response to new Regulatory Action questions.

Member firms must submit final answers to the new U4 disclosure questions for each registered representative by November 14, 2009

Regulatory Notices, Updates, and Rule Changes

Financial Industry Regulatory Authority — Regulatory Notices/Notices To Members

September

Regulatory Notice 09-54 SEC Approves Amendments Requiring Related Market Center Indicator in Non-Tape Reports Submitted to FINRA. **Effective Date:** March 1, 2010

August

Regulatory Notice 09-52 SEC Approves Amendments to FINRA Trade Reporting Rules on OTC Equity Transactions Executed Outside Normal Market Hours. **Effective Date:** January 11, 2010

Regulatory Notice 09-53 Increased Margin Requirements for Leveraged Exchange-Traded Funds and Associated Uncovered Options. **Effective Date:** December 1, 2009

Regulatory Notice 09-51 SEC Approves Amendments Relating to Recordkeeping and the Unsolicited Customer Order Exception of SEA Rule 15c2-11. **Effective Date:** September 21, 2009

Regulatory Notice 09-50 SEC Approval and Effective Date for New Consolidated FINRA Rules. **Effective Date** (FINRA Rule 2320):

October 19, 2009. **Effective Date** (Repeal of Incorporated NYSE Rules 134 and 440I): August 17, 2009

Regulatory Notice 09-49 SEC Approves Amendments to Modernize and Simplify NASD Rule 2720 Relating to Public Offerings in which a Member Firm with a Conflict of Interest Participates. **Effective Date:** September 14, 2009

(CONTINUED)

Regulatory Notice 09-48 SEC Approves Rule Establishing Expedited Procedures for Arbitrating Promissory Note Cases. **Effective Date:** September 14, 2009

Regulatory Notice 09-47 New Large Options Positions Report (LOPR) Requirements Due to Implementation of Options Symbology Initiative. **Posted on:** 8/6/09

Regulatory Notice 09-46 FINRA Reminds Alternative Trading Systems of Their Reporting Obligations. **Posted on:** 8/5/09

Regulatory Notice 09-45 FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Sale of Securities in a Fixed Price Offering. **Comment Period Expires:** September 18, 2009

July

Regulatory Notice 09-44 FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Fidelity Bonds. **Comment Period Expires:** September 14, 2009

Regulatory Notice 09-43 SEC Approves Amendments to the Panel Composition Rules of the Arbitration Code for Industry Disputes. **Effective Date:** August 31, 2009

Regulatory Notice 09-42 FINRA Reminds Firms of Their Obligations With Variable Life Settlement Activities. **Posted on:** 7/30/09

Regulatory Notice 09-41 SEC Approves Rule Change Creating New Limited Representative—Investment Banker Registration Category and Series 79 Investment Banking Exam. **Effective Date:** November 2, 2009

Regulatory Notice 09-40 SEC Approval and Effective Dates for New Consolidated FINRA Rules on Electronic Filing Requirements for Uniform Forms and Arbitration Disclosures. **Effective Date** (FINRA Rule 1010): July 27, 2009. **Effective Date** (FINRA Rule 2263): September 25, 2009

Regulatory Notice 09-39 SEC Approves Changes to the FINRA Regulation Board Composition and Conforming Changes to the FINRA Regulation By-Laws. **Effective Date:** August 20, 2009

Regulatory Notice 09-38 Guidance on the Net Capital and Reserve Formula Treatment of Senior Unsecured Debt Securities Issued Under the Debt Guarantee Program Component of the FDIC's Temporary Liquidity Guarantee Program. **Effective Date:** July 15, 2009

Regulatory Notice 09-37 Trading in Motors Liquidation Company (Formerly Known as General Motors Corporation). **Posted on:** 7/14/09

Regulatory Notice 09-36 SEC Approves an Amendment to the Tolling Provision in the Arbitration Codes for Customer and Industry Disputes. **Effective Date:** August 10, 2009

Securities and Exchange Commission

August

Release No. 34-60423 Regulation S-AM: Limitations on Affiliate Marketing Other Release Nos.: IC-28842, IA-2911 **Effective Date:** September 10, 2009

July

Release No. 34-60388 Amendments to Regulation SHO (Corrected—Conforming to Federal Register Version) **Effective Date:** July 31, 2009

Municipal Securities Rulemaking Board

August

MSRB Notice 2009-49 Build America Bonds: Reminder of Customer Confirmation Yield Disclosure Requirement

MSRB Notice 2009-48 Amendment to Rule A-14—Annual Fees

MSRB Notice 2009-47 Request for Comment Regarding Priority of Orders in Primary Offerings

MSRB Notice 2009-46 Amendments to Rules G-11 and G-12 Filed with SEC

(CONTINUED)

July

MSRB Notice 2009-45 Amendments Filed to Administrative Rules: Rules A-3, A-4, A-5 and A-6

MSRB Notice 2009-44 Proposals Filed to Provide for Additional Primary Market and Continuing Disclosure Information to Be Made Available Through EMMA

MSRB Notice 2009-43 Request for Comment on Additional Increases in Transparency of Municipal ARS and VRDO

MSRB Notice 2009-42 MSRB Issues Interpretive Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities

MSRB Notice 2009-41 Applicability of MSRB Rules to California Registered Warrants

MSRB Notice 2009-40 Interpretive Letter Regarding Solicitation Activity on Behalf of an Affiliated Company Pursuant to Rules G-37 and G-38

MSRB Notice 2009-39 MSRB Launches the Continuing Disclosure Service of EMMA

Financial Crimes Enforcement Network

Joint News Release - FinCEN Seeks Comments on AML Plan for Non-Bank Mortgage Lenders and Originators (07/15/2009)

Joint News Release - FinCEN Releases Latest Edition of SAR Activity Review—By the Numbers (07/07/2009)

Joint News Release - FinCEN Advisory: Structuring by Casino Patrons and Personnel (07/01/2009)

Joint News Release - FinCEN Guidance Clarifies 314(b) Information Sharing (06/16/2009)

Joint News Release - FinCEN Moves to Streamline Mutual Fund BSA Requirements (06/05/2009)

Conferences/Webcasts

FINRA Conferences

Chief Regulatory Officers' Conference
October 14–15, 2009 • New York, NY

Advertising Regulation Conference
October 21–22, 2009 • Washington, DC

Annual Conference
May 26–28, 2010 • Baltimore, MD

ACA Compliance Group

Roundtables
October 14, 2009 • Miami, FL
October 20, 2009 • San Francisco, CA
October 21, 2009 • Los Angeles, CA

Webcasts
Portfolio Risk Management for CCOs
October 20, 2009

Communications with the Public
October 27, 2009

Latest GIPS Guidance and New Requirements for 2009 & 2010
November 3, 2009

Insider Trading & Informational Barriers
November 17, 2009

Filing Dates

2009 Monthly/Quarterly FOCUS Part II/IIA Filings

Month Ending	Due Date
September 30, 2009	October 23, 2009
October 31, 2009	November 24, 2009
November 30, 2009	December 23, 2009
December 31, 2009	January 27, 2010

2009 Customer Complaint Filings

Quarter Ending	Due Date
3rd quarter 2009	October 15, 2009
4th quarter 2009	January 15, 2010

2009 Annual Audit Filings

Fiscal Year End	Due Date
September 30, 2009	November 30, 2009
October 31, 2009	December 30, 2009
November 30, 2009	January 29, 2010
December 31, 2009	March 1, 2010

ACA Compliance Group (ACA) is a full-service compliance consulting firm committed to offering unparalleled regulatory compliance and GIPS verification services designed to satisfy the needs of investment advisers, private funds, investment companies, insurance companies and broker-dealers.

In these uncertain times, compliance officers must closely monitor changing regulations while fulfilling their current compliance obligations. As an alternative to increasing their compliance staff, leading financial services firms choose to partner with ACA.

ACA clients benefit from the creation of customized compliance programs that meet the increasingly complex regulatory requirements. Please contact us to discuss how ACA's team of former FINRA, NYSE and SEC regulators can help you effectively manage your compliance burden.

Nothing herein should be construed as legal advice or as a legal opinion for any particular situation. ACA makes no representations about the accuracy of the information contained herein or its appropriateness for any given situation.

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