

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the Continued Membership
of
Macquarie Capital (USA) Inc.
with
FINRA

Notice Pursuant to
Rule 19h-1
Securities Exchange Act
of 1934

SD-2063

Date: April 26, 2017

I. Introduction

On April 30, 2015, Macquarie Capital (USA) Inc. (the “Firm” or “Macquarie”) submitted a Membership Continuance Application (“MC-400A” or the “Application”) to FINRA’s Department of Registration and Disclosure. The Application seeks to permit the Firm, a FINRA member subject to a statutory disqualification, to continue its membership in FINRA. A hearing was not held in this matter. Rather, pursuant to FINRA Rule 9523(a), FINRA’s Department of Member Regulation (“Member Regulation”) recommended that the Chair of the Statutory Disqualification Committee, acting on behalf of the National Adjudicatory Council, approve the Firm’s continued membership in FINRA pursuant to the terms and conditions set forth below.

For the reasons explained below, we approve the Firm’s Application.

II. The Statutorily Disqualifying Event

The Firm is subject to a statutory disqualification, as that term is defined in Section 3(a)(39) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Article III, Section 4 of FINRA’s By-Laws, as a result of a Final Judgment (the “Judgment”) entered on March 31, 2015, by the United States District Court for the Southern District of New York. The Judgment permanently enjoined the Firm from violating Sections 17(a)(2) and (3) of the Securities Act of 1933 (the “Securities Act”) in the offer or sale of any security.¹

¹ Exchange Act Section 3(a)(39), which incorporates by reference Exchange Act Section 15(b)(4)(C), provides that a person is subject to statutory disqualification if it is enjoined from, among other things, engaging in any conduct or practice as a broker-dealer or in connection with the purchase or sale of any security.

The Judgment resulted from a complaint filed by the SEC that alleged the Firm and two of its investment bankers used materially false offering documents in connection with its underwriting and marketing of a 2010 secondary public offering of registered common stock for Puda Coal, Inc. (“Puda”), a Chinese-based issuer. Specifically, the complaint alleged that the Firm hired a third party to conduct due diligence on Puda and its purported 90% indirect ownership interest of a Chinese coal company (Puda’s principal asset and sole source of revenue). Although the due diligence report prepared for the Firm revealed that Puda did not own any interest in the coal company, the Firm did not update the offering materials to disclose this information to investors.² The complaint further alleged that the Firm’s supervisory and control structures were inadequate and that it did not have a sufficient system in place to ensure that the due diligence report was properly assessed and acted upon.

Without admitting or denying the allegations in the SEC’s complaint, the Firm consented to the Judgment. In addition to permanently enjoining the Firm, the Judgment ordered the Firm to pay \$12 million in disgorgement and prejudgment interest and imposed a civil penalty of \$3 million. The Judgment also required the Firm to pay the costs of establishing a fund to compensate investors who suffered losses after purchasing Puda stock in the secondary offering at issue.³ The Judgment did not require the Firm to comply with any undertakings.

III. Background Information about the Firm

The Firm has been a FINRA member since 1994. The Application states that it has three branch offices, six Offices of Supervisory Jurisdiction (“OSJs”), and employs approximately 558 registered individuals (including approximately 62 registered principals) and 232 non-registered individuals. The Application further states that the Firm does not employ any individual who is subject to statutory disqualification.

A. Recent Routine Examinations

On November 26, 2016, FINRA issued the Firm a Cautionary Action in connection with the Firm’s 2016 examination. FINRA cited the Firm for the following: failing to have adequate controls and procedures regarding short sales; failing to have adequate controls and supervision in place to prevent erroneous internal cross transactions; failing to have sufficient supervisory oversight concerning monitoring credit risk exposure related to the Firm’s agency lending business; weaknesses relating to access to the Firm’s general ledger system; and overstating customer debits in the Firm’s Customer Reserve Formula Computation. The Firm responded in writing that it corrected the deficiencies noted.

² Once information regarding ownership of the coal company became public, Puda’s stock price plunged and it was subsequently delisted and its stock deregistered.

³ The Firm has paid all amounts due and owing under the Judgment.

On November 20, 2015, FINRA issued the Firm a Cautionary Action in connection with the Firm's 2015 examination. FINRA cited the Firm for failing to have written policies and procedures specifying how credit and market risks are managed at the broker-dealer level and for issuing inaccurate customer account statements. The Firm responded in writing that it corrected the deficiencies noted.

On May 28, 2014, FINRA issued the Firm a Cautionary Action in connection with the Firm's 2014 examination. FINRA cited the Firm for several deficiencies in the Firm's stock borrow and stock loan deficit calculations. The Firm responded in writing that it corrected the deficiencies noted.

B. Recent Regulatory Actions

In December 2015, FINRA accepted a Letter of Acceptance, Waiver and Consent ("AWC") from the Firm for violations of Exchange Act Section 17(a), Exchange Act Rules 17a-4 and 17a-25, and FINRA Rules 8211, 8213, and 2010. Without admitting or denying the allegations, the Firm consented to findings that it submitted to the SEC and FINRA blue sheets that inaccurately reported certain information and that it did not have in place an adequate audit system related to its blue sheet submissions. FINRA censured the Firm, fined it \$2.95 million, and ordered it to conduct a review of its policies, systems and procedures (and to certify in writing that it did so).⁴

In October 2014, FINRA accepted an AWC from the Firm for violations of FINRA Rules 4560, 3010, and 2010. Without admitting or denying the allegations, the Firm consented to findings that it failed to report short interest positions and that its supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable securities laws and regulations. FINRA censured the Firm and fined it \$20,000. FINRA also ordered the Firm to revise its supervisory procedures related to short interest reporting (which it subsequently did).

In January 2014, FINRA accepted an AWC from the Firm for violations of Exchange Act Rule 10b-10 and FINRA Rule 7450. Without admitting or denying the allegations, the Firm consented to findings that it transmitted to the Order Audit Trail System inaccurate or incomplete reports, inaccurately indicated on customer confirmations that transactions were executed at an average price, and failed to provide written notification to customers that transactions were executed at an average price. FINRA censured the Firm and fined it \$9,000.

C. Civil Litigation

The Firm was also named as a defendant in one class action lawsuit involving the 2010 public offering that triggered the Firm's disqualifying event. Without admitting any wrongdoing, the Firm settled this matter for \$7.4 million in October 2015. The record further shows that the Firm has been named as a defendant in other actions involving

⁴ The Firm complied with its certification requirement.

securities law claims in connection with the Firm's activities as an underwriter. Certain of these matters have been dismissed, while others have been settled or remain pending.

IV. The Firm's Proposed Continued Membership in FINRA and Proposed Plan

The Firm seeks to continue its membership in FINRA notwithstanding the Judgment that triggered its statutory disqualification. As noted above, the Judgment did not require the Firm to comply with any undertakings. The Firm, however, has represented that it will implement the following plan (the "Plan") to help prevent future misconduct similar to the misconduct underlying the Judgment:

1. Hire outside counsel to conduct a review of its Global Enhanced Due Diligence Guidance and Macquarie Capital U.S. Due Diligence Considerations for Capital Markets ("Due Diligence Guidance") at least every two years for a period of five years from the date of this Notice. Macquarie will consider any recommendations made by outside counsel regarding its Due Diligence Guidance, discuss any such recommendations with outside counsel, and implement the recommendations as appropriate. The Firm will obtain a written documentation of the review conducted by outside counsel, and will document the Firm's response to such review, including any revisions made to the Firm's Written Supervisory Procedures. All related documents will be kept segregated for ease of review during any FINRA statutory disqualification or other examination. At the conclusion of the five-year review period, the Firm will review the Due Diligence Guidance on an as-needed basis, based on the nature of the capital markets business and transactions at such time.
2. Hire outside counsel to conduct an annual training for all of Macquarie's investment banking staff in the United States on due diligence considerations and the Due Diligence Guidance for a period of five years from the date of this Notice. The training will be conducted separately from the Firm's mandatory Continuing Education training program and all of the Firm's investment banking staff in the United States will be asked to attend the training. The effectiveness of this training will be reviewed to determine the ongoing frequency of such training after five years, based on the nature of the capital markets business and transactions at such time. The Firm will maintain copies of the agenda for each of the annual trainings provided and will document attendance at such trainings. The Firm will segregate such documents for ease of review during any FINRA statutory disqualification or other examination.
3. The Firm has already implemented a procedure ("the Due Diligence Confirmation Procedure") requiring that, for each offering in which the Firm serves as the lead underwriter, the Series 24 Principal must confirm in writing prior to the date of launch of such offering that he

or she is familiar with the Firm's due diligence policies and procedures, is satisfied that the due diligence process was performed appropriately, and that all material issues identified in the due diligence process have been either resolved or appropriately disclosed ("Due Diligence Confirmations"). Additionally, the Firm's Compliance Department will institute a procedure to document an independent review to ensure that the Firm has complied with the Due Diligence Confirmation Procedure. The Firm will segregate copies of the Due Diligence Confirmations signed by the Series 24 Principal and documentation of the Compliance Department's review for ease of review during any FINRA statutory disqualification or other examination.

Subsequent to approval of the Firm's continued membership in FINRA notwithstanding its statutory disqualification, FINRA will utilize its examination and surveillance processes to monitor the Firm's compliance with the standards prescribed by FINRA Rule 9523.

V. Discussion

Member Regulation recommends approving the Firm's request to continue its membership in FINRA. After carefully reviewing the entire record in this matter, we approve the Application.

In evaluating an application like this, we assess whether the statutorily disqualified firm seeking to continue its membership in FINRA has demonstrated that its continued membership is consistent with the public interest and does not create an unreasonable risk of harm to the market or investors. *See* FINRA By-Laws, Art. III, Sec. (3)(d); *cf. Frank Kufrovich*, 55 S.E.C. 616, 624 (2002) (holding that FINRA "may deny an application by a firm for association with a statutorily-disqualified individual if it determines that employment under the proposed plan would not be consistent with the public interest and the protection of investors"). Factors that bear on our assessment include the nature and gravity of the statutorily disqualifying misconduct, the time elapsed since its occurrence, the restrictions imposed, and whether there has been any intervening misconduct.

Although the Judgment involved serious violations of the federal securities laws, the violative conduct occurred in 2010, more than six years ago, and was related to a single public offering. The two Firm registered representatives named in the complaint underlying the Judgment have not been registered with the Firm since 2011 and 2012. Further, and although the Judgment did not require any undertakings, the Firm has taken steps to prevent future misconduct similar to the misconduct underlying the Judgment. For example, the Firm represents that it has modified and enhanced its due diligence practices related to public offerings, and has agreed to, among other things, continue to review its procedures on a regular basis. The Firm has also agreed to conduct regular trainings germane to the issues underlying the Judgment, and now requires that each

supervising principal confirm in writing that all material issues identified in connection with a public offering are addressed or disclosed.

We further find that although the Firm has some recent regulatory history, the record shows that it has taken corrective actions to address noted deficiencies. We agree with Member Regulation that the Firm's regulatory history should not prevent it from continuing as a FINRA member, and based upon the Firm's representations and compliance with the Plan, we conclude that its continued membership is in the public interest and does not present an unreasonable risk of harm to the market or investors.⁵

At this time, we are satisfied, based in part upon the Firm's representations, Member Regulation's representations concerning FINRA's future monitoring of the Firm, and the record currently before us, that the Firm's continued membership in FINRA is consistent with the public interest and does not create an unreasonable risk of harm to the market or investors. Accordingly, we approve the Firm's Application to continue its membership in FINRA as set forth herein.⁶ In conformity with the provisions of Exchange Act Rule 19h-1, the continued membership of the Firm will become effective within 30 days of the receipt of this notice by the Commission, unless otherwise notified by the Commission.

On Behalf of the National Adjudicatory Council,



Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary

⁵ We also note that, in connection with the Judgment, the SEC found good cause to grant the Firm a waiver from the disqualification provision of Securities Act Rule 506(d)(2)(ii) of Regulation D.

⁶ FINRA certifies that the Firm meets all qualification requirements and represents that it is registered with BATS ZX-Exchange, EDGA Exchange, Inc., EDGX Exchange, Inc., NASDAQ, DTC, and NSCC, which concur with the Firm's proposed continued membership.