

## Obligation of Issuers to Provide Notice of Company-Related Actions

### SEC Approves New FINRA Rule Relating to the Processing of and Fees for Company-Related Actions for Non-Exchange-Listed Securities

Effective Date: September 27, 2010

#### Executive Summary

Effective September 27, 2010, new FINRA Rule 6490 (Processing of Company-Related Actions) codifies the requirements in SEA Rule 10b-17 for issuers of a class of publicly trading securities to provide timely notice to FINRA of certain corporate actions (e.g., dividend or other distribution of cash or securities, stock split or reverse split, rights or subscription offering). Issuers must also provide timely notification to FINRA of certain other specified corporate actions. The rule clarifies the scope of FINRA's regulatory authority and discretionary power when processing documents related to announcements for company-related actions for non-exchange-listed equity and debt securities, and implements fees for these services.<sup>1</sup> Issuers must complete the necessary forms and pay the applicable fees within the required time periods or they will be subject to late fees and delayed processing of documents to announce corporate actions.

The text of the new rule is set forth on FINRA's website at [www.finra.org/rulefilings/2009-089](http://www.finra.org/rulefilings/2009-089).

Questions regarding this *Notice* should be directed to:

- FINRA Operations at (866) 776-0800; select option 1; or
- Kosha K. Dalal, Associate Vice President and Associate General Counsel, Office of General Counsel, at (202) 728-6903.

#### August 2010

##### Notice Type

- Rule Approval

##### Suggested Routing

- Compliance
- Legal
- Operations
- Senior Management
- Systems
- Trading and Market Making

##### Key Topic(s)

- Fees
- Non-Exchange-Listed Securities
- Over-the-Counter Trading

##### Referenced Rules & Notices

- NASD Rule 11140
- FINRA Rule 6490
- SEA Rule 10b-17
- UPC Rules

## Background

Historically, FINRA has performed certain limited functions relating to the processing of non-exchange-listed issuer company actions in the over-the-counter (OTC) securities market. Specifically, FINRA reviews and processes documents related to announcements for company-related actions pursuant to SEA Rule 10b-17 (Untimely Announcements of Record Dates),<sup>2</sup> and other company actions, including the issuance of or change to a trading symbol or company name, mergers, acquisition, dissolutions or other company control transactions, bankruptcy or liquidations. FINRA announces company-related actions pursuant to requests from issuers and their agents on its website in a document known as the “Daily List,” establishes the ex-date for distributions and dividends and adjusts the trading price of the securities where applicable.<sup>3</sup> These functions are important to trading and settlement in the OTC marketplace and help promote investor protection and market integrity.

## Discussion

### Issuer Obligations Under New FINRA Rule 6490

FINRA Rule 6490 (Processing of Company-Related Actions) codifies the requirements in SEA Rule 10b-17 for issuers of a class of publicly trading securities to provide timely notice to FINRA of certain corporate actions (*e.g.*, dividend or other distribution of cash or securities, stock split or reverse split, rights or subscription offering). Generally pursuant to SEA Rule 10b-17, issuers must notify FINRA at least 10 days prior to the record date for such corporate action. Issuers must also notify FINRA of certain other corporate actions (*e.g.*, the issuance of or change of trading symbols, mergers, bankruptcy) no later than 10 days prior to the effective date of the company action. Issuers must complete the required forms and pay the applicable fees within such time periods or they will be subject to late fees and delayed processing of documents to announce corporate actions.

The new rule further permits FINRA to request other documents that may be necessary to verify information issuers provide on the forms. FINRA may, in its discretion, conduct detailed reviews of submissions, on a case-by-case basis. Moreover, the new rule authorizes FINRA to not process a request to announce a corporate action if FINRA determines that the request is deficient and not processing is necessary to protect investors and the public interest and to maintain fair and orderly markets.

### SEA Rule 10b-17 Company-Related Actions

SEA Rule 10b-17, an anti-fraud rule of the federal securities laws, provides that issuers must notify FINRA no later than 10 days prior to the record date involved. In case of a rights subscription or other offering, if the 10-day advance notice is not practical, issuers must notify FINRA on or before the record date and in no event later than the effective date of the registration statement to which the offering relates. Generally, issuers must notify FINRA of the following actions:

- a dividend or other distribution in cash or in kind, except an ordinary interest payment on a debt security, but including a dividend or distribution of any security of the same or another issuer;
- a stock split or reverse split; or
- a rights or other subscription offering (collectively, referred to as “SEA Rule 10b-17 Actions”). For example, an issuer of non-exchange-listed publicly traded securities that is planning a stock split on shares of its common stock to holders of record on February 25 would be required under SEA Rule 10b-17 and FINRA Rule 6490 to provide written notice to FINRA no later than 10 days prior to the record date for the transaction, or by February 15.

Moreover, SEA Rule 10b-17 prescribes information that must be included in the notice, including, but not limited to:

- the title of the security;
- date of declaration;
- record date;
- payment or distribution date;
- for cash distributions, the amount to be paid per share;
- for distribution of securities, generally the amount of the security outstanding immediately prior to and immediately following the dividend or distribution and the rate of the dividend or distribution;
- details of any conditions that must be satisfied to enable the payment or distribution; and
- additional details relating to stock or reverse splits.

Issuers should review the text of SEA Rule 10b-17 to fully understand their obligations, which may be amended from time to time.

### Other Company-Related Actions

Issuers with a class of publicly trading securities also undertake other corporate actions relating to such securities, including the issuance of or change to a trading symbol or company name, merger, acquisition, dissolution or other company control transaction, bankruptcy or liquidation (“Other Company-Related Actions”; and together with SEA Rule 10b-17 Actions, are collectively referred to as “Company-Related Actions”).

In accordance with Rule 6490, FINRA may prescribe the necessary forms, supporting documentation and fees to process announcements for Company-Related Actions.

### Submitting Notice of Company-Related Actions

An issuer or other duly authorized representative that is obligated to notify FINRA of a Company-Related Action must:

1. Complete, sign and submit the Company-Related Action Notification Form to FINRA Operations at least ten (10) days prior to the record date or effective date (as applicable) involved for the Company-Related Action. The form is available on FINRA’s website at [www.finra.org/upc/forms](http://www.finra.org/upc/forms).
2. Ensure that the issuer’s duly authorized transfer agent signs and submits a completed Transfer Agent Verification Form to FINRA Operations simultaneously.
3. Attach supporting documentation (*e.g.*, copy of board resolutions authorizing the Company-Related Action, amendment to the charter of incorporation) as required by the Company-Related Action Notification Form.
4. Pay all applicable fees, including late fees, in the manner prescribed on the Company-Related Action Notification Form.
5. Submit the above package either electronically or via overnight mail to FINRA Operations at the addresses specified on the applicable Form.

FINRA Operations will assign a unique, identifying number to each request to process documentation for a Company-Related Action. Issuers or their duly authorized representatives must include the number on all future submissions, notices and correspondence from them to FINRA Operations relating to the action.

### Applicable Fees

Rule 6490 requires issuers to pay the following fees to FINRA:

<b>SEA RULE 10b-17 ACTION</b>	<b>FEE</b>
Timely SEA Rule 10b-17 Notification	\$200
Late SEA Rule 10b-17 Notification (Notice submitted at least 5 calendar days prior to corporate action date)	\$1,000
Late SEA Rule 10b-17 Notification (Notice submitted at least 1 calendar day prior to corporate action date)	\$2,000
Late SEA Rule 10b-17 Notification (Notice submitted on or after corporate action date)	\$5,000
<b>OTHER COMPANY-RELATED ACTION</b>	<b>FEE</b>
Voluntary Symbol Request Change	\$500
Initial Symbol Set Up	No Charge
Symbol Deletion	No Charge
<b>APPEALS</b>	<b>FEE</b>
Action Determination Appeal Fee	\$4,000

### FINRA Operations Determination

Once an issuer or its duly authorized representative submits a Company-Related Action Notification Form, FINRA Operations will review the submission and may request additional information or documentation as may be necessary to verify the accuracy of the information. If the party that submits the form does not sufficiently respond within 90 calendar days of the date FINRA Operations requests additional information or documentation, the request will be deemed “lapsed” and will be closed.

During the course of the review, if FINRA Operations believes that one of five explicitly enumerated factors outlined in Rule 6490 may be triggered, it generally will conduct an in-depth review of the Company-Related Action and may seek additional information or documentation from the issuer or duly authorized representative as outlined above. Where a Company-Related Action is deemed deficient, FINRA Operations may determine that it is necessary for the protection of investors, the public interest and to maintain fair and orderly markets, that documentation related to a Company-Related Action will not be processed. Factors that may be considered by the FINRA Operations in finding a request to process documentation related to a Company-Related Action deficient are *explicitly limited* 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 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 laws violations<sup>4</sup>;
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; and/or
5. there is significant uncertainty in the settlement and clearance process for the security.

## Appeal Process

If FINRA Operations determines that a request to process a Company-Related Action is deficient, FINRA will provide written notice to the requesting party. The written notice will state the specific factor(s) that caused the request to be deemed deficient. The issuer or its duly authorized representative may request an appeal of such determination by submitting a written request for an appeal to FINRA Operations within seven (7) calendar days after service of notice of the deficiency by FINRA. A three-member subcommittee composed of current and/or former industry members of FINRA's Uniform Practice Code Committee will review the appeal. The written request for an appeal must be accompanied by proof of payment of the non-refundable Action Determination Appeal Fee and must set forth with specificity any and all defenses to the determination by FINRA Operations that a request is deficient.

While the appeal is pending, FINRA will stay the processing of the Company-Related Action. The UPC subcommittee convenes once a month to consider all appeals received during the prior month and will render a determination within three (3) business days following the day the appeal is considered by the UPC subcommittee. The UPC subcommittee's determination will constitute final action by FINRA. If the issuer or its duly authorized agent fails to file a written request for an appeal within seven (7) calendar days after service of notice, FINRA Operations' determination shall constitute final action by FINRA.

## Submissions by Third-Parties

Supplementary Material .02 (Requests by Third-Parties), permits FINRA, in its discretion, to announce a Company-Related Action when it is contacted by a third party, such as The Depository Trust & Clearing Corporation (DTCC), foreign exchanges or regulators, member firms or associated persons. In such instances, FINRA would request that the third-party contact the issuer in question regarding its obligations under SEA Rule 10b-17 or other rules and regulations, as applicable, and instruct the issuer to contact FINRA directly to provide notice and complete the requisite forms. However, FINRA Operations may in its discretion review and process a Company-Related Action based on information from a third-party when it believes the action is necessary for the protection of the market and investors and/or FINRA Operations has been unable to obtain notification of the Company-Related Action from the issuer. In all cases, FINRA notes that it must have actual substantiated knowledge of a Company-Related Action from a credible source before it can consider announcing such action.

## Referral of Possible Non-Compliance with SEA Rule 10b-17 to SEC Staff

Non-compliance with SEA Rule 10b-17 has been an ongoing concern, and FINRA expects the new rule to reduce such non-compliance. An issuer that fails to notify FINRA of a proposed corporate action, as required by SEA Rule 10b-17, is potentially violating an anti-fraud rule of the federal securities laws. The possible sanctions for violating federal securities laws are significant. In addition, transfer agents that knowingly aid and abet such violations may also be subject to possible sanctions. Where FINRA Operations staff has actual knowledge, it will use its best efforts to provide a list of non-complying issuers to the SEC staff.

## Development of Electronic Forms and Payment Processing System

FINRA is developing electronic forms and a payment processing system to process documents for Company-Related Actions more efficiently. Until the system is ready, FINRA requires parties to use paper forms and the payment methods listed on the UPC page on FINRA's website. FINRA expects to have the electronic system available by the first quarter of 2011 and will announce the effective date of the new system in a future *Regulatory Notice*.

FINRA encourages all interested parties to review its dedicated Web page for UPC matters which, among other things, provides detailed guidance on the necessary forms, required supporting documentation, methods to submit the required fees and a Frequently Asked Questions section.

## Endnotes

- 1 See Securities Exchange Act (SEA) Release No. 62434 (July 1, 2020; 75 FR 39603 (July 9, 2010); SR-FINRA-2009-089 (Order Approving Proposed FINRA Rule 6490 (Processing of Company-Related Actions) to Clarify the Scope of FINRA's Authority When Processing Documents Related to Announcements for Company-Related Actions for Non-Exchange Listed Securities and To Implement Fees for Such Services).
- 2 See Securities Exchange Act Rule 10b-17 (SEA Rule 10b-17).
- 3 See NASD Rule 11000 Series (UPC rules). See also, NASD Rule 11140 relating to setting of ex-dates.
- 4 This includes instances where FINRA has actual knowledge that the SEC has issued an order pursuant to Section 12(k) of the Exchange Act temporarily suspending the issuer's securities or pursuant to Section 12(j) of the Exchange Act revoking registration of the issuer's securities.

© 2010 FINRA. All rights reserved. FINRA and other trademarks of the Financial Industry Regulatory Authority, Inc. may not be used without permission. *Regulatory Notices* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.