

# Structured Thoughts

*News for the financial services community.*

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## Dividend Adjustments on the Way

To help shareholders benefit in the event that Congress does not retain the lower rates for dividends in connection with the ongoing "fiscal cliff" negotiations, a variety of companies have increased their fourth quarter dividends in 2012. Some companies have accelerated the payment dates of their planned dividends to ensure that they are paid before the end of the year. Some have increased their planned dividend payments above prior quarterly levels. Other companies may pay a special dividend payment. In some cases, the fourth quarter increase will be offset by a decrease in the subsequent first quarter's dividend. In each case, these dividend payments may trigger the dividend adjustment provisions of structured notes linked to the relevant underlying stocks.

Most stock-linked notes have provisions that adjust the price of the stock, and therefore, the return on the notes, when the linked stock pays a special or extraordinary dividend. After the applicable "ex date", a special dividend may reduce the stock price, in order to account for the smaller amount of cash held by the company. Consequently, for typical stock-linked notes, which are bullish on the linked stock, a special dividend would usually reduce the note's return if protections are not built into the note terms. And of course, holders of structured notes usually don't benefit from the dividend on the linked stock. Dividend adjustment provisions protect the investors' interests by, under certain circumstances, adjusting upwards the price of the linked stock for purposes of the notes, offsetting the negative impact of the special dividend.

Various dividend adjustment provisions exist:

- A special dividend must exceed a certain size threshold to be triggered.
- A special dividend must be deemed "material" by the calculation agent in order to be triggered.

- Mainly in the case of single-stock linked notes purchased by institutional investors, a provision that is automatically triggered whenever the dividend exceeds, or is less than, a “base dividend” agreed to at the time of pricing. This type of provision can differ from the other two types. Instead of providing only “investor protection,” this type of provision can also work “adversely” to an investor when the linked stock reduces its dividend, because the provision will cause the stock price, for purposes of the notes, to decrease.

As a result, depending upon the terms of a structured note, the planned dividend increases may cause an upward adjustment of the stock price. For a smaller set of notes, mainly notes for institutional investors described in the third bullet above, a potential Q1 dividend decrease after the Q4 increase may then decrease the stock price after the initial upward adjustment.

Depending on the circumstances of the relevant company, stockholders may receive the same total amount of cash with or without the special dividend. They could simply receive it sooner and at a lower average income tax rate. In contrast, depending on the terms of a structured note, some notes may have increased returns due to the increased dividend, and then, may or may not have a decreased return due to the Q1 decreased dividend. In this regard, calculation agents for structured notes may wish to review the adjustment provisions for notes subject to a special dividend, and the extent to which they have discretion to require an adjustment, or to modulate the extent of the required adjustment.

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## Federal Court Decision Supports Use of “Big-Boy Letters”

### Introduction

“Big-Boy Letters” are often used as a tool to limit an issuer’s or broker-dealer’s potential liability in connection with a private sale of securities. In these letters, the investor represents that, as a “big boy,” it is a sophisticated party that can fend for itself. Often, these letters also contain an explicit waiver of all claims against the inside party arising from the nondisclosure of non-public information, including violations of Rule 10b-5 under the Securities Act of 1933.

“Big Boy Letters” serve several useful purposes for both the inside and outside parties as they can:

- increase the execution speed of time-sensitive transactions;
- reduce the costs and risks of potential claims and liability from frustrated counterparties; and
- facilitate the contractual allocation of risks between sophisticated parties.

These letters can be particularly useful in connection with private sales of sophisticated structured products to institutional investors. For example, the security may have particularly complex terms, and/or an affiliate of the issuer may possess material non-public information that relates to the security, such as business or financial information about the stock linked to the structured note.

### Are They Enforceable?

The enforceability of “Big-Boy Letters” has been the subject of dispute.<sup>1</sup> This uncertainty stems from tension between the “sanctity of a contract,” on the one hand, and Section 29(a) of the Securities Exchange Act of 1934, which states that waivers of liability for securities fraud are void as a matter of public policy. However, a recent U.S. District Court decision has articulated a means to honor the contractual relationship created by “Big-Boy Letters” without characterizing their effect as a waiver of securities fraud liability and thus as void as a matter of public policy.

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<sup>1</sup> Compare *Harsco v. Segui*, 91 F.3d 337 (2d Cir. 1996) (indicating that waivers that are the result of sophisticated business entities negotiating at arm’s length should be enforced), with *AES Corp v. The Down Chemical Co.*, 325 F.3d 174 (3d Cir. 2003) (rejecting the *Harsco* court’s view that sophisticated parties can contract out of duties imposed by federal securities laws).

## Pharos Capital

In *Pharos Capital Partners, L.P. v. Deloitte & Touche, LLP*, plaintiff Pharos Capital Partners (“Pharos”) filed suit alleging fraud in connection with its \$12 million equity investment in National Century Financial Enterprise, Inc. (“NCEF”)—an investment that lost its full value when NCEF proceeded to file for bankruptcy.<sup>2</sup> Pharos claimed that defendant Credit Suisse Securities, LLC (“Credit Suisse”), acting as co-placement agent in connection with the offering, failed to disclose material information while also materially misrepresenting NCEF’s business operations. Credit Suisse’s defense rested primarily on the existence of a “Big-Boy Letter,” in which Pharos acknowledged that it was a “sophisticated institutional investor” who was “relying exclusively” on its own due diligence and would bear the risk of an “entire loss” of its investment.<sup>3</sup>

Rather than treating the “Big-Boy Letter” as a waiver of liability, the court focused on its effect on a crucial element of successful fraud claims. In granting summary judgment in favor of defendant Credit Suisse, the court noted that common law claims for fraud and negligent misrepresentation require the aggrieved party to have *justifiably* relied upon the alleged misrepresentation or omission. The court then went on to cite the clear language of the “Big-Boy Letter” to hold that any reliance on the part of Pharos was unjustifiable and thus does not support a claim for fraud or negligent misrepresentation.<sup>4</sup> In other words, the existence of a well-crafted “Big-Boy Letter” does not waive liability for securities fraud; rather, it may eviscerate the underpinnings of such a claim.

*Pharos* demonstrates the value to underwriters of furnishing “Big-Boy Letters” in connection with the offering of complex structured products. However, the existence of such a letter, on its own, may not be sufficient to shield underwriters from liability. Underwriters should also have reason to believe that the investor can in fact protect itself. Obtaining this level of comfort requires reasonable know-your-customer procedures, providing access to any relevant requested materials upon which the investor can rely, and negotiating the content of the “Big-Boy Letter” to evidence an arm’s length transaction between two sophisticated parties.

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## FINRA Updates Its Suitability Questions and Answers

On December 10, 2012, FINRA issued Regulatory Notice 12-55, in which FINRA expanded on its earlier suitability guidance, in Regulatory Notice 12-25, of the terms “customer” and “investment strategy”, as used in FINRA Rule 2111. FINRA also provided a link to its new “suitability Web page”, containing questions and answers about FINRA Rule 2111.

Regulatory Notice 12-55 can be found at:

<http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p197435.pdf>

The suitability web page can be found at:

<http://www.finra.org/Industry/Issues/Suitability/>

The updated guidance is relevant to sales practices in the structured products industry.<sup>5</sup>

### Definition of “Customer” as it Relates to Potential Investors

FINRA clarified that the suitability rule applies to a potential investor who then becomes a customer, and the point at which suitability obligations attach. The rule applies where a registered representative makes a recommendation to purchase a security to a potential investor if that individual executes the transaction through the broker-dealer with which

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<sup>2</sup> 2012 WL 5334027 (S.D. Oh. Oct. 26, 2012).

<sup>3</sup> *Id.* at \*1.

<sup>4</sup> *Id.* at \*9.

<sup>5</sup> We most recently described FINRA Rule 2111 and Regulatory Notice 12-25 in Volume 3, Issue 8 of Structured Thoughts (available at <http://www.mofo.com/files/Uploads/Images/120530-Structured-Thoughts.pdf>).

the representative is associated or the broker-dealer will receive, directly or indirectly, compensation as a result of the recommended transaction. The suitability obligation would not apply, however, if the potential investor does not act on the recommendation or executes the recommended transaction away from the broker-dealer with which the registered representative is associated without the broker-dealer receiving compensation for the transaction.

FINRA noted that, with respect to a recommendation made to a *potential* investor, suitability obligations attach when the transaction occurs, but the suitability of the recommendation is evaluated based on circumstances that existed at the time that the recommendation was made. When a broker-dealer or registered representative makes a recommendation to a *customer* (as opposed to a potential investor), suitability obligations attach at the time that the recommendation is made, irrespective of whether a transaction occurs.

### Investment Strategies

FINRA expanded on its examples of what would or would not be considered an “investment strategy”. Recommended investment strategies must be suitable. Recommendations of some specific types of securities, such as high dividend companies or types of securities in a particular market sector would constitute an investment strategy, regardless of whether the recommendation identified particular securities. The notice does not indicate whether recommending “structured notes” generally is sufficiently specific to constitute an investment strategy.<sup>6</sup>

Recommendations that do not refer to a security or securities do not fall under the suitability rule. For example, the rule would not apply to a registered representative’s recommendation of a non-security investment as part of a customer’s outside business activity, where that customer separately decides on its own to liquidate securities positions and apply the proceeds toward the recommended non-security investment. In contrast, if a customer, absent a recommendation by a registered representative, decides on its own to purchase a non-security investment and then asks the registered representative to recommend which securities the customer should sell to fund the purchase of the non-security investment, the suitability rule would apply to the recommendation regarding which securities to sell, but not to the customer’s decision to purchase the non-security investment.

The notice raises the question about a broker-dealer’s supervisory responsibilities for a registered representative’s recommendation of an investment strategy involving a security and a non-security investment. While stating that its supervisory rules do not provide an exact method, the notice indicated that a broker-dealer could use a risk-based approach. A firm could focus on the detection, investigation and follow-up of “red flags” indicating that a recommendation may have been made for an unsuitable investment strategy with both a security and a non-security component. The suitability obligations would apply to the security component of the recommended investment strategy, but the suitability analysis must also be informed by a general understanding of the non-security component of the recommended investment strategy. These concerns would apply to an investment strategy that involves structured certificates of deposits, even though they are typically not “securities”, and other structured products. FINRA reminded broker-dealers of their other regulatory obligations to investigate unusual activity.

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## FINRA Rule 5123 Excludes Some, But Not All, Options

Option issuers may be surprised to learn that sales of some over-the-counter options are within the filing requirements of FINRA Rule 5123 (Private Placements of Securities). Rule 5123 requires members selling securities issued by non-members in a private placement to file the private placement memorandum, term sheet or other offering documents with FINRA within 15 days of the first sale of the securities, or indicate that there were no offering documents used.<sup>7</sup>

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<sup>6</sup> As a practical matter, a general recommendation of “structured notes” would most likely be followed by the investor asking “which ones?” The suitability determination would apply to the registered representative’s response.

<sup>7</sup> FINRA Rule 5123 is available on FINRA’s website at

[http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=10753](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10753). We have issued two News Bulletins on Rule 5123. “SEC Adopts New FINRA Rule 5123 on Private Placements” can be found at <http://www.mofo.com/files/Uploads/Images/120615-FINRA-Rule-5123.pdf> and “FINRA Issues Guidance for Private Placement Filings” can be found at <http://www.mofo.com/files/Uploads/Images/121210-FINRA-Issues-Guidance-Private-Placements.pdf>.

A sale of an OTC equity option to an individual accredited investor would require the member to make the filing required by the rule. Rule 5123(b)(1) exempts private placements to certain classes of investors, including accredited investors described in Rule 501(a)(1), (2), (3) or (7) under the Securities Act of 1933 (institutional accredited investors) and eligible contract participants, as defined in Section 3(a)(65) of the Securities Exchange Act of 1934.

The rule also exempts private placements of standardized options, as defined in Rule 238 under the Securities Act. Standardized options must be traded on a national securities exchange or on a national securities association registered pursuant to Section 15A(a) of the Securities Exchange Act. Consequently, a private placement of OTC options to an individual accredited investor, or to any other investor not within the classes of exempted investors enumerated in Rule 5123(b)(1), would require a member to file the private offering documents. This seems to be an incongruous result since options trading can only be undertaken with customers that have been cleared for options trading and who receive options disclosures.<sup>8</sup>

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## Commodity Pool Issues

As many are aware, the Dodd-Frank Act amended the definition of “commodity pool”, making it broader by including any enterprise operated for the purpose of trading in swaps. Trading in swaps may seem like a high bar, but there is little guidance as to the type of entity that constitutes a “commodity pool.” Some of that guidance suggests that entering into a single swap may be sufficient to trigger the registration requirement. The CFTC has issued various interpretative letters clarifying that certain entities (such as business development companies, family offices, equity REITs, etc.) that might inadvertently be included within the “commodity pool” definition should not be considered commodity pools to the extent that these entities satisfy the specified CFTC conditions for relief.

Institutions that use repackaging vehicles or that use trust vehicles to issue structured products should consider whether any of these vehicles may be considered a commodity pool. In CFTC Letter No. 12-45 issued on December 7, 2012, the CFTC provides further relief for certain legacy and other securitization vehicles.<sup>9</sup> However, the CFTC also notes in that letter that certain vehicles may be deemed commodity pools, including, for example “a repackaging vehicle that issues credit-linked or equity-linked notes where the repackaging vehicle owns high quality financial assets, but sells credit protection on a broad based index or obtains exposure to a broad based stock index through a swap. The vehicle finances its acquisition of the high quality assets by issuing notes to investors that are linked to credit risks or price changes in the stock index.” The CFTC notes that this type of vehicle may be a commodity pool. Further, the CFTC also points to another example: “a repackaging vehicle that acquired a three year bond, issued a tranche of notes, and used swaps to extend the investment experience of the bond (and thus the tranche of notes) to four years may be deemed to be a commodity pool, as would a repackaging vehicle that paired the three year bond with a swap to provide inflation rate protection.” In light of this commentary and the over broad definition of “commodity pool,” any structured product that relies on the use of a trust or other collective investment vehicle should be analyzed closely.

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## Indices: GFMA’s Framework of Principles

Following on from the publication of its proposals in September 2012, the Global Financial Markets Association (“GFMA”) has now released its final framework of principles in respect of conducting benchmark price assessment. The principles focus on enhancing market integrity and transparency through sponsors (i.e., entities or groups which develop and direct the determination, publication and licensing of a benchmark) meeting three primary obligations when designing, operating and publishing benchmarks:

- 1) governance – ensuring that there is a single point of accountability and that roles and responsibilities are clearly defined;

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<sup>8</sup> FINRA Rule 0180, which precludes the application of Rule 5123 and other FINRA rules to security-based swaps, does not apply to a private placement of an OTC equity option, as such an option does not fall within the definition of a “Security-Based Swap”, as defined in Section 3(a)(68) of the Securities Exchange Act and the rules and guidance of the SEC or its staff.

<sup>9</sup> The letter may be found at the following link: <http://www.cftc.gov/ucm/groups/public/@llettergeneral/documents/letter/12-45.pdf>.

- 2) design and methodology – ensuring that, amongst other things, the benchmark has a robust design which provides an accurate measure of the market and incorporates (where possible) real transaction data; and
- 3) control infrastructure – ensuring that a resilient infrastructure is in place by requiring periodic review and the maintenance of mechanisms which provide continuity of the benchmark under duress.

The GFMA principles are only a first step towards improving market confidence in benchmarks. Next steps include ensuring the broadest possible agreement from all stakeholders through promoting awareness and understanding of the principles in meetings and calls and attempting to encourage stakeholders to hold each other accountable by refusing to do business with each other in the event of breaches of the principles. Further discussion and consultation with regulators, government entities and industry bodies is required in order to review the principles and generate feedback. It is hoped that the principles will be incorporated by regulators and governments as they take further strides to co-ordinate an international approach. Such efforts to date include:

- 1) consultation on the functioning and oversight of oil price reporting agencies by IOSCO in March 2012;
- 2) review of the framework for setting and governing LIBOR by the designated new chief executive of the Financial Conduct Authority, Martin Wheatley (August 2012);
- 3) European Commission consultation seeking views on possible new regulations governing the creation and use of indices which serve as benchmarks (September 2012);
- 4) IOSCO are also currently looking at benchmarks generally and it is expected that a consultation will be released in January 2013; and
- 5) ESMA are preparing some interim principles for issuance at the EU level in respect of benchmarks generally. Again, these are expected to be published in early 2013.

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## The Division of Investment Management Lifts ETF Ban, But Not for Leveraged ETFs

In remarks made on December 6, 2012 to the ALI CLE 2012 Conference on Investment Adviser Regulation.<sup>10</sup> Norm Champ, the Director of the Division of Investment Management, said that the Division will partially lift the two-year old moratorium on considering exemptive requests under the Investment Company Act of 1940 relating to actively-managed exchange-traded funds that make use of derivative products, subject to certain representations to be made in any future exemptive request. However, due to the Division's concerns about leveraged ETFs, Director Champ said that the Division will "continue not to support new exemptive relief for such ETFs."

Please see the full discussion of Director Champ's remarks in the December 2012 Morrison & Foerster Investment Management Legal + Regulatory Update, which can be found at <http://www.mofo.com/files/Uploads/Images/121214-Investment-Management-Update.pdf>.

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## Here Comes 2013...

This is our last issue of Structured Thoughts for 2012. We wish our readers happy and healthy holidays, and a wonderful new year.

The business and regulatory environment for structured products continues to evolve, sometimes in ways that surprise all of us. In this final article, we identify a few items to look out for in 2013.

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<sup>10</sup> Director Champ's remarks can be found at <http://www.sec.gov/news/speech/2012/spchl20612nc.htm>.

*Estimated Value.* Market participants will probably remember 2012 most for the SEC's April 2012 sweep letter, and its focus on the disclosure of estimated values of structured notes. As of the end of 2012, most market participants have not revised their structured note offering documents, as they continue their discussions with the SEC staff, await additional guidance from the SEC, and/or complete their internal valuation procedures. If the SEC does in fact provide any additional guidance, and as issuers have the opportunity to consider best practices in connection with the new disclosures, we may see further evolution in these disclosures.

*New FINRA Communications Rules.* On February 4, 2013, FINRA's new communication rules, 2210 and 2211, will become effective. Market participants will be furnishing a greater number of free writing prospectuses and similar documents relating to structured products to FINRA, and obtaining principal review for a variety of offering documents. Based on the new submissions, it is possible that the FINRA staff will reach out to specific broker-dealers, or to the market generally, as to any disclosure practices that it deems insufficient.

*Amendments to Regulation M.* The SEC has not yet issued final rules with respect to its proposal to remove the references to investment grade securities from Regulation M.<sup>11</sup> Any revisions to Regulation M may impact the manner in which structured notes are offered, and the manner in which broker-dealers create a secondary market for them.

*Conflicts of interest.* The SEC issued proposed rules to implement the Dodd-Frank Act Section 621 prohibition on material conflicts of interest relating to certain securitizations some time ago, and has not finalized these rules. The conflicts of interest proposals may affect certain structured products that are issued in reliance on a special purpose vehicle or trust. The conflicts of interest rules are expected to be finalized toward the end of the first quarter of 2013, in conjunction with final action on the Volcker Rule.

*Volcker Rule.* The Volcker Rule also may have an effect on the structured products market, especially on the type of secondary market activity that will be permissible for underwriters of structured products. Based on recent statements by regulators, we anticipate that the Volcker Rule will be finalized by March 2013.

*FINRA and Conflicts of Interest.* In July 2012, FINRA commenced a street sweep, soliciting information as to how participants in the structured products market identified and managed conflicts of interest.<sup>12</sup> Once FINRA has evaluated and digested the information obtained by the sweep, it may take additional actions, including the identification of best practices for industry participants, or sanctioning broker-dealers that have not made proper disclosures or maintained proper procedures.

*Role of Third Party Distributors.* Both the SEC and FINRA have taken an interest in the role that third-party dealers (i.e., distributors other than the lead underwriter, such as selling group members) play in the distribution of structured products. At times, questions have arisen as to how these distributors are selected and screened by the lead underwriter, and whether these distributors have adequate sophistication and training to offer structured products for their customers. The "know your dealer" regime remains largely unregulated in the U.S., with different market participants following different procedures, and making different decisions as to which entities they will permit to participate in their offerings. 2013 may see additional scrutiny, and perhaps additional guidance, as to the role that these distributors play.

*Reverse Inquiry Transactions.* Both the SEC and FINRA have raised questions to market participants relating to reverse inquiry transactions. This process in part reflects the process by which these regulators are becoming more educated as to the role of reverse inquiry transactions from registered investment advisors and other sophisticated investors in the offering process. Questions have arisen as to whether the existing disclosure and pricing practices, including the new estimated value disclosures, remain as relevant for these types of investors, and whether differences in the offering process and offering documents are appropriate in these cases.

*Proprietary Indices and Related Guidance.* Broker-dealers continue to seek to enhance their range of offerings, and to provide useful investment tools for investors, by developing a range of proprietary indices. Of course, due to potential uncertainties under existing legislation, including the Investment Company Act and the Investment Advisers Act, many

<sup>11</sup> We discussed the proposals in Volume 2, Issue 10 of Structured Thoughts: <http://www.mofo.com/files/Uploads/Images/110620-Structured-Thoughts.pdf>.

<sup>12</sup> We discussed the street sweep in our August 2012 client alert: <http://www.mofo.com/files/Uploads/Images/120814-FINRA-Conflicts-of-Interest.pdf>.

issuers and underwriters have taken a cautious approach to some proposed products. Whether in 2013, or at some later point, market participants will hope to obtain more clarity as to the rules of the road, and the extent to which their affiliated broker's investment recommendations and/or discretion can play a role in developing these indices. Efforts by industry organizations, such as the Global Financial Markets Association,<sup>13</sup> to identify standards relating to new market measures may also gain traction as best practices in the market.

## European Regulatory Developments

*PRIPs Initiative Developments.* Regulatory initiatives with respect to Packaged Retail Investment Products (or PRIPs) gained momentum this year, with the publication of draft regulations in July 2012 and first EU presidency compromise proposal on November 27, 2012. The regulations require that in circumstances where an investment product is sold to retail investors, a Key Investor Document (KID) must be prepared by the product 'manufacturer'. It is expected that further consideration will be given by the European Parliament and the Council of the EU to the legislative proposals during 2013, with a vote by the European Parliament's Economic and Monetary Affairs Committee scheduled for March 20, 2013. It is not expected, however, that the regulations will apply until mid-2015.

*EMIR Reporting Requirements.* Transaction reporting requirements in respect of derivatives transactions in the European Union will be phased in from 2013 onwards. Where there is a registered trade repository available, transaction reporting of credit and interest rate contracts will be required from July 1, 2013. This is the earliest possible date from which transaction reporting under the European Market Infrastructure Regulation (EMIR) shall be required. If there is no registered trade repository available on or before April 1, 2013, reporting must take place within 90 days after registration of such trade repository. If there is no registered trade repository available on or before July 1, 2015, reporting commences on July 1, 2015, directly to the European Securities and Markets Authority (ESMA). Transaction reporting in respect of all other types of derivatives contracts shall not be required until 2014 at the earliest.

*UCITS V.* In July 2012, the European Commission published a legislative proposal focusing on amendments with respect to the duties of depositories (safe-keeping, oversight and delegation), the remuneration of UCITS managers and the ways in which the relevant rules could be better harmonized. It is expected that the proposal will be further considered by the European Parliament during 2013, although it is also widely believed that member states will be given around 2 years to transpose the amendments to the existing directive into their national laws. Accordingly, it is unlikely that any changes will come into effect until the end of 2014 at the earliest.

*MiFID II.* Legislative proposals intended to replace and recast the Markets in Financial Instruments Directive are slated to be considered by the European Parliament in its plenary session on October 24 / 25, 2013. Such scheduling comes a full year after the proposals were originally intended to be considered.

*Financial Conduct Authority (UK only).* On April 1, 2013, the Financial Services Authority (FSA) will finally be replaced as the UK's single financial services regulator. The Financial Conduct Authority (FCA) will assume its new role as regulator of wholesale, retail and financial markets, the infrastructure which supports those markets and as prudential regulator of firms which do not fall under the scope of the new Prudential Regulation Authority (PRA). These changes are likely to result in new powers of the FCA to utilize temporary product intervention rules. A consultation on these issues is currently underway and it is intended that a final statement of policy will be published in advance of the legal cutover to the FCA in April 2013.

*Retail Distribution Review (UK only).* Efforts have been made in the UK to ensure that there is greater clarity with respect to advice provided by investment advisers. Measures which come into force in 2013 include: (1) a requirement that firms state whether they offer "independent advice" (i.e., personal, unbiased recommendations based on a comprehensive and fair analysis of the relevant market) or "restricted advice" (i.e., where an advisor is tied to specific products), (2) stricter requirements regarding minimum qualification levels for advisers and in respect of their continuing professional development (CPD); and (3) a ban on traditional forms of commission (paid by product providers to investment advisers) in respect of advised sales relating to investment products. Instead, consumers will pay an agreed investment adviser charge, either in the form of a fee or as part of the product.

We look forward to continuing the conversation in 2013....

<sup>13</sup> The GFMA's proposed principles may be found at: <http://www.gfma.org/correspondence/item.aspx?id=350>.

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## MoFo Capital Markets Introduces Structured Product Resource Page

By popular demand of our clients and other market participants, our capital markets website now includes a page containing links to key legal resources relating to structured products.

The page may be found at the following link: <http://www.mofo.com/resources/structured-products/>.

The page includes links to a wide variety of frequently-used reference materials, including:

- FINRA's releases relating to structured products.
- FINRA's enforcement proceedings relating to structured products.
- SEC materials relating to structured products.
- Back-issues of this venerable publication.
- And more.

We hope these materials will help you navigate the evolving legal landscape for structured products.

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## FAQs at Your Fingertips

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Morrison & Foerster named **Structured Products Firm of the Year, Americas, 2012** by *Structured Products* magazine for the fifth time in the last seven years. See the write up at <http://www.mofo.com/files/Uploads/Images/120530-Americas-Awards.pdf>.

Morrison & Foerster named **Best Law Firm of the Americas, 2012** by *StructuredRetailProducts.com*.

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