

February 18, 2010

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Subject: File Number SR-FINRA-2009-089**

Dear Ms. Murphy:

On behalf of a number of our clients, the Nelson Law Firm, LLC respectfully submits the following comments on proposed FINRA Rule 6490, which is intended 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 ("Proposed Rule 6490").

FINRA contends that Proposed Rule 6490 will deter microcap fraud. We strongly support regulatory efforts to prevent and punish fraudulent activities by issuers of non-exchange listed securities ("OTC Securities"). However, we do not believe that Proposed Rule 6490 will have this salutary effect. Rather, the costs imposed under the Rule will cause many issuers of OTC Securities not to submit corporate actions to FINRA. As a result, investors in the securities issued by these non-complying issuers will suffer harm, and the market for these securities will be impaired. For this reason, we oppose Proposed Rule 6490 and believe that FINRA should amend the Rule to better accomplish its statutory mandate to protect the market and investors in OTC Securities.

Our clients' investment strategies include the purchase of non-exchange listed securities of issuers that are bankrupt, in liquidation or involved in various forms of reorganization ("Liquidating OTC Securities"). During the bankruptcy, liquidation or reorganization process, a record date may be established by the issuer to determine the holders of a Liquidating OTC Security who are entitled to a distribution. This record date generally will be approved by a federal bankruptcy court or, in the case of statutory liquidation, a state court. Our clients may, in furtherance of their investment strategies, purchase or sell Liquidating OTC Securities prior to and after such a record date.

A Liquidating OTC Security generally consists of an interest in some corporate asset that will require a substantial amount of time to reduce to cash that may be distributed to security holders. For example, a Liquidating OTC Security may represent an interest in a lawsuit. The net proceeds of litigation, if any, will not be available for distribution until

the case is settled or a final judgment is rendered. In many cases, a Liquidating OTC Security consists of an interest in several assets that will be reduced to distributable proceeds at different times. As a result, there may be successive distributions over a period of many years.

The issuer of a Liquidating OTC Security generally does not establish a new record date at the time a distribution is made to holders. Instead, the issuer distributes to the original record holders determined on the record date established by the court. Accordingly, it is a characteristic of Liquidating OTC Securities that a lengthy period of time is expected to elapse from the record date and the time when a distribution will be paid.

For any number of reasons, some holders of a Liquidating OTC Security as of the record date may not wish to retain their position until a final distribution is made. Moreover, the amount and timing of a distribution remains uncertain until the time of distribution. So, there can be a difference of opinion among investors regarding the value of any Liquidating OTC Security. As a result, a market for Liquidating OTC Securities exists, where willing sellers can transfer their holdings to willing buyers for value.

The settlement of transactions in Liquidating OTC Securities often requires a different process than the settlement of transaction in other securities. On the record date established during the bankruptcy, liquidation or reorganization process, the issuer's securities records are usually closed and subsequent transfers of securities are no longer recognized on the issuer's records. This enables the issuer's liquidating estate to avoid the costs of retaining a transfer agent and other costs related to the settlement of securities transactions. As a result, a transaction in a Liquidating OTC Security cannot be settled through access to the issuer's books and records.

In the case of a Liquidating OTC Security represented by a physical certificate, a market transaction can be settled through the creation of a physical due bill. A "due bill" is a contract, a form of which is contained in FINRA's Uniform Practice Guide, which provides that the seller of a security will transmit any proceeds received from a distribution to the buyer.<sup>1</sup>

The vast majority of securities, however, are not held in physical form. Instead, positions are represented by deposits at the Depository Trust Corporation ("DTC"). As a result, the largest holder of record will be CEDE & Co., which is the nominee name for DTC. In turn, the FINRA member firms that hold deposits of securities at DTC keep records indicating the beneficial ownership of securities by their customers represented by positions at DTC. As a result, a transfer of a Liquidating OTC Security is generally accomplished by a book entry transfer on the books of the FINRA member firms maintaining positions at DTC. Transfers through the facilities of DTC do not require any change to the transfer records

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<sup>1</sup> See NASD Rule IM-11630. A sample due-bill form is attached as Exhibit 1.

maintained by an issuer. Accordingly, when a distribution is made on an OTC Liquidating Security, the cash proceeds are delivered to DTC, which in turn delivers them to the FINRA member firms with deposits at DTC in proportion to the size of their current respective positions in the Security.

While an issuer establishes a record date to identify the record holders entitled to a distribution, FINRA's rules determine how those distributions will be allocated as a result of transactions in the over-the-counter markets. FINRA does this by setting an "ex-dividend" date.<sup>2</sup> Persons who purchased a security and continue to hold it up to the ex-dividend date are entitled to receive the distribution, while those who purchased on the ex-dividend date and later are not. FINRA's determination of ex-dividend dates is **extremely important** for investors in Liquidating OTC Securities and **crucial** for market integrity.

FINRA generally relies on issuers to deliver a notice that a distribution will be made (a "10b-17 Notice") in compliance with Rule 10b-17 under the Securities Exchange Act of 1934 (the "Exchange Act") to set an ex-dividend date. However, issuers of Liquidating OTC Securities often neglect to deliver this notice to FINRA.

We are concerned that issuers of Liquidating OTC Securities generally do not believe they are obligated to provide a 10b-17 Notice to FINRA. At the time a liquidating distribution is made, the issuers will in many cases be represented by a trustee with a duty to maximize the value of the estate for record holders. The trustee's sole remaining obligation to securities holders is to obtain the highest possible value for the remaining assets of the issuer's estate and deliver the proceeds to holders of record. The trustee may believe, and be advised by counsel, that it would be inappropriate to pay fees to FINRA to provide a 10b-17 Notice because those fees would diminish the value of the estate. In any event, an issuer in liquidation has no plans to raise any additional capital and therefore no incentive to be concerned about investors in Liquidating OTC Securities or market transactions that may be taking place during the lengthy period between a record date and a liquidating distribution. We believe that FINRA is often made aware of a liquidating distribution in a Liquidating OTC Security when informed by DTC that proceeds have been received.

We are therefore concerned that, under Proposed Rule 6490, FINRA will decide not to set an ex-dividend date because payment has not been received from the issuer of an OTC Liquidating Security. FINRA's failure to set an ex-dividend date will not have any effect on the issuer, but will cause unnecessary disputes among investors regarding their entitlement to distributions and a resulting loss of confidence in the market.

We expect that FINRA's failure to set an ex-dividend date pursuant to Proposed Rule 6490 when an issuer fails to provide a 10b-17 Notice will cause investors to create physical due bills for transactions in book-entry securities. The presentation of physical due bills will

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<sup>2</sup> See NASD Rule 11140.

inevitably lead to costly contractual disputes over distributions, which simply do not exist in a book-entry environment. As a result, Proposed Rule 6490 will burden transactions in Liquidating OTC Securities with wholly unnecessary risks and transactions costs. There will be fewer beneficial transactions between willing purchasers and sellers of Liquidating OTC Securities, which will interfere with the efficient allocation of resources in the economy.

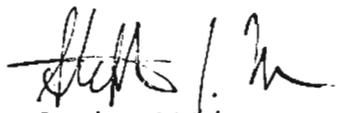
Section 15A(b)(6) of the Exchange Act, in relevant part, requires FINRA to establish rules "to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest." FINRA's statutory responsibilities under Section 15A necessarily include the establishment of ex-dividend dates because FINRA's ex-dividend dates are essential to foster cooperation and coordination with persons engaged in, and clearing and settling, transactions in OTC Liquidating Securities. We object to Proposed Rule 6490 because it seems to be intended to allow FINRA to escape from its responsibilities under Section 15A when it is not getting paid for establishing an ex-dividend date.

We agree that issuers of OTC Securities should live up to their responsibilities to make timely filings of 10b-17 Notices. In principle, it is appropriate that issuers pay the cost of processing 10b-17 Notices. If nothing else, something should be done to make courts and trustees involved in corporate liquidations aware of their responsibilities to investors in Liquidating OTC Securities. But, we do not believe that the failure of an issuer of a Liquidating OTC Security to make a timely filing of a 10b-17 Notice, or to pay for the costs of processing, relieves FINRA of its responsibilities under Section 15A of the Exchange Act to protect investors and to perfect the mechanism of a free and open market.

Accordingly, we believe that Proposed Rule 6490 should be amended to provide that FINRA will continue to set ex-dividend dates where appropriate for the protection of investors and the public interest, whether or not it receives timely 10b-17 Notices or payments for processing corporate actions.

Our clients are willing to provide additional information to the Commission or its staff if that would be helpful. Please call Stephen J Nelson of The Nelson Law Firm, LLC at (914) 220-1910 or send email to [sjnelson@nelsonlf.com](mailto:sjnelson@nelsonlf.com), if you have any questions or need any additional information.

Respectfully submitted,



Stephen J Nelson

**EXHIBIT 1**



Print

**IM-11630. Sample Due-Bill Forms**

**(a) Due-Bill for Stock Dividend or Stock Distribution**

For value received, the undersigned hereby assigns, transfers and sets over to \_\_\_\_\_ the stock distribution of \_\_\_\_\_ ( ) shares of \_\_\_\_\_ stock of \_\_\_\_\_ to be issued on \_\_\_\_\_ to the registered holder of \_\_\_\_\_ ( ) shares of \_\_\_\_\_ stock of \_\_\_\_\_ represented by certificate number \_\_\_\_\_, to which the undersigned is entitled as a stock dividend, and hereby irrevocably constitutes and appoints \_\_\_\_\_ attorney to transfer the shares representing said stock dividend on the books of said corporation, with full power of substitution in the premises.

Dated \_\_\_\_\_

\_\_\_\_\_  
(Official Signature)

**(b) Due-Bill for Rights**

For value received, the undersigned hereby assigns, transfers, and sets over to \_\_\_\_\_ the warrant and/or fractional warrant to which the undersigned is entitled, evidencing the rights to subscribe for \_\_\_\_\_, which warrant and/or fractional warrant is to be issued to the holder of record at the close of business \_\_\_\_\_ of \_\_\_\_\_ ( ) shares of \_\_\_\_\_ stock of \_\_\_\_\_ represented by certificate No. \_\_\_\_\_

Dated \_\_\_\_\_

\_\_\_\_\_  
(Official Signature)

**(c) Due-Bill for Interest on When Issued Contract**

This is to certify that, upon issuance of \_\_\_\_\_ in accordance with the plan approved by \_\_\_\_\_, the undersigned will pay to \_\_\_\_\_ \$ \_\_\_\_\_ representing (contingent)(income) interest for \_\_\_\_\_ on \$ \_\_\_\_\_ principal amount of said bonds sold to him when, as, and if issued on \_\_\_\_\_ 19 \_\_\_\_\_

This due-bill shall become null and void if the contract for sale of said bonds can not be completed in accordance with the plan approved by \_\_\_\_\_, on \_\_\_\_\_

Dated \_\_\_\_\_

\_\_\_\_\_  
(Official Signature)

**(d) Due-Bill for Dividend on When Issued Contract**

This is to certify that, upon issuance of \_\_\_\_\_ in accordance with the plan approved by \_\_\_\_\_, the undersigned will pay to \_\_\_\_\_

\$ \_\_\_\_\_, representing the dividend of \$ \_\_\_\_\_ per share declared for the period ending 19 \_\_\_\_\_, on \_\_\_\_\_ shares of \_\_\_\_\_ stock of \_\_\_\_\_ sold to him when, as, and if issued on \_\_\_\_\_ 19 \_\_\_\_\_

This due-bill shall become null and void if the contract for sale of said stock cannot be completed in accordance with the plan approved by \_\_\_\_\_, on \_\_\_\_\_

Dated \_\_\_\_\_

\_\_\_\_\_  
(Official Signature)

**(e) Due-Bill Check**

*Consider this check as due-bill until payable date as shown below*

NEW YORK \_\_\_\_\_, 19 \_\_\_\_\_ No. 1999  
X Y Z BANK

1-2  

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210

Pay  
To  
The  
Order  
Of

\_\_\_\_\_  
\$

DOLLARS

In Payment of Dividend or Interest

Dividend Account  
Interest Account

On

\_\_\_\_\_

NOT PAYABLE BEFORE \_\_\_\_\_

Record Date

\_\_\_\_\_

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