MAYER | BROWN

VOLUME 07, ISSUE 02 | April 2026

REVERSE inquiries

Structured and market-linked product news for inquiring minds.

Every Day Counts—Or Does It? Day Counts Revisited

For most of the year, calendar days, business days and trading days are the same. Then holidays happen and confuse things. What are the different types of days, and why does it matter?

Calendar days are just what they sound like – they include every day on the calendar and are used to compute interest.

Trading days are days on which the relevant stock exchanges are open. In the United States, the New York Stock Exchange and the Nasdaq exchanges observe the same holiday schedule. A half-day of trading is also considered a "good" trading day when calculating a day-count.

Trading days (and business days for that matter) are distinct from days on which EDGAR will be operational and accept filings. EDGAR's calendar of "good filing days" is available on the SEC website. The SEC will also issue announcements with respect to additional holidays that may occur. It is important to always check for recent announcements because the main calendar is not updated for special holidays.

Business days are days on which banks are open. For most structured products issuers, this will be when banks are open in New York. Foreign bank issuers may also modify the definition of business day to require a "good" business day in both New York and their home jurisdiction. Business days should always be determined based on the relevant central bank calendar. For banks observing New York business days, the relevant publication is the Federal Reserve's "K.8" calendar.

Settlement days are typically aligned with business days, but they are not always the same. To determine if a day is a "good settlement day," you will also need to confirm that the relevant settlement system will be open for business in addition to it otherwise being a good business day. DTC announces its holiday schedule at the end of each year for the following year. Some holidays, including Good Friday, for example, are designated as "limited settlement services" days. You should check with your paying agent to determine whether the applicable product will be accepted for initial settlement on any limited settlement services day. It may differ by product type.

What about "federal holidays"? Federal holidays are another calendar and are distinct from these definitions.

In This Issue

FINRA Member Settles with FINRA for Failure to Maintain Appropriate Procedures for Regulation S Compliance

A Financial Industry Regulatory Authority, Inc. ("FINRA") member (the "broker-dealer") recently entered into a settlement with FINRA in connection with failing to establish and maintain a supervisory system to comply with the requirements for the exclusion from registration under the Securities Act of 1933 (the "Securities Act") provided by Regulation S thereunder ("Regulation S") for the offer and sale of unregistered debt securities, primarily structured products.

FINRA and the broker-dealer executed a Letter of Acceptance, Waiver and Consent (the "AWC") on March 16, 2026.[1] According to the AWC, the broker-dealer offered and sold debt securities in reliance on Regulation S without having written supervisory procedures for Regulation S offers and sales, surveillance systems to monitor such Regulation S transactions, or established supervisory practices to ensure compliance with Regulation S. Instead, the broker-dealer relied solely on signed risk disclosures from its customers, ignoring "red flags" indicating that the customers might actually be "U.S. persons," as that term is defined in Regulation S. The broker-dealer's overall failure to supervise these Regulation S transactions amounted to a violation of FINRA's rules on maintaining effective supervisory systems, FINRA Rule 3110, and maintaining high standards of commercial conduct, FINRA Rule 2010.

Between at least April 2022 and April 2024, the broker-dealer engaged in more than $650 million of customer transactions involving Regulation S securities. It also offered and sold more than $5.8 million of debt securities distributed in reliance on Regulation S to customers whose account records indicated that they were potentially located in the United States or that they may have met the definition of a "U.S. person."

According to FINRA, during a FINRA cycle examination of the broker-dealer, it was discovered that with respect to Regulation S transactions the broker-dealer failed to have: (1) specific written supervisory policies or procedures, (2) surveillance or other supervisory tools, and (3) supervisory practices. Additionally, the broker-dealer's sole compliance practice of having customers sign a risk disclosure that included a disclaimer of "U.S. person" status before being allowed to purchase structured products was not reasonably designed to achieve compliance with the registration requirements of the Securities Act. FINRA also found that the broker-dealer failed to keep these same risk disclosures current after initial collection. Furthermore, the broker-dealer did not have a process to review the disclosures once collected and did not follow up on "red flag" instances where there were indications from customer account records that a customer may have had a U.S. residential or tax address and permitted the offer and sale of debt securities to such customers in reliance on Regulation S. The broker-dealer also permitted sales that may not have qualified for a safe harbor to occur during the 40-day distribution compliance period.

FINRA members and any entity engaging in the offer and sale of securities in reliance on Regulation S should ensure that they establish and maintain supervisory systems reasonably designed to achieve compliance with applicable securities laws and FINRA rules, particularly adopting formal written policies, implementing such policies into routine practices, and actively verifying, monitoring and addressing any potential compliance risks or deficiencies. This AWC action also makes it clear that FINRA members should not rely on customer disclaimers and attestations alone as a securities law compliance measure. Careful initial collection of customer information and review of such data, supervision, ongoing verification and proactive investigation of potential non-compliance are all necessary to meet FINRA and other regulatory requirements.

FINRA Proposes Amendments to Rule 2210 to Permit Use of Projections

On February 10, 2026, FINRA filed with the U.S. Securities and Exchange Commission ("SEC") proposed amendments to FINRA Rule 2210, Communications with the Public, which would allow broker-dealer members to include hypothetical performance projections and targeted returns for securities in communications with investors—which is currently generally prohibited.

The proposal would relax existing restrictions on the use of "predictions and projections" by allowing communications with investors that include projections and targeted returns under specific conditions, remove limits on which investors can receive projections, drop strict disclosure wording requirements and permit the use of back-tested hypothetical performance.

Please see our alert here.

Second Circuit Affirms Dismissal of Suit Involving ETN Reverse Stock Split

Plaintiff's lawyers continue to flail away at Barclays PLC for not including their exchange traded notes ("ETNs") in their 2022 rescission offer for inadvertent issuances of unregistered debt securities. The ETNs were not included in the rescission offer because ETNs are continuously distributed; i.e., all ETNs of a series have the same CUSIP number and therefore they cannot be traced to a particular registration statement. Consequently, issued and registered ETNs are fungible with ETNs that were issued off of a registration statement without the required filing fee having been paid. ETNs issued in the latter case would have been unregistered securities, issued in violation of Section 12(a)(1) of the Securities Act. Some ETNs, listed under the NYSE symbol VXX, were inadvertently issued as unregistered securities.

In the latest attempt, VXX owners argued that a 4:1 reverse split of the VXX ETNs undertaken during the time that unregistered VXX ETNs were being issued was a violation of Section 12(a)(1) of the Securities Act and that the unregistered VXX ETNs were issued under a registration statement containing material misstatements and omissions, in violation of Section 11 of the Securities Act.

The Second Circuit affirmed the lower court's dismissal of both claims.

The stock split argument was particularly weak, given that the original VXX pricing supplement stated that the issuer might initiate a split or reverse split of the ETNs on any business day. Nonetheless, plaintiffs argued that the reverse split was an unregistered sale of new ETNs, made in violation of Section 12(a)(1) of the Securities Act.

The court responded that the "sale" prerequisite to a violation of Section 12(a)(1) was not met because "the term 'sale' or 'sell' [is defined as] every … disposition of a security … for value," citing Section 2(a)(3) of the Securities Act. Citing treatises and cases, the court reasoned that a reverse stock split was not a sale because "[merely] recasting the number of securities that the investor holds" is not a new investment for value. Rather, a split is a "not-for-value reshuffling of assets." Citing Judge Posner, the court stated that "a reverse … split generally does not even arguably involve[ ] any purchase or sale." Investors did not lose or gain anything with

the split. "Although [w]ords are protean in the hands of lawyers, even the most skilled verbal manipulation cannot transform such an involuntary and immaterial swap into a 'sale.'"[2]

The stock split was announced in a pricing supplement dated April 23, 2021 (the "April Supplement"). Plaintiffs argued that under Item 512(a)(2) of Regulation S-K under the Securities Act, the April Supplement was a new registration statement incorporating "misleading" previous prospectuses, under which the issuer was liable under Section 11 of the Securities Act.

Plaintiffs, however, failed to trace their post-split ETNs to the April Supplement, meaning that they did not trace their post-split ETNs to a defective registration statement. The April Supplement stated that it covered the "'initial sale of the [post-split] ETNs' that Barclays *still held in its inventory*" (emphasis added) and "'market making transaction[s],' which it defines as sales from Barclays' *own cache of post-split ETNs* to 'dealers [who would] resell such ETNs to the public."[3] (Emphasis added.) Plaintiffs' ETNs, by definition, were not covered in the April Supplement.

Staying on the Right Track: Monitoring Program Issuance Limits

Frequent debt issuers rely on medium-term note programs ("MTNs") to offer their securities quickly in response to market opportunities. Some issuers may issue 20 or more notes a day at certain points in their monthly marketing cycle. Are there limitations on the aggregate principal amount of notes that can be issued under these MTN programs? If so, where or how are these limits set? How are they determined? What happens if any of these limits is exceeded?

We discuss these questions in the context of exempt offerings of structured notes, as well as offerings of structured notes registered under the Securities Act. Similar concepts apply, of course, to offerings of traditional debt securities.

EXEMPT OFFERINGS

We start with any internal limits on issuances imposed by the issuer itself, and also those included in the offering and operative documents.

Board resolutions. An issuer's board resolutions authorizing the creation of an MTN program usually will set an upper limit on the aggregate principal amount of securities that may be issued. It is important to check how this limit is expressed:

- Issued – this means that the total issued amount is fixed, whether or not some of the securities have matured or been redeemed
- Issued and outstanding – this means that securities that have matured or been redeemed will not be counted in the total, so a larger amount of securities can be issued over a longer period of time until the "issued and outstanding" amount is reached (if ever)
    - Variation: Outstanding during a certain time period, such as a calendar year, after which a further board resolution would be required to increase the amount

[2] See *Knapp v. Barclays*, 25-1631 (2nd Cir. Mar. 24, 2026) at pp. 8-10.

[3] *Id.* at pp. 13-15.

A board may delegate the authority to set limits on the aggregate principal amount issued to a committee or certain authorized officers.[4]

Disclosure and Operative Documents. Where are these limits disclosed or specified, and what is the difference?

If an issuer authorizes a certain principal amount of debt securities to be issued under its MTN program, the offering memorandum for the MTN program will usually disclose on the front cover that amount, and whether it is purely an issuance amount or if it excludes securities that have matured or been redeemed ("outstanding at any time"). The distribution agreement for the MTN program will also state that amount on the cover page. The indenture (or agency agreement) for the MTN program generally will not include the issuance limit, in order to avoid having to re-execute those documents upon a periodic renewal.

Why is this important? MTN programs operate pursuant to a distribution agreement. In that agreement, the issuer makes a representation that the securities to be issued are "***duly authorized***, and, when the securities are issued and delivered pursuant to this agreement, the securities will have been duly executed, authenticated, issued and delivered …." Issuer's counsel will be required to opine to much the same in the opinion addressed to the distributor.

Under the distribution agreement, all of the issuer's representations therein will be made and deemed made at the following times:

- Upon execution of the distribution agreement
- At each acceptance by the issuer of an offer to purchase securities
- At each settlement date for the issuance of securities
- Upon the delivery of an officer's certificate to the distributors as part of a set of diligence deliverables (officer's certificate, comfort letter and opinion of counsel)

If the issuer has oversold the amount authorized by the board resolutions, it cannot sell securities to the distributors without breaching its representation that such securities are duly authorized.

Those are the operative documents where the limits on issuances are included, and where any issuance above the limit would give rise to a contractual claim by the distributor against the issuer.[5]

What about the limit stated on the cover page of the offering memorandum? As a disclosure matter, could it give rise to a claim by some clever plaintiff's lawyer representing a purchaser whose debt securities did not pay off as they hoped in the event of an oversale?

It is hard to imagine such a claim, which would have to be brought under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder. The plaintiff would have to allege that the maximum offering amount stated in the offering memorandum was a material misstatement or omission, reliance on that disclosure and causation showing that the oversale of securities beyond the amount stated in the offering memorandum caused the plaintiff's loss. Such a claim would also require proof of intent, which would be difficult.

[4] As a diligence point and particularly when drafting an opinion on due authorization, the issuer's charter documents must be checked to ensure that any committee is duly constituted and to consider whether there are any limits on issuances of securities in the charter documents.

[5] The discussion above also applies to commercial paper programs and other continuous offering programs.

REGISTERED OFFERINGS

Even though the amount of debt securities issued under a registered MTN program may be within the issuer's internal limits, as expressed in the board resolutions, it is possible that the amount sold might exceed the amount registered with the Securities and Exchange Commission ("SEC") under the Securities Act. In that case, the oversold debt securities would be unregistered securities.

A "well-known seasoned issuer" (a "WKSI") is eligible to file an automatic shelf registration statement to register offers and sales of securities. A WKSI can either register a fixed amount of securities and pay the filing fee in advance under Rule 456(a) under the Securities Act or it can register an indeterminate amount of securities and defer payment of all or a portion of the registration fee under Rules 456(b) and 457(r) under the Securities Act. If Rule 456(a) is used, takedowns off of the Registration Statement on Form S-3ASR will be limited to the stated registered amount.

WKSIs that choose to "pay-as-you-go" under Rules 456(b) and 457(r) under the Securities Act defer paying a filing fee in advance, but instead pay a fee at the time of the filing of the final pricing supplement for any offering. At that time, the filing fee is deducted from the issuer's fee account with the SEC.

Each approach has its advantages and disadvantages. WKSIs that use Rule 456(a) do not have to keep paying a fee each time that they take down securities from the shelf. However, they have to keep track of their remaining shelf capacity, as discussed below. Issuers that are not WKSIs but are eligible to use Form S-3 must use Rule 456(a) and also must keep track of their remaining shelf capacity.[6] WKSIs that defer payment have to ensure that their account at the SEC has enough money in it to cover the filing fees at the time of an issuance.[7] Again, a matter of keeping track internally.

Any issuer (including a WKSI) that uses Rule 456(a) to register the offer and sale of a specific amount of securities must have internal procedures to keep track of the dollar amount of securities that have been sold and the remaining capacity on the shelf registration statement. If the issuer loses track of its remaining shelf capacity and oversells the amount that is registered pursuant to the shelf registration statement, it will have sold unregistered securities.

This happened to a large frequent issuer. The issuer, which had been a WKSI but lost its WKSI status, oversold the amount of securities that it had registered on its Form F-3. The issuer conducted a rescission offer for the unregistered securities and also paid a civil penalty.

According to the issuer, its failure to identify external regulatory limits on the sale of the relevant securities and the failure to monitor against these limits had led it to conclude that it had a material weakness in certain aspects of its internal control environment and that, as a consequence, its internal control over financial reporting and disclosure controls and procedures as of the relevant fiscal year end were not effective. Plaintiff's attorneys commenced class actions against the issuer based on Exchange Act Section 10(b) and Rule 10b-5 thereunder.

[6] The Form S-3 cannot be post-effectively amended to increase the registered amount (except under the limited circumstances provided by Rule 462(b) under the Securities Act). Form S-3ASR can only be post-effectively amended to register additional securities pursuant to Rule 413(b).

[7] If there are insufficient funds in an issuer's account with the SEC, the printer will usually alert the issuer as the printer will receive a message from the SEC's EDGAR system that the filing cannot be made.

If an issuer has oversold its registered shelf capacity, the Exhibit 5 opinion of counsel as to the due authorization of the securities could be called into question. However, that opinion usually includes an assumption to the effect that "at or prior to the time of the delivery of any such security, the Board of Directors (or a duly authorized committee thereof) of the issuer shall have duly authorized the issuance and sale of such security and such authorization shall not have been modified or rescinded …." Nonetheless, prior to issuing such an opinion, diligence by counsel would require a review of the matters that we cover here, including reviewing program authorizations and limits.

Of course, program authorizations, authorized amounts, issued amounts, etc. should be the subject of diligence in connection with program renewals, program amendments, and syndicated takedowns.

OCC REGISTRATION OF OFFERINGS OF DEBT SECURITIES BY NATIONAL BANKS

National banks issuing debt securities must file a registration statement with the Office of the Comptroller of the Currency ("OCC") under 12 C.F.R. Part 16 (the "Securities Offering Rules") unless an exemption from registration is available. Although the securities of national banks are exempt from registration under the Securities Act by virtue of Section 3(a)(2) thereof, unless an exemption is available from the Securities Offering Rules,[8] the national bank must file a registration statement with the OCC.[9]

Most national banks with bank note programs tailor their offerings to fit within the exemption provided by 12 C.F.R. Part 16.6, which requires, among other things, offerings of nonconvertible debt in $250,000 minimum denominations, sales to only accredited investors (as defined in Rule 501(a) under the Securities Act), the debt is "investment grade" (as defined in 12 C.F.R. Part 16.2(f)) and the offering document is filed with the OCC.

Because the offering memorandum filed with the OCC would state the aggregate principal amount of debt securities to be offered, the national bank issuer should ensure that they do not oversell that amount.

Although Section 3(a)(2) securities are not exempt from registration with the OCC under 12 C.F.R. Part 16.5(a), securities exempt from registration under Section 3(a)(3) of the Securities Act (maturity of 270 days or less and meeting the "current transaction" requirement) are within 12 C.F.R. Part 16.5(a). Therefore, if a national bank's bank note program allows for, and issues, bank notes that qualify for the Section 3(a)(3) exemption, those issuances would not be counted against the amount stated on the cover page of the offering memorandum filed with the OCC.

CREATING A GOOD TRACK RECORD

Frequent issuers (such as issuers of structured notes) should have in place written policies and procedures that address monitoring of issuances to ensure that neither internal limits (such as board resolutions) nor external limits (such as SEC filing fees) are exceeded.

These procedures might address, among other things:

- Personnel dedicated to the task, with backups. In considering personnel, different approaches will inevitably be required for each institution. Also, it may be necessary for the institution's Treasury funding group to monitor certain amounts, such as the internal limits and the registration fees, since these relate to the issuer and the issuer's programs and its registration statements. One or more

[8] 12 C.F.R. Part 16.5 provides exemptions from registering under Part 16.3, but specifically excludes Section 3(a)(2) of the Securities Act.

[9] See 12 C.F.R. Part 16.3 (registration requirement); 12 C.F.R. Part 16.15 (form and content – issuers may use Securities Act registration forms).

funding groups within the affiliated broker-dealer may be responsible for monitoring issuances undertaken by their groups. These may need to be reconciled.
- Periodic audits of the tracking function. It will be essential to test that the functions work reliably.
- A set amount of registered securities under which the issuer would refile the shelf to register an amount within the limits set by the board.

Some issuers have their outside counsel assist with tracking issuances of their structured notes. However, the issuer is ultimately responsible for ensuring that there is available shelf capacity.

Upcoming Events

- **The Defined Outcome Series**
  Register here
  Join us for a series of short sessions that will discuss defined outcome products. Defined outcome products include a range of products that are designed to provide investors with some level of certainty (a "predictable" outcome if held for the specified period) usually based on a buffer, while providing equity market exposure. In recent periods, defined outcome ETFs have experienced particularly notable growth.
    - **Considerations for index providers to, or hedge providers to, ETFs**
      Tuesday, May 5, 2026 | 12:00 p.m. – 12:40 p.m. ET
    - **Understanding the regulation of SMAs**
      Tuesday, May 19, 2026 | 12:00 p.m. – 12:40 p.m. ET

IN CASE YOU MISSED IT…

The Defined Outcome Series: Comparing the tax treatment to investors of structured products, ETNs, UITs, and ETFs (February 2026)

See the materials.

REVERSEinquiries Workshop: NAIC/SVO Understanding Changes to the Regulatory Capital Landscape (April 2026)

See the materials.

The Defined Outcome Series: Tax structuring issues for entities taxed as registered investment companies (RICs, UITs and ETFs) (March 2026)

See the materials.

The Defined Outcome Series: Comparing disclosure and other requirements applicable to ETFs with those applicable to structured notes and ETNs (April 2026)

See the materials.

The Regulatory Curve: Developments Involving Commodity Pool Operators and Advisors (March 2026)

See the materials.

At the 2025 GlobalCapital Global Derivatives Awards, Mayer Brown was:

- **Americas Law Firm of the Year (Overall) (for the fourth consecutive year and for the sixth time in the last eight years) and**
- **US Law Firm of the Year (for the fifth time in the last six years).**

Mayer Brown was named Best Law Firm at Structured Retail Products' 2025 SRP Americas Awards.

ANNOUNCEMENTS

LinkedIn Group. Stay up-to-date on structured and market-linked products news by joining our **REVERSEinquiries LinkedIn group**.

Suggestions? *REVERSEinquiries* is committed to meeting the needs of the structured and market-linked products community, so you ask and we answer. Send us questions that we'll answer on our LinkedIn anonymously or send us topics for future newsletter issues.

To request to join our LinkedIn group, or send us suggestions/comments, scan this QR code with your phone's camera, to email us at hhairihan@mayerbrown.com.

The **Free Writings & Perspectives**, or **FW&Ps**, blog provides news and views on securities regulation and capital formation. The blog provides up-to-the-minute information regarding securities law developments, particularly those related to capital formation. FW&Ps also offers commentary regarding developments affecting private placements, mezzanine or "late stage" private placements, PIPE transactions, IPOs and the IPO market, new financial products and any other securities-related topics that pique our and our readers' interest. Our blog is available at: http://www.freewritings.law.

Bradley Berman
T: +1 212 506 2321
E: bberman@mayerbrown.com

Elizabeth Encinas
T: +1 212 506 2103
E: eencinas@mayerbrown.com

Declan Goulding
T: +1 212 506 2675
E: dgoulding@mayerbrown.com

Marla Matusic
T: +1 212 506 2437
E: mmatusic@mayerbrown.com

Anna Pinedo
T: +1 212 506 2275
E: apinedo@mayerbrown.com