



August 7, 2023

Re: Comments in Response to FINRA Regulatory Notice 23-09 (May 9, 2023) (“FINRA Requests Comment on FINRA Rules Impacting Capital Formation”)

Sent by Email to: [pubcom@finra.org](mailto:pubcom@finra.org)

GVC Capital LLC (“GVC”) appreciates the opportunity to respond to Regulatory Notice 23-09 and submits respectfully the following comments and requests:

Introduction:

Current federal and state laws, rules, and regulations, SEC rules and regulations, exchange rules, and FINRA Rules, among others, regarding “Capital Formation” are remarkably complex and nuanced. Navigating compliance with those laws, rules, and regulations (if, when, and as applicable) to the particular facts and circumstances of discrete “Capital Formation” transactions often is exceedingly complex for issuers, legal counsel and (if involved with same) FINRA member broker dealers and their associated persons.

The interplay and interrelationships between and among these laws, rules, and regulations especially can be exceedingly complex and nuanced. *See, e.g.*, the various references authored and posted by the SEC’s Office of the Advocate for Small Business Capital Formation and/or the SEC’s Office of Small Business Policy Division of Corporate Finance, <https://www.sec.gov/education/capitalraising> and <https://www.sec.gov/smallbusiness/OSBP>.

Both the SEC and FINRA profess to “promote” or “facilitate” the capital raising process consistent with proper investor protection, but these complexities and nuances continue to endure and hinder capital raising efforts.

All reasonable securities industry firms and their associated persons acknowledge and appreciate the need to balance and honor, respectively, considerations of investor protection and facilitating capital formation.

FINRA Regulatory Notice 23-09 provides in relevant part on page 3:

FINRA notes that its rules and programs are only part of a broader framework of securities laws, rules and regulations that govern or affect capital formation—the Sarbanes-Oxley Act of 2002, the Jumpstart Our Business Startups Act of 2012, SEC rules, and rules of other SROs (e.g., securities exchanges). Making changes to this broader regulatory framework is beyond FINRA’s control, and in certain cases FINRA rules are governed by specific statutory requirements or SEC rules. Nevertheless, FINRA

welcomes comment on how its rules and programs relate to this broader regulatory framework and whether there are opportunities for FINRA to more closely align its rules and programs with the work of other regulators in a manner that promotes capital formation and preserves important investor protections.

This underscores the complexity described above.

In Regulatory Notice 23-09, "... FINRA is requesting general comment on the functioning of its rules, operations and administrative processes that most directly apply to capital raising." *Id.*

GVC is a small broker dealer that is focused principally on private capital raising for private and public issuers. GVC's comments herein are structured accordingly.

GVC appreciates FINRA's published guidance in these regards, including *e.g.*: FINRA Regulatory Notice 10-22 (April 2010) ("Regulation D Offerings: Obligation of Broker-Dealers to Conduct Reasonable Investigations in Regulation D Offerings"); FINRA Regulatory Notice 20-21 (July 1, 2020) ("Communications With the Public: FINRA Provides Guidance on Retail Communications Concerning Private Placement Offerings"); and FINRA Regulatory Notice 23-08 (May 9, 2023) ("Private Placements: FINRA Reminds Members of Their Obligations When Selling Private Placements").

However, as summarized, below GVC believes that additional actions, clarifications and/or guidance from or by FINRA is/are needed.

Summary Requests for FINRA's Consideration and Action:

1. FINRA Personnel Carefully Should Analyze Each Securities Offering Individually; FINRA Personnel Should Not Make Assumptions and/or Generalize Based on Terminology, Labels, and/or the Type of Transaction

For example:

- There are legitimate and illegitimate "private placements" and other securities offerings.
- There are legitimate and illegitimate issuers of "microcap/low priced securities".
- There are broker dealers that endeavor diligently and in good faith to comply with all applicable laws, rules, and regulations, and those that do not.
- Securities transaction facts and circumstances vary widely.
- "Capital formation" is not a cookie cutter, one size fits all business.

It is important *inter alia* to consider individually and distinguish between and among: (1) bona fide and properly conducted and supervised private placements or other securities offerings; (2) non-bona fide, non-legitimate, improper, fraudulent and/or even criminal private placements or other securities offerings; (3) carefully targeted and/or limited private placements or other

securities offerings (*e.g.*, only to “accredited”, experienced, “institutional”, and/or other “sophisticated” investors without the use of general solicitation and/or advertising); and/or (4) broadly and/or indiscriminately marketed private placements or other securities offerings to “retail” investors.

As one example, private offering transactions relying on Rule 506(b) of Regulation D are materially different than those relying on Rule 506(c) of Regulation D. FINRA observed that, because of the adoption of Rule 505(c) of Regulation D, “member firms have become increasingly involved in the distribution of private placement securities through online platforms and other widely disseminated communications such as digital advertisements.” FINRA Regulatory Notice 20-21 (July 1, 2020) (“Communications With the Public: FINRA Provides Guidance on Retail Communications Concerning Private Placement Offerings”), page 2.

2. Improve FINRA Rule 2210 (“Communications with the Public”) and Other Definitions that Flow Through/Apply to “Capital Formation” Considerations in Various Contexts

FINRA (and/or the SEC and/or the states) should evaluate, harmonize, and improve in the contexts of capital raising transactions the definitions, *e.g.*, of “accredited investor”, “retail investor”, “institutional investor”, “retail communication” and “institutional communication”.

“Accredited investor” is defined in Rule 501 of Regulation D. *See, e.g.*, <https://www.sec.gov/education/capitalraising/building-blocks/accredited-investor>.

FINRA Rule 2210(a)(6) states that a “‘Retail investor’ means any person other than an ‘institutional investor’” defined in FINRA Rule 2210(a)(4); and a “retail investor” is defined in Reg BI as a “natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes.”

FINRA Rule 2210(a)(4) defines “institutional investor” as:

- (A) person described in Rule 4512(c), regardless of whether the person has an account with a member;
- (B) governmental entity or subdivision thereof;
- (C) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of such plans;
- (C) qualified plan, as defined in Section 3(a)(12)(C) of the Exchange Act, or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of such plans;
- (D) member or registered person of such a member; and

(F) person acting solely on behalf of any such institutional investor.

FINRA Rule 4512(c) provides:

(c) For purposes of this Rule, the term "institutional account" shall mean the account of:

(1) a bank, savings and loan association, insurance company or registered investment company;

(2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or

(3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million.

Consistent and clear definitions in these regards will facilitate capital raising.

A longstanding difficulty with FINRA Rule 2210, which over time has worsened because of email and other accelerated communication means, is that FINRA Rule 2210(a)(4) states at the end: "No member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any retail investor." In today's business environment that is conducted pervasively via email, this sentence presents challenges to FINRA members like GVC that conduct all or part of their securities business with "institutional" or other accredited, experienced, or sophisticated investors, especially via email communications that easily can be "forwarded or made available to any retail investor" by the recipient of the email.

FINRA stated as follows in FINRA Regulatory Notice 23-08, page 11, regarding "Communications with the Public" (emphasis added; footnote references 64 and 65 omitted):

Under FINRA rules, offering materials will be considered a communication with the public for purposes of FINRA Rule 2210 (Communications with the Public) if the member was involved in preparing the materials. If a PPM or other offering document presents information that is not fair and balanced or that is misleading, then the member that assisted in its preparation may be found to have violated FINRA Rule 2210. Moreover, sales literature concerning a private placement that a member distributes generally constitutes a communication by that member with the public, whether or not the member assisted in its preparation. In 2020, FINRA published *Regulatory Notice 20-21* [(July 1, 2020) ("Communications with the Public: FINRA Provides Guidance on Retail Communications Concerning Private Placement Offerings")] to help member firms comply with FINRA Rule 2210 when creating,

reviewing, approving, distributing or using retail communications concerning private placement offerings.

This section of FINRA Regulatory Notice 23-08 about “Communications with the Public” presents potential interpretation and/or potential application challenges for a FINRA member broker dealer like GVC engaged in capital raising, including for example: (1) when the issuer and/or its legal counsel prepare(s) all of the offering materials (*e.g.*, PPM, subscription agreement, investor questionnaire, *et al.*) and all related and/or collateral documentation, *e.g.*, describing the issuer, its business, its plans, and the offering (typically the issuer prepares one or more PowerPoint decks or other such collateral documentation for review by potential investors along with the offering materials prepared by the issuer and/or its counsel); and (2) a FINRA member broker dealer such as GVC does not provide any substantive drafting and/or other substantive assistance in such regards, and all final drafting and all other decisions regarding the form and content of all such documentation rest solely with the issuer and/or its legal counsel and/or other inside and/or outside professional advisors.

GVC requests respectfully that FINRA clarify and confirm that a communication/document is not deemed to be a communication of a FINRA member within the context of FINRA Rule 2210 or otherwise unless the FINRA member: prepares the communication; assists in the preparation of the communication; adopts the communication as its own; and/or becomes substantively entangled with the communication.

Specifically, FINRA should retract or clarify (consistent with the discussion above and elsewhere herein) the specific sentence in Regulatory Notice 23-08, on page 11, that reads: “Moreover, sales literature concerning a private placement that a member distributes generally constitutes a communication by that member with the public, whether or not the member assisted in its preparation.”

### 3. Improve FINRA Rule 5123

Effective on October 1, 2021, FINRA adopted changes to FINRA Rule 5123 “to require members to file retail communications that promote or recommend private placement offerings that are subject to those rules’ [FINRA Rules 5122 (“Private Placements of Securities Issued by Members”) and 5123] filing requirements.” FINRA Regulatory Notice 21-26 (July 15, 2021) (“Private Placement Retail Communications: FINRA Amends Rules 5122 and 5123 Filing Requirements to Include Retail Communications That Promote or Recommend Private Placements”) (emphasis added).

FINRA explained, *id.* at page 2 (emphasis added; footnote references omitted):

FINRA has amended Rules 5122 and 5123 to require firms to file with Corp Fin retail communications that promote or recommend a private placement offering subject to those rules’ filing requirements, in addition to the currently required PPMs, term sheets and other offering documents. The amendments do not apply to any offerings that are currently exempt from filing, such as sales exclusively to institutional accounts. The amendments will require a member to file such retail communications with Corp Fin no

later than the date on which the member must file the private placement offering documents under Rules 5122 and 5123.

FINRA Rule 5123(a) was amended to read as follows, new language underlined:

Each member that sells a security in a non-public offering in reliance on an available exemption from registration under the Securities Act ("private placement") must: (i) submit to FINRA, or have submitted on its behalf by a designated member, a copy of any private placement memorandum, term sheet or other offering document, and any retail communication (as defined in Rule 2210) that promotes or recommends the private placement, including any materially amended versions thereof, used in connection with such sale within 15 calendar days of the date of first sale; or (ii) notify FINRA that no such offering documents or retail communications were used. Members must provide FINRA with the required documents, retail communications, or notification and related information, if known, by filing an electronic form in the manner prescribed by FINRA.

Of course, note above the repeated use of the term "retail communication".

It is GVC's experience that most if not all company issuers seeking to raise capital prepare, and most if not all prospective investors expect, a PowerPoint deck or similar document prepared by the company issuer that outlines *inter alia* the company's business, its plans, and its hopes. The company issuer's PowerPoint deck or similar document is a "standard" tool to provide information for prospective investors to consider whether the company issuer is worthy of additional consideration and due diligence.

The company issuer's offering documents set forth the legally binding terms and conditions of each offering.

FINRA Rule 2210(b)(1)(D) states (emphasis added): "The requirements of paragraph (b)(1)(A) shall not apply with regard to the following retail communications, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to Rules 3110(b) and 3110.06 through .09: ... (iii) **any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.**"

In determining whether any communication is considered that of a FINRA member, GVC submits, moreover, that FINRA should expressly endorse and apply in this context the following: FINRA Regulatory Notice 17-18 (April 2017) ("Social Media and Digital Communications: Guidance on Social Networking Websites and Business Communications") and especially FINRA Regulatory Notice 10-06 (January 2010) ("Social Media Web Sites: Guidance on Blogs and Social Networking Web Sites").

In relevant part, FINRA Regulatory Notice 10-06 discusses whether "Third-Party Posts"/"third-party content" on a member firm's social media site is considered by FINRA "to be the firm's communication under Rule 2210." *Id.* at page 7. FINRA answered as follows (emphasis added):

As a general matter, FINRA does **not** treat posts by customers or other third parties as the firm's communication with the public subject to Rule 2210. Thus, the prior principal approval, content and filing requirements of Rule 2210 do **not** apply to these posts.

Under certain circumstances, however, third-party posts may become attributable to the firm. Whether third-party content is attributable to a firm depends on whether the firm has (1) **involved itself in the preparation of the content** or (2) **explicitly or implicitly endorsed or approved the content.**

According to the SEC, circumstance (1) above is referred to “as the “entanglement” theory (*i.e.*, the firm or its personnel is entangled with the preparation of the third-party post) ... and that circumstance (2) above is referred to “as the “adoption” theory (*i.e.*, the firm or its personnel has adopted its content)”. FINRA explained how the SEC’s theories in these regards, which “the SEC employed ... as a basis for a company’s responsibility for third-party information that is hyperlinked to its Web site, a similar analysis would apply to third-party posts on a social media site established by the firm or its personnel.” *Id.* at page 8.

GVC submits respectfully that these SEC “entanglement” and “adoption” considerations and theories that FINRA accepted/endorsed also apply to third-party content and/or materials in the capital formation contexts. Under any/all circumstances in which a third person or party prepared the content and/or materials without the “entanglement” of or the “adoption” by the FINRA member, no such communications are the communications of a FINRA member under FINRA Rule 2210 or otherwise.

FINRA explained further (*id.*; emphasis added):

For example, FINRA would consider such a third-party post to be a communication with the public by the firm or its personnel under the **entanglement theory** if the firm or its personnel paid for or otherwise was involved with the preparation of the content prior to posting. FINRA also would consider a third-party post to be a communication with the public by the firm or its personnel under the **adoption theory** if, after the content is posted, the firm or its personnel explicitly or implicitly endorses or approves the post.

Q10 asks: “Must a firm monitor third-party posts?” FINRA answered as follows (emphasis added):

**FINRA does not consider a third-party post to be a firm communication with the public unless the firm or its personnel either is entangled with the preparation of the third-party post or has adopted its content.** Nevertheless, FINRA has found through its discussions with members of the Social Networking Task Force and others that many firms monitor third-party posts on firm Web sites. For example, some firms monitor third-party posts to mitigate the perception that the firm is adopting a third-party post, to address copyright issues or to assist compliance with the “Good Samaritan” safe harbor for blocking and screening offensive material under the Communications Decency Act.

We are not aware (and please advise if we missed any such references) of any FINRA guidance or other references regarding the meaning of “promote” in the context of FINRA Rule 5123. In contrast, FINRA has provided guidance about the meaning of “recommendation.” *See, e.g.*, Footnote 17 of FINRA Regulatory Notice 23-08 (May 9, 2023) (“Private Placements: FINRA Reminds Members of Their Obligations When Selling Private Placements”). If no such references or guidance regarding “promote” in the context of FINRA Rule 5123 has/have been issued by FINRA, GVC submits respectfully that it should do so.

Depending on the individual potential investor, a FINRA member broker dealer like GVC and its registered associated persons may, but frequently may not, make a “recommendation” of a private placement and/or other securities investment. If no such “recommendation” is made by any duly registered associated person, neither FINRA Rule 2111 nor Reg BI applies.

4. Require FINRA’s Clearing Firm Member Securities Broker Dealers to Individually Evaluate, Treat and Handle Securities

Some securities clearing firms have arbitrary policies mandating that they will not accept for deposit in any securities brokerage account any securities that have a value lower than a specific dollar amount (*e.g.*, \$3/share). This can create “orphaned shareholders”, *i.e.*, investors who/that acquired the securities of legitimate issuers but because of such arbitrary clearing firm policies are foreclosed from reasonable and appropriate secondary liquidity for their investments.

Instead, FINRA and/or the SEC should require securities clearing firms to transact business (*e.g.*, permit deposits in securities brokerage accounts and effect purchases and sales) in respect of any/all securities the valid and legitimate origin/source of which is/are documented by an introducing securities broker dealer or other credible source.

5. Work Harder with the SEC and the States to Make it Easier for Issuers to Raise Capital

At present, and as referenced above, there is a crazy quilt legal and regulatory environment of overlapping, distinct and/or contradictory or inconsistent laws, rules and regulations impacting capital formation. For example, sometimes federal law preempts state law and sometimes it does not.

6. To Improve Investor Protection, Take Steps Individually or with the SEC and/or State Securities Authorities to Increase in the Capital Raising Business the Involvement of Competent FINRA Member Registered Broker Dealers and Competent Registered Associated Persons

FINRA reported on page 3 of FINRA Regulatory Notice 23-08 as follows (emphasis added; footnote reference omitted):

The majority of Regulation D offerings are sold directly by issuers without any broker-dealer involvement. Approximately 20 percent of Regulation D offerings involve “intermediaries,” such as broker-dealers. **Thus, only a small percentage of investors in private placements are afforded the protections of FINRA rules and other relevant**



**broker-dealer regulations that apply when a Regulation D offering involves a member.**

Similarly, FINRA Regulatory Notice 20-21 (July 1, 2020) (“Communications With the Public: FINRA Provides Guidance on Retail Communications Concerning Private Placement Offerings”) states on page 2:

The offerings that are sold directly by issuers or through the efforts of intermediaries that are not FINRA member firms are not subject to the regulatory requirements applicable under FINRA rules and are not subject to FINRA’s examination and review programs. Although FINRA does not have jurisdiction over Reg D private placements that are sold directly to investors or through non-member firm intermediaries, it is committed to promoting investor protection through meaningful regulation and oversight of member firms participating in these offerings.

If FINRA is serious about “promoting the integrity of the offering process and protecting investors”, FINRA should encourage and make it easier for FINRA member firms to engage in private placement (and other capital formation) activity rather than concede such a huge percentage of such business “to issuers or through the efforts of intermediaries that are not FINRA member firms are not subject to the regulatory requirements applicable under FINRA rules and are not subject to FINRA’s examination and review programs.”

For example, FINRA should:

- Expressly encourage issuers to work with competent FINRA Member Registered Broker Dealers.
- Work with the SEC to confirm that \$5,000 minimum net capital securities broker dealers are permitted to participate as selling group members on a “best efforts” (broker/agency) basis in securities transactions that one or more other, higher net capital securities broker dealers are underwriting on a “firm commitment” (dealer/principal) basis. This would help facilitate capital formation by enabling such selling group members (acting as brokers/agents on a “best efforts” basis with no financial commitments/obligations for net capital purposes to purchase any securities) to assist the underwriter(s) (acting as principal on a “firm commitment” (dealer/principal) basis with financial commitment for net capital purposes to purchase securities) with the distribution.

**Conclusion:**

We with GVC would be happy to discuss these matters with FINRA personnel. And please advise if we have missed considering any applicable and material SEC, FINRA or other relevant references or guidance.

Thank you.