P.O. Box 6625, Athens, GA 30604 Tel: 706-208-9620 Fax: 706-993-3342

TO: pubcom@finra.org ***Attn: Joseph Price and Marcia E. Asquith***

RE: comment on 5122 proposal

Dear Mr. Price and Ms. Asquith:

This following, regarding proposed changes to Rule 5122, is the official position of the National Investment Banking Association ("NIBA") response to FINRA's request for comments.

NIBA represents well over 200 broker dealers, and approximately 8000 registered representatives who regularly conduct private placements, many of whom have been in business for decades. (see "About NIBA" on last page of this letter)

We applaud the provisions related to disclosure and wholesaling, and agree in essence with the goals of FINRA for those two macro-issues.

We believe, however, that the provisions relating to filings with FINRA and the allocation of offering proceeds require modification.

We offer both an explanation of the problem and a reasonable solution to each problematic position that has been approved by both our Board of Directors and our membership in general.

USE OF PROCEEDS ISSUE: ONE SIZE DOES NOT FIT ALL

The cost of "papering" private placements has risen dramatically over the last decade. By "papering" we mean all of the expenses that both issuers and placement agent broker dealers, and/or managing broker dealers, must spend prior to the commencement of a private placement.

The most common and recurring of these expenses are listed in Table 1, below, which shows only the expenses that are incurred by the majority of issuers of privately placed *equity* securities. Often, placements of debt or derivative securities require additional legal, accounting, due diligence and investigative reporting, or other expenses above those required for the offering of equity securities.

In Table 1, the presentation displays ranges of minimum to high dollar amounts by columns of what those expenses tend to cost issuers, and/or broker dealers. When taking these dollar amounts as a percentage of transactions where the total offering size in dollars is greater than $20,000,000, there is no issue related to the use of the 85/15 split.

However, when comparing the percentage of the dollar cost of "papering" a transaction of less than $20,000,000, and especially for smaller transactions in the $5,000,000 or less range, the required and full disclosure "papering" costs are a significantly greater percentage of the offering costs, and an inordinate percentage of the 15 points.

Clearly, one size fits all is not appropriate.

We believe that the solution to this issue is generally as follows:

1) First step=<u>Agree on the line items of the types of expenses that are offering related costs, versus costs that could be represented accurately within the use of proceeds.</u> Clearly, all the items on Table 1 are offering related costs, with the possible exception of some of the appraisal and valuation costs, which in some instances would be more accurately included in the use of proceeds, instead of characterizing them as offering related costs. For the purposes of these comments, we are including them in offering related costs.

TABLE 1= LINE ITEM TOTALS	$423,850 High estimate	$200,800 Low estimate
Issuers Counsel	$75,000	$25,000
Underwriters Counsel	$35,000	$18,000
AUDITORS	$28,000	$12,000
ACCOUNTANTS & BOOKKEEPERS	$20,000	$12,000
INDEPENDENT DUE DILIGENCE RPT	$25,000	$18,000
BACKGROUND RPRTS	$4,000	$1,500
CERTIFICATION RPRTS	$15,000	$4,500
V-ROOM VPN FINRA APPROVED SECURE WEB SITE FOR DOCUMENT & DD PRESENTATION	$2,400	$1,200
APPRAISALS &/or Valuations	$45,000	$13,000
TRAVEL for DD & Preparation	$10,000	$3,500
SUPPLIES	$5,000	$3,500
SECRETARIAL/CLERICAL	$10,000	$4,000
Broker Dealer DD EXPENSES	$50,000	$35,000
BANK LOCKBOX &/OR ESCROW	$2,000	$500
BROKER DEALER MRKTG Materials	$10,000	$4,000
Investor MRKTG Materials	$20,000	$5,000
COMPANY PERSONNEL TRAVEL IF 1 OR 2 GO to PRESENTATIONS	$19,200	$9,600
IBK REP TRAVEL TO SUCH MTGS	$9,600	$9,600
DD MTG FOR BROKER DEALERS	$13,650	$8,100
Printing PPM'S minimum #400	$15,000	$8,000
TELEPHONE	$7,000	$3,500
MAIL&COURIER	$3,000	$1,300

CATEGORY GROUP TOTALS		
	$423,850 High estimate	$200,800 Low estimate
ALL LEGAL	$110,000	$43,000
ALL ACCOUNTING	$48,000	$24,000
ALL DUE DILIGENCE RELATED	$166,400	$84,200
ALL MARKETING RELATED	$89,450	$44,800
CO INTERNAL COSTS	$10,000	$4,800

PLUS—ADDITIONAL COSTS COULD BE INCURRED IN ASSISTING AND PREPARING INDEPENDENT DUE DILIGENCE REPORT; TRAVEL; PRINTING; CLERICAL & WHOLESALERS NOT ALREADY INCLUDED ABOVE.

2) Second step= Segregate the dollar amount of the "papering" costs, unrelated to the selling costs of the offering into a "box" which would be represented to the investors in disclosure by line item and cost in dollars, not JUST as a percentage of the offering gross amount. This "boxed" dollar amount would be allowed separate from the percentage representing the aggregate percentage allowed for commissions and selling costs. An example would be:

LINE ITEM TOTALS	$334,400	$156,000
FOR PREPARING THE OFFERING	High estimate	Low estimate
Issuers Counsel	$75,000	$25,000
Underwriters Counsel	$35,000	$18,000
AUDITORS	$28,000	$12,000
ACCOUNTANTS & BOOKKEEPERS	$20,000	$12,000
INDEPENDENT DUE DILIGENCE RPT	$25,000	$18,000
BACKGROUND RPRTS	$4,000	$1,500
CERTIFICATION RPRTS	$15,000	$4,500
V-ROOM VPN FINRA APPROVED SECURE WEB SITE FOR DOCUMENT & DD PRESENTATION	$2,400	$1,200
APPRAISALS &/or Valuations	$45,000	$13,000
TRAVEL for DD & Preparation	$10,000	$3,500
SUPPLIES	$5,000	$3,500
SECRETARIAL/CLERICAL	$10,000	$4,000
Broker Dealer DD EXPENSES	$50,000	$35,000
TELEPHONE	$7,000	$3,500
MAIL & COURIER	$3,000	$1,300

MARKETING & SELLING RELATED COSTS

TOTALS	$89,450	$44,800
BANK LOCKBOX &/OR ESCROW	$2,000	$500
BROKER DEALER MRKTG Materials	$10,000	$4,000
Investor MRKTG Materials	$20,000	$5,000
COMPANY PERSONNEL TRAVEL		

IF 1 OR 2 GO to PRESENTATIONS	**$19,200**	**$9,600**
IBK REP TRAVEL TO SUCH MTGS	**$9,600**	**$9,600**
DD MTG FOR BROKER DEALERS	**$13,650**	**$8,100**
Printing PPM'S minimum #400	**$15,000**	**$8,000**

3) Third step= Require the presentation in the PPM or disclosure document to include the information related to the expenses that are "boxed" and for the percentage that the broker dealer is receiving in compensation in the form of commissions and marketing and selling costs, whether the marketing and selling costs were paid by the issuer or the broker dealers. Thus, (i) the commission amount would be plainly stated; (ii) any non-cash compensation would be plainly stated; and, (iii) the marketing and selling costs would be plainly stated; and, (iv) all supported by tables for further clarity. For instance, in a $5,000,000 gross offering, where the preparation costs of the offering were $200,000, and the marketing and selling related costs, exclusive of commissions, were $60,000, the representation would display the aggregate boxed costs at $200,000, which is 4% of the offering amount, and the aggregate selling and marketing costs of $60,000, which is 1.2%; and then discuss and display the commissions as a percentage of the offering separately, as well as any non-cash compensation.

   Since the broker dealer costs as expended are already in the marketing and selling cost segregation, exclusive of commissions and non-cash compensation, as well as the issuers' selling costs incurred, the broker dealers would not require as large a non-accountable expense allowance within their commission and costs structure. All of the issuers' and broker dealers' costs can be estimated for purposes of costs not yet expended or realized at the time the PPM or disclosure document is printed, and adjusted similar to registered offering disclosures.

   Therefore, in the $5,000,000 example above, if selling commissions were 10%, or $500,000, and 1% were non-accountable expenses, or $50,000, which would be typical in an offering so small, and "boxed" expenses were $200,000 with selling and marketing costs at $60,000, then the minimum cost of preparing and selling the $5,000,000 offering would be $810,000, which represents in the old methodology approximately 16.2%.

   A $10,000,000 placement example, if selling commissions were 9%, or $900,000, and 1% were non-accountable expenses, or $100,000, which would be typical in an offering of that size, and "boxed" expenses were $330,000 with selling and marketing costs at $90,000, then the minimum cost of preparing and selling the $10,000,000 offering would be $1,420,000, which represents in the old methodology approximately 14.2%.

Especially in transactions of under $10,000,000 in aggregate offering amount sought from investors, the percentage of 15% would no longer be required by FINRA, since

the typical selling commissions for a "retail" transaction meant to be marketed to individuals as Accredited Investors, and not Qualified Institutional Investors as defined by 144A of the Securities Act of 1933, as amended, or to Qualified Purchasers, as defined under the Investment Company At of '40, sections 2 (51) (A) or 3 (c) (7), are in the 8% to 10% range, and the selling costs are in the 1.5% to 3% range. Thus, the selling costs will now be in the 9.5% to 13% range, inclusive of commissions, and not the 15% amount.

Broker dealers must be paid fairly for their placement services, and current commissions representative of the "retail" sector of Accredited Investors should remain in the 8% to 10% range for commissions, dependent on the dollar amount being raised and the complexity of the transaction, irrespective of selling costs.

Selling and marketing costs, as displayed in the above table, are not unreasonable in dollar amounts. The table represents dollar amounts that assume only 12 DD meetings in up to 16 cities, with only two company representatives and one broker dealer representative at each meeting. Many offering require significantly more meetings in more cities, especially in the environment of the last three years, and are expected to continue for some time in the future. The approximate range of $45,000 to $89,000 in marketing and selling costs, are only examples; realizing that many offerings are more expensive to complete, especially when the sales period extends beyond six months, which is becoming more common.

The number of broker dealers that can or will sell private placements has declined rapidly over the last three years. The number of sales associates has also declined, and the number of Accredited Investors is declining, especially since the Dodd-Frank Act adjustment to the definition of an Accredited Investor. Yet, the number of private placement offerings is increasing, as fewer issuers choose to engage in registered offerings, even when the issuer has securities already registered and trading.

Issuers and broker dealers do not desire to spend any more than is necessary to prepare an offering, "paper" it, market and sell it, while still complying with all disclosure, due diligence and regulatory requirements. In addition, by "boxing" the dollar costs of required preparation and due diligence, as these costs may rise in the future, there will be no further need for lengthy and costly amendments, as the line items are determined, and the costs within the "box" will adjust with market availability of such services or goods.

Without protective methodology for smaller dollar transactions, capital formation for smaller private and reporting issuers would become onerous and impractical, and broker dealers, who are the largest contributors to capital formation of micro-cap and nano-cap issuers, would be unable to conduct such offerings profitably.

We strongly urge FINRA to modify the language of Rule 5122 to include "boxed" line items and segregation of marketing and selling costs, and further segregation of

commissions and non-cash compensation disclosures consistent with what we have set forth.

FILING WITH FINRA: TIMING is EVERYTHING

A large number of states require rescission letters to be offered to purchasers of unregistered securities when certain changes are incorporated by "sticker" or subsequent version printing of PPM's or disclosure documents. The timing of FINRA communication of comments or requested modifications to transactions already offered and sold, in part or whole, to investors, thus becomes a serious issue with potentially catastrophic consequences to issuers, investors and broker dealers.

FINRA's intent in the proposed Rule 5122 revision is to conduct *ex post* reviews of the filed document(s). Such timing may often subject Issuers to unnecessary risks related to modifications in the disclosures within the documents, or even transaction structure. Most of these types of modifications would require notice to the investors, both those who have already invested, as well as all Offerees. States could require the issuer to rescind the transaction, or offer the rescission option to the investors. Issuers' who have already expended some or all of the funds contributed by investors at that point would, in all likelihood, be unable to execute such a rescission. If market conditions change between commencement of an offering and the date of a rescission offer, investors may base rescission decisions on the general market conditions and not on the merits of the offering and the issuer in which they have just invested. Broker dealers who have sold a material amount of the offering and paid out commissions to its registered representatives could jeopardize operating and net capital requirements when forced to refund their compensation.

Although unintended, these serious consequences could result from the timing of the review by FINRA.

If FINRA conducts only *ex post* review, how can broker dealers feel comfortable in offering transactions to their Accredited Investor clients knowing that a future request for modification could throw the entire transaction into potential rescission in many states? How can issuers feel secure in initiating their offerings prior to FINRA "no action" notification?

While FINRA does not intend for its review to delay the initiation of a private offering, this timing issue must be addressed to prevent that from happening.

FINRA should, instead, be required to respond on the **material aspects** of the offering materials filed no later than ten days after the stated initiation of the offering. Issuers would be allowed to file placement memorandums or disclosure documents as soon as **late-draft, materially complete versions** are available. At the time of filing with FINRA, issuers would notify FINRA of the expected first offering date. This would mitigate virtually all of the **material risks** to the issuers,

the investors and the broker dealers, posed above, as little harm should develop in such a short period of time.

If FINRA staffing levels are currently insufficient to adequately process a ten day notice for **materiality,** then FINRA should remove the filing requirement proposal for Rule 5122 entirely until it can accommodate such a process, or table this filing requirement issue until a non-damaging alternate method can be devised.

We cannot envision an environment where FINRA *ex post* reviews as proposed would be practical, except where such review was related to offering violations by a broker dealer or by an issuer. Since the vast majority of private placements are conducted by issuers and broker dealers in compliance with all practical, legal and regulatory norms, we do not endorse practices by FINRA that would place issuers, investors and broker dealers at unnecessary risk as a result of a small number of issuers or broker dealers that scoff best practices in offering private placements.

We strongly urge FINRA to incorporate these two material and significant changes into any revision of 5122.

Thank you for the opportunity to share our views. They are endorsed by our association.

The Board of Directors of NIBA

About National Investment Banking Association (NIBA)
NIBA is a national not-for-profit trade association serving and offering membership to regional and independent FINRA Member investment banking firms, boutique corporate finance Member firms and specialized investment brokerages, along with providing valuable services to its Associate Members, which includes institutional investors, hedge fund managers, securities attorneys, CPAs, regulatory consultants and other domestic and international Industry professionals.

Since its inception, NIBA member firms have successfully completed over 1000 equity offerings totaling approximately $10 billion in new capital for America's finest emerging growth companies. The member firms of NIBA represent over 8000 registered representatives with an estimated $78 billion in assets under management, and our members have been responsible for 90% of all Initial Public Offerings under $20 million. For more information, please visit www.nibanet.org.