March 10, 2011

Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street, NW
Washington, DC 20006-1506

Re: Proposed Amendments to FINRA Rule 5122-Regulatory Notice 11-04

Dear Ms. Asquith:

I am the President of Mick & Associates, P.C., LLO, a law firm based in Omaha, Nebraska with a national practice representing independent broker-dealers in the conduct of outside due diligence on private placement and publicly registered, non-traded securities offerings. Our firm is comprised, in part, of a former general counsel to a member firm, former tax counsel to a member firm and a 19-year FINRA attorney. We have reviewed approximately 1,400 private placement sponsors and private placement offerings over the past nine years.

As a preliminary matter, we applaud the conceptual approach of the proposed amendments to FINRA Rule 5122. The proposed amendments dovetail with the current North American Securities Administrators Association's ("NASAA") guidelines regarding front-end compensation applicable to non-traded REITs and other offerings defined therein. While we advocate and vigorously negotiate on behalf of our clients and the investing public total front-end offering costs in the range of 10-12%, the proposed amendments provide a minimum regulatory consistency and an improvement over current limited application.

Our firm would, however, in an effort to provide guidance to our broker-dealer clients and to assist our independent analysis in the due diligence process, request clarification of the following through final amendments to Rule 5122:

1. Clarification whether the requirement that at least 85% of the offering proceeds raised may not be used to pay for offering costs, discounts, commissions or any other cash or non-cash sales incentives (the "85% Threshold") is <u>applied on a transactional or aggregate basis</u>. The utilization of early investor incentives, commission discount schedules for larger

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investments, and blended broker-dealer/registered investment advisor distribution, for instance, may result in numerous transactions complying with the 85% Threshold but violation of the 85% Threshold could nevertheless occur on an aggregate basis;

2. Our firm has reviewed numerous private placements wherein the soliciting broker-dealer and its registered representatives participate in back-end compensation, which is almost always dependent upon the financial performance of the particular offering. We request either clarification that: (a) such back-end compensation will not be included in the 85% Threshold or (b) application of a discount rate to determine the present value of such compensation in calculating compliance with the 85% Threshold, any discounts or reductions, and a formula therefor, given the inherently speculative nature of such future payments, and whether such calculations can be based upon the private placement sponsor's proforma projections, if any, or our independent financial underwriting (where calculable);

3. Please clarify in the final amendments to the Rule whether the 85% Threshold applies to industry-related conference expenses, and if the same are deemed a portion of "offering costs," a proposed allocation formula for private placement sponsors that may have more than one offering in its offering period;

4. The putative purpose of the amendments to Rule 5122, as stated by FINRA in Regulatory Notice 11-04, is "[T]o provide investors with additional protection from fraud and abuse…." While we believe FINRA's proposed changes are yet another warning to the independent broker-dealer community to perform ongoing due diligence of private placement offerings, we question the ability of our broker-dealer clients to "promptly conform the offering to comply with this Rule" (see proposed subsection 5122(d)(4)). We believe a non-affiliate selling broker-dealer should not be required, as it would not necessarily have the influence (absent a control or affiliate relationship), to force a private placement issuer to amend its offering documents. We believe the more appropriate solution would be the reasonably prompt termination of the offering selling agreement.

Again, while we commend FINRA's efforts to define the 85% Threshold and ensure that the balance of offering proceeds is dedicated to the business purposes of the offering, from our perspective there is a substantial portion of the iceberg, if you will, that lies below the surface of the offering proceeds table in any private placement memorandum and the offering's organizational documents. For example, a real estate offering may provide for a 6% acquisition fee, management fees that are 200 basis points higher than market, an unacceptable markup on asset acquisition, or 6% disposition costs (consistent with NASAA guidelines but defining mediocrity in our opinion). The 85% Threshold does not prohibit a 30-35% turn-key markup in an oil drilling partnership, a private equity post-money valuation and ownership split reducing prospective investors' equity interest by 50%, nor a life settlement offering that prefunds premium and servicing reserves and pays the balance of offering proceeds directly to the sponsor *ab initio*. All of these structures would be outright rejected by our firm completing "reasonable basis due diligence," and hopefully would be treated in a similar manner by our responsible broker-dealer clients who have not yet succumbed to dissolution as a result, primarily, of falsity

mongering by industry publications and claimant lawyers, most of which has been originally generated by securities regulator pleadings and publications.

In further reference to the above sentence, FINRA also states in the Regulatory Notice that in recent enforcement cases "a participating broker-dealer was affiliated with the issuer, and this affiliation facilitated the broker-dealer's misuse or conversion of offering proceeds." A footnote to this comment references the Provident case and an affirmative statement that "in fact more than 50% of the proceeds were used to pay the dividends and expenses of earlier offerings." In fact, the Receiver's First Quarterly Report dated October 30, 2009 and filed in the U.S. District Court, Northern District of Texas, indicates that according to the records of the receivership entities that he reviewed, over $560 million was spent to obtain mineral assets and leasehold interests. Similarly, a factual reserve summary prepared by an independent engineering firm, Albrecht & Associates in June, 2008 stated the aggregate Provident/Sinclair lease position had a current value of $839 million of proven acreage and reserves. It is also a fact that the February 2, 2009 FINRA Examination Disposition Letter regarding the December, 2008 cycle examination of the subject affiliate broker-dealer has no Exceptions related whatsoever to "[facilitation of] the broker-dealer's misuse or conversion of offering proceeds" (Regulatory Notice p.4). So, aside from the financial pain, shuttered broker-dealers and crippling legal expenses caused in part by regurgitated FINRA and SEC "facts" with ZERO opportunity for many of the maligned private placement sponsors to have their day in court, of the $480 million raised from investors and $175 million credit line provided by Sinclair/Frost Bank, at least $560 million was spent on acquiring assets that at one point were worth approximately $840 million, before the Great Recession and the carnage in natural gas markets.

In summary, while we appreciate FINRA's efforts to regulate the distribution compensation of any private placement offering via the 85% Threshold, we will continue to critically analyze and reject those offerings whose "business purposes" are much more abusive to investors than excess compensation arrangements. We would also respectfully ask that FINRA refrain from taking positions that have been devastating to a number of our broker-dealer clients, your member firms, before facts are investigated and proven.

Very truly yours,

Bryan S. Mick

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