

Required fields are shown with yellow backgrounds and asterisks.

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SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No. \* SR - 2021 - \* 002

Amendment No. (req. for Amendments \*)

Filing by Financial Industry Regulatory Authority

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

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|--|---|--|--|--|---|
| Initial *<br><input checked="" type="checkbox"/> | Amendment *<br><input type="checkbox"/>   | Withdrawal<br><input type="checkbox"/> | Section 19(b)(2) *<br><input type="checkbox"/> | Section 19(b)(3)(A) *<br><input checked="" type="checkbox"/> | Section 19(b)(3)(B) *<br><input type="checkbox"/> |
|  |   |  | Rule   |  |   |
| Pilot<br><input type="checkbox"/>                | Extension of Time Period<br>for Commission Action *<br><input type="checkbox"/> | Date Expires *<br><input type="text"/> | <input type="checkbox"/> 19b-4(f)(1)           | <input type="checkbox"/> 19b-4(f)(4)                         |   |
|  |   |  | <input type="checkbox"/> 19b-4(f)(2)           | <input type="checkbox"/> 19b-4(f)(5)                         |   |
|  |   |  | <input type="checkbox"/> 19b-4(f)(3)           | <input checked="" type="checkbox"/> 19b-4(f)(6)              |   |

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) \*

☐

Section 806(e)(2) \*

☐Security-Based Swap Submission pursuant  
to the Securities Exchange Act of 1934

Section 3C(b)(2) \*

☐

Exhibit 2 Sent As Paper Document



Exhibit 3 Sent As Paper Document

**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

Proposed Rule Change Relating to the Private Placement Filer Form under FINRA Rules 5122 and 5123

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Kathryn Last Name \* Moore

Title \* Associate General Counsel

E-mail \* kathryn.moore@finra.org

Telephone \* (202) 728-8200 Fax (202) 728-8264

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)

Date 01/27/2021

By Patrice Gliniecki

(Name \*)

Senior Vice President and Deputy General Counsel

Patrice Gliniecki,

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFT website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of the Proposed Filer Form Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act,” “Exchange Act” or “SEA”),<sup>1</sup> the Financial Industry Regulatory Authority, Inc. (“FINRA”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) proposed changes to the Private Placement Filer Form (“Filer Form”) that members complete when submitting private placement filings under FINRA Rules 5122 (Private Placements of Securities Issued by Members) or 5123 (Private Placements of Securities).

The proposal does not make any changes to the text of FINRA rules. A copy of the Filer Form that includes the proposed changes is attached as Exhibit 3.

(b) Not applicable.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

The Chief Legal Officer of FINRA authorized the filing of the proposed changes to the Filer Form with the SEC pursuant to delegated authority. No other action by FINRA is necessary for the filing of the proposed changes to the Filer Form.

FINRA has filed the proposed changes to the Filer Form for immediate effectiveness. FINRA anticipates that the implementation date will be May 22, 2021.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

**3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Changes**

(a) Purpose

Rules 5122 and 5123 require a FINRA member to file information regarding private placements in which the member participates.<sup>2</sup> When Rule 5123 became effective on December 3, 2012,<sup>3</sup> FINRA required members to use the Filer Form for filings under both rules.<sup>4</sup> Members submit the Filer Form and relevant offering documents to FINRA through the FINRA Gateway.<sup>5</sup> On July 1, 2013, FINRA amended Rule 5123 to require members to file the requisite information “in a manner prescribed by FINRA” and also began using an updated version of the Filer Form.<sup>6</sup> On May 22, 2017,

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<sup>2</sup> Both Rules 5122 and 5123 provide exemptions from the filing requirement when certain types of securities are sold or securities are sold to certain types of investors. See Rules 5122(c) and 5123(b).

<sup>3</sup> See Securities Exchange Act Release No. 67157 (June 7, 2012), 77 FR 35457 (June 13, 2012) (Notice of Filing of Amendments No. 2 and No. 3 and Order Granting Accelerated Approval of File No. SR-FINRA-2011-057); Regulatory Notice 12-40 (September 2012).

<sup>4</sup> See Regulatory Notice 12-40 (September 2012). See also Regulatory Notice 13-26 (August 2013); Securities Exchange Act Release No. 69843 (June 25, 2013), 78 FR 39367 (July 1, 2013) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Members’ Filing Obligations Under FINRA Rule 5123 (Private Placements of Securities) File No. SR-FINRA-2013-026).

<sup>5</sup> FINRA Gateway is an online compliance tool that provides consolidated access to FINRA applications and allows members to submit required filings electronically to meet their compliance and regulatory obligations.

<sup>6</sup> See Regulatory Notice 13-26 (August 2013) and Securities Exchange Act Release No. 69843 (June 25, 2013), 78 FR 39367 (July 1, 2013) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Members’ Filing Obligations Under FINRA Rule 5123 (Private Placements of Securities) File No. SR-FINRA-2013-026).

FINRA began using a further updated Filer Form.<sup>7</sup> The changes proposed herein would update the version of the Filer Form that has been in use since May 2017 for filings made pursuant to Rule 5122 and Rule 5123.

The proposed changes would represent the fourth version of the Filer Form since Rule 5123 became effective in 2012. Updates to the Filer Form would assist FINRA in fulfilling its regulatory responsibilities by improving the quality of information that is filed with it about the private placement and the member's role in offering the securities. Specifically, FINRA proposes to clarify questions that may have been unclear to members, and add other questions that, with the benefit of experience, FINRA believes would help it better understand the issues and potential risks associated with a private placement.

The Filer Form has three main components: (1) the "Participating Member Information" section, which seeks information about the members that are selling the private placement; (2) the "Issuer Information" section, which captures basic information about the issuer; and (3) the "Offering Information" section, which seeks information about the offering.<sup>8</sup>

FINRA proposes changes to the Filer Form that would add or clarify questions or other information requested in the Offering Information section. The benefit to members

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<sup>7</sup> See Regulatory Notice 17-17 (April 2017) and Securities Exchange Act Release No. 80321 (March 28, 2017), 82 FR 16245 (April 3, 2017) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Private Placement Filer Form Under FINRA Rules 5122 and 5123 File No. SR-FINRA-2017-008).

<sup>8</sup> FINRA staff also monitor SEC and FINRA disciplinary actions involving private placements. This monitoring enables FINRA to identify issues that frequently occur in private placements.

and FINRA would be twofold. When a FINRA review of the submitted Filer Form identifies a potential concern or a need for additional information, it typically leads to follow-up questions by FINRA staff. These inquiries absorb members' and FINRA's resources. The proposed changes to the Filer Form would provide more focused and complete information that, in many cases, would obviate the need for these follow-up inquiries. In addition, the proposed changes would enable FINRA to get better information about those issues in private placement transactions that have presented the most risk in disciplinary cases.

The proposed changes address three key categories of offering information that can benefit from more focused or complete information in the Offering Information section of the Filer Form: (i) contingency offerings; (ii) the disciplinary history of the issuer, its principals and related parties; and (iii) the use of proceeds.

FINRA also proposes to add a new question regarding FINRA Rule 3280 (Private Securities Transactions of an Associated Person). In addition, FINRA proposes updates to existing questions regarding the member's date of first sale or offer, the Securities Act registration exemptions that apply and what type of documents are being filed with FINRA.

The Filer Form does not set standards of disclosure or information gathering requirements for members that participate in private placements.<sup>9</sup> Rather, the information provided by members on the Filer Form assists FINRA in focusing its review

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<sup>9</sup> The scope of a member's obligations to conduct a reasonable investigation of a private placement is addressed in Regulatory Notice 10-22 (April 2010). FINRA Rules 5122 and 5123 and the Filer Form do not impose any additional requirement of reasonable investigation beyond what is discussed in that Notice.

on the areas of heightened concern in the private placement market. Based on a review of private placement enforcement actions from 2016 to 2018, FINRA found frequent violations resulting from improper contingency arrangements,<sup>10</sup> inadequate investigations concerning disciplinary history<sup>11</sup> and the issuer's intended use of proceeds,<sup>12</sup> and private offerings sold by associated persons away from their firm without proper authorization and oversight.<sup>13</sup>

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<sup>10</sup> FINRA has found that members failed to safeguard investor funds in offerings that were subject to certain conditions to close or failed to return funds to investors as required when the issuer made material changes to the terms of the contingency or offering. See, e.g., McDonald Partners LLC, FINRA AWC No. 2015043649601 (February 21, 2018); Financial America Securities, Inc., FINRA AWC No. 2014042711601 (May 26, 2016); Dawson James Securities, Inc., FINRA AWC No. 2015044393901 (February 07, 2017); TerraNova Capital Equities, Inc., FINRA AWC No. 2015047958301 (December 21, 2017).

<sup>11</sup> In recent cases, including those involving fraud, FINRA has found that members did not meet their obligation to conduct a reasonable investigation of the offering when they failed to identify or follow up on areas of heightened concern regarding the background of the issuer, its principals, or related parties. See, e.g., First American Securities, Inc., FINRA AWC No. 2015046056405 (November 7, 2016); Richard Gomez, FINRA NAC Decision No. 2011030293503 (March 28, 2018); Carolina Financial Securities, LLC and Bruce V. Roberts, FINRA OHO Decision No. 2014040295201 (May 26, 2017).

<sup>12</sup> In recent cases, including those involving fraud, FINRA has found that members did not meet their obligation to conduct a reasonable investigation of the offering when they failed to review or follow up on areas of heightened concern regarding related party transactions or the issuer's intended use of proceeds. See, e.g., Harold Lee Connell, FINRA AWC No. 2016051493702 (June 12, 2018); Carolina Financial Securities, LLC and Bruce V. Roberts, FINRA OHO Decision No. 2014040295201 (May 26, 2017); Bridge Capital Associates, Inc., FINRA AWC No. 2014039283801 (December 12, 2016).

<sup>13</sup> See, e.g., First American Securities, Inc., FINRA AWC No. 2015046056405 (November 7, 2016); Richard Gomez, FINRA NAC Decision No. 2011030293503 (March 28, 2018); Ahmed Ghassan Gheith, FINRA AWC No. 2016052540603 (April 24, 2018); Brandon D. Gioffre, FINRA AWC No. 2015046448701 (June 23, 2016).

The proposed Filer Form changes would help address these concerns and streamline the existing information collection procedure that FINRA relies on to fulfill its regulatory responsibility related to private placements.

The questions in the Offering Information section of the Filer Form can generally be answered either by: (i) inputting requested information or responding “unknown”; or (ii) checking one of three “radio buttons” for “yes,” “no,” or “unknown.” The proposed changes to the Filer Form would not alter this general approach. Members would continue to have the option to respond “unknown” to each proposed new or revised question or request for information. Therefore, the Filer Form, as proposed to be modified, would not impose any new obligation on members to seek out information that they do not already have.<sup>14</sup> FINRA also notes that the Filer Form provides (and would continue to provide) a free text box at the end of the form for members that wish to clarify their answers or add other relevant information with regard to particular questions or requests for information.

#### Contingency Offerings

The proposed changes to the Offering Information section would add and clarify several questions regarding contingency offerings;<sup>15</sup> FINRA continues to observe

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<sup>14</sup> The Filer Form provides that the member submitting the filing must answer the questions “[b]ased on the information contained in the offering document (or if otherwise known by your firm).”

<sup>15</sup> For purposes of the Filer Form, a contingency offering is a private placement in which the closing or sale of securities in the private placement is contingent on an event or condition, typically the receipt of orders for a minimum aggregate dollar amount or number of securities by an expiration date. Members participating in contingency offerings must understand and comply with the requirements of SEA Rules 10b-9 and 15c2-4. See Private Placement FAQ #1 under the heading “Filing Form” available on the finra.org website.



numerous instances of non-compliance with this type of offering.<sup>16</sup> The Filer Form today asks if the contingency has been met at the time of filing. The proposed changes to the Filer Form would add three additional questions/requests if the offering is a contingency offering, each with the option to respond “unknown”: (1) a request for the member to provide the date by which the contingency must be met; (2) a question asking if there have been any changes to the original terms of the contingency during the course of the offering (e.g., extension of the date by which the contingency must be met);<sup>17</sup> and (3) a question regarding whether “the subscription process involves your firm receiving or transmitting investor funds in the offering”. This last question would provide FINRA with transparency regarding whether the broker-dealer is subject to the requirements for handling funds under SEA Rule 15c2-4.<sup>18</sup> If the member responds “yes” to this last question, the Filer Form would ask if “your firm is acting as the agent or trustee for investor funds until the contingency is met.” The terms “agent or trustee” are used in

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<sup>16</sup> See Regulatory Notice 16-08 (February 2016). FINRA’s review of securities offering documents has revealed instances in which broker-dealers have not complied with the contingency offering requirements of SEA Rules 10b-9 and 15c2-4. In the Notice, FINRA provided guidance regarding the requirements of SEA Rules 10b-9 and 15c2-4 and reminded broker-dealers of their responsibility to have procedures reasonably designed to achieve compliance with these rules.

<sup>17</sup> As noted, the member submitting the Filer Form must answer the questions “[b]ased on the information contained in the offering document (or if otherwise known by your firm).” The member may provide further information in the free text box at the end of the Filer Form.

<sup>18</sup> Rule 15c2-4 requires that upon receiving money or other consideration from an investor in a contingency offering, a broker-dealer must promptly either (1) deposit those funds into “a separate bank account” for which the broker-dealer is the account holder and is designated as agent or trustee; or (2) transmit those funds to a bank that has agreed in writing to act as the escrow agent for the offering.

SEA Rule 15c2-4, which governs the manner in which a member must handle investors' funds in a contingency offering. If the member responds "yes" or "unknown" there would be no more questions. If the member responds "no," the Filer Form would require the member to provide the name of the escrow agent in a free text box or respond "unknown."

#### Disciplinary History

The Offering Information section also would be revised to add questions regarding disciplinary history. Currently, the Filer Form asks whether the issuer, any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor, or any of the issuer's affiliates has been the subject of SEC, FINRA or state disciplinary actions or proceedings or criminal complaints within the last 10 years. The proposed revisions to the Filer Form would change the current question to also inquire about "other federal agency" disciplinary actions (in addition to SEC, FINRA and state disciplinary actions or proceedings or criminal complaints) within the last 10 years. If the member responds "yes" to the revised question, the Filer Form would request the identification of the individual or entity that was the subject of such action or allow the member to respond "unknown." For each identified entry, the proposed revisions to the Filer Form would first ask whether the individual or entity has registration records in the Central Registration Depository ("CRD®"). If the member responds "yes" to the CRD question, then the member would enter the name of the individual or entity with no more questions.<sup>19</sup> If instead the member responds "no" or "unknown" to the CRD question, the

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<sup>19</sup> Using the "CRD lookup" function, the member selects whether the subject is an individual or entity, then enters either the name or CRD number and selects the appropriate result to generate the name and CRD number in the Filer Form.

Filer Form would request that the member provide the name of the individual or entity with the disciplinary history or respond “unknown.” If the member provides the name of the entity or individual with the disciplinary history, the Filer Form’s next requests would be for three pieces of information, each of which includes the option to select “unknown”: (1) the type of action or proceeding (that may be selected from a drop down box); (2) the approximate year that the event was initiated; and (3) the status of the event (that may be selected from a list of options provided in a drop down box). While the information requested in these three questions would assist FINRA’s review of an area of concern, FINRA recognizes that by providing the unknown option, it is possible that some members may not possess definitive information needed to answer the questions. If the member responds “unknown” when requested to provide the name of the entity or individual with the disciplinary history, there are no more questions.

#### Use of Proceeds

The Offering Information section would be revised to include a reformulation of the existing request for information regarding the use of the offering proceeds. Currently, the Filer Form asks whether the issuer is “able to” use offering proceeds to make or repay loans to, or purchase assets from any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor or any of the issuer’s affiliates. The proposed changes to the Filer Form would re-formulate the current question by asking whether the issuer “intends to” use (rather than is “able to” use)<sup>20</sup> offering proceeds to

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<sup>20</sup> The replacement of “able to use” with “intends to use” is meant to clarify the question, which seeks information about the member’s understanding of the issuer’s intended use of proceeds. It would not constitute a substantive change to the information required by the Filer Form.

make or repay loans to, or purchase assets from, the listed persons. The proposed changes to the Filer Form also would expand the scope of the current question by asking whether the issuer intends to “otherwise direct investor proceeds” to the listed persons. The question would retain the option to respond “unknown.” If the member responds “yes” to this question despite the option to respond “unknown,” the proposed changes to the Filer Form would add a request for the member to identify the type(s) of payment(s) and the approximate dollar amount, and would provide the option to respond “unknown.”

#### Private Securities Transactions

The Offering Information section would be revised to add a question regarding identification of private securities transactions. FINRA seeks to have more information regarding how frequently private offerings are sold by associated persons away from their firm. The proposed changes to the Filer Form would ask “if your firm is filing an offering that your associated person is selling in a private securities transaction subject to FINRA Rule 3280”.<sup>21</sup> The member may respond “yes”, “no” or “unknown.”

#### Information Clarification and Accuracy Improvement

Finally, FINRA proposes minor changes to three existing questions in the Offering Information section of the Filer Form in order to clarify the information requested and improve the accuracy of responses. The first proposed change is to the current questions

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<sup>21</sup> FINRA Rule 3280 (Private Securities Transactions of an Associated Person) requires, prior to participating in any private securities transaction, an associated person to provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein, including if compensation will be received. In the case of a transaction in which the associated person may receive selling compensation, that transaction must be approved in writing by the member.

concerning the member's date of first sale or offer, which FINRA relies upon to assess the timeliness of the filings. For Rule 5123 filings, the current Filer Form requests that the member provide the date of its first sale in the offering (by way of a calendar box) or respond "unknown," and separately instructs the member to check a box if sales have yet to commence. These questions would be replaced with "Has your firm commenced sales of the offering?" The member may respond "yes," "no," or "unknown." If the member has answered "yes" that it commenced sales, the Filer Form would request that the member enter the date of first sale or respond "unknown." Likewise, for Rule 5122 filings, the current Filer Form requests that the member provide the date of first offer (by way of a calendar box) or respond "unknown," and separately instructs the member to check a box if sales have yet to commence. These questions would be replaced with "Has your firm made any offers for the private placement or otherwise provided the offering documents to any investor?" As with the Rule 5123 filings, the member may respond "yes," "no," or "unknown." If the member has answered "yes," the Filer Form would request the member enter the date of first offer or provision of offering documents to any investor or respond "unknown."

Second, the proposed changes to the Offering Information section would update the options that a member may select when answering what exemption from registration the issuer is relying upon. The current question allows the member to select Rule 505. Rule 505 was repealed in 2016 and is no longer an available exemption; therefore, the Filer Form would remove that option.<sup>22</sup>

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<sup>22</sup> See Securities Act Release No. 10238 (October 26, 2016), 81 FR 83494 (November 21, 2016).

Third, the proposed changes to the Filer Form would amend the process by which the member uploads offering documents that it used in connection with the sale of the offering. For each document the member uploads, the Filer Form would request that the member identify the type of document by selecting an option from a drop down box (e.g., private placement memorandum or term sheet) with an option to identify the document as “other” and the option to select multiple types of documents (e.g., indicate that the document is a term sheet and a private placement memorandum).

### Conclusion

As noted above, the proposed revisions to the Filer Form would assist FINRA in fulfilling its regulatory responsibilities by improving the quality of information that is filed with it about the private placement and the member’s role in offering the securities. Specifically, FINRA proposes to clarify questions that may have been unclear to members, and add other questions that, with the benefit of experience, FINRA believes would help it better understand the issues and potential risks associated with a private placement (e.g., an offering with an unmet contingency, an issuer with disciplinary history or associated persons’ selling private offerings away from their firms). In addition, the proposed new questions should in many cases obviate the need for follow-up questions after filing and would therefore streamline the existing information collection procedure that FINRA relies on to fulfil its regulatory responsibilities related to private placements.

As noted in Item 2 of this filing, FINRA has filed the proposed changes for immediate effectiveness. FINRA anticipates that the implementation date will be May 22, 2021.

(b) Statutory Basis

FINRA believes that the proposed changes to the Filer Form are consistent with the provisions of Section 15A(b)(6) of the Act,<sup>23</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, in that it will assist in FINRA's efforts to detect and prevent fraud in connection with specified private placements. In addition, the proposed changes would assist FINRA in evaluating the specified private placement activities of members and assess whether members are conducting a reasonable investigation and whether members are complying with private placement obligations including regarding contingency offerings for private placement offerings in which they participate.

**4. Self-Regulatory Organization's Statement on Burden on Competition**

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed changes, their potential economic impacts, including anticipated costs, benefits, and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet FINRA's regulatory objectives.

Regulatory Need

The proposed Filer Form changes are intended to streamline the existing information collection procedure in fulfilling FINRA's regulatory responsibility related

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<sup>23</sup> 15 U.S.C. 78o-3(b)(6).

to private placements. In particular, in connection with its review of submitted Filer Forms, FINRA spends significant time and resources in making follow-up inquiries to members in areas of heightened concern, including terms of contingency offerings, disciplinary history, and use of proceeds after members submit the Filer Form. Constraints of regulatory resources in this process may lead to unnecessary or prolonged reviews and investigations, thereby imposing extra costs and regulatory uncertainty for members.<sup>24</sup> These constraints may even hinder FINRA's ability to detect fraudulent acts and practices in an accurate and timely manner.

#### Economic Baseline

The economic baseline for the proposed changes is the current Filer Form under FINRA Rules 5122 and 5123, and FINRA's existing private placement regulatory procedure. FINRA has collected information detailing 2,353 private placement filings submitted by 394 members with initial filing dates between May 1, 2019 and May 1, 2020. The average (maximum) number of filings per member is 6 (157) during the period.<sup>25</sup> Of the 2,353 filings, 48% provided "yes" answers to at least one of the three existing questions identifying whether the filing relates to a contingency offering; whether the issuer, its principals or related parties have disciplinary histories; and

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<sup>24</sup> The private placement filing requirement is a notice filing only and members do not wait for approval from FINRA in connection with a private placement. If FINRA asks questions of the member in response to its filing, the member may become concerned that there may be a potential compliance issue with the private placement.

<sup>25</sup> Among the filing members, 70% of them are frequent filers who had also filed at least one private placement filing during the period of May 1, 2018 and May 1, 2019.



whether offering proceeds may be used by the issuer or related parties for certain identified purposes.<sup>26</sup>

According to the current regulatory procedure, FINRA reviews the information provided in the Filer Form along with other data to determine the risk profile of a private placement through its triage program. In the case in which an offering receives a high-risk assessment, FINRA initiates a further review and gathers details about the private placement. FINRA also frequently conducts informational inquiries to members if a review raises further concern and leads to a FINRA investigation. Because of the time and resources needed to respond, these regulatory inquiries can be costly to members. These inquiries also tend to require significant regulatory resources, cause delays in FINRA reviews and investigations, and impose extra communication costs and regulatory uncertainty on members after the filing process.

#### Economic Impacts

The proposal would add questions in the Filer Form with the option to answer “unknown” pertaining to the issues of heightened concern including contingency offerings, disciplinary history, use of proceeds, and private offerings sold by associated persons away from their firms.<sup>27</sup> In cases where members choose to provide additional information, the further questions or requests for information at the outset would shift the responsibility of information collection on the key issues from FINRA (after the filing) to

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<sup>26</sup> The rest of the filings provided either “no” or “unknown” answers to these questions.

<sup>27</sup> As mentioned earlier, the proposal would also make minor changes to clarify existing questions and improve the accuracy of responses in the Filer Form.

these members (upon filing). FINRA believes that these members already know the requested information and accordingly would have no increases in relevant costs of information collection or would face relatively low costs of information collection if they do not already know the requested information and perform additional investigation to determine it, instead of answering “unknown.” Subsequent regulatory inquiries to obtain such information based on the existing Filer Form, in comparison, could require significant FINRA resources and impose higher costs and regulatory uncertainty on these members. The proposal could therefore reduce information collection costs as a whole for FINRA and members by avoiding regulatory inquiries to obtain the information requested in the new proposed questions, and thereby streamlining the regulatory process.

The proposal would also help FINRA better understand the scope and severity of existing high-risk matters in private placements. By allowing access to additional information in areas of heightened concern, the proposal would assist FINRA in refining its triage program, thereby extending its ability to assess risk profiles and detect fraudulent and manipulative acts and practices in these areas. FINRA believes that members may likely benefit from fewer unnecessary reviews and shortened review and investigation cycles due to a streamlined regulatory process and enhanced regulatory insights. The proposal’s benefits, however, may vary depending on how frequently additional information is provided rather than “unknown” responses to the new questions in the Filer Form following the proposal.

The proposed amendments could minimally increase the costs of collecting and providing additional information for members who answer “yes” to one of the three existing questions regarding contingency offerings, the disciplinary history of the issuer,

its principals and related parties, and the use of proceeds. FINRA believes that this cost increase to members, however, is relatively low overall compared with the benefit they would receive from reduced regulatory communication costs and uncertainty. In addition, members that would choose to provide “unknown” answers to each new question would not be subject to such a cost increase. FINRA does not expect cost increases will deter member entry to the industry or private placement offerings or result in any significant burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act.

#### Alternatives Considered

An alternative considered by FINRA was to prohibit “unknown” responses in the Filer Form. This alternative may lead to greater benefit, for example, from efficiencies in regulatory procedure and enhanced regulatory insights into high-risk matters. However, FINRA believes that the alternative would pose higher information collection costs on members. The proposal, therefore, permits “unknown” responses. Members may, however, choose to expend effort and incur associated costs with collecting and reporting additional information.

5. **Self-Regulatory Organization’s Statement on Comments on the Proposed Filer Form Changes Received from Members, Participants, or Others**

Written comments were neither solicited nor received.

6. **Extension of Time Period for Commission Action**

Not applicable.

7. **Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)**

The proposed changes are effective upon filing pursuant to Section 19(b)(3) of the Act<sup>28</sup> and paragraph (f)(6) of Rule 19b-4 thereunder,<sup>29</sup> in that the proposed changes do not significantly affect the protection of investors or the public interest; do not impose any significant burden on competition; and do not become operative for 30 days after filing or such shorter time as the Commission may designate.

In accordance with Rule 19b-4(f)(6),<sup>30</sup> FINRA submitted written notice of its intent to file the proposed changes, along with a brief description and text of the proposed changes, at least five business days prior to the date of filing, or such shorter time as the Commission may designate, as specified in Rule 19b-4(f)(6)(iii) under the Act.<sup>31</sup>

**8. Proposed Changes Based on Rules of Another Self-Regulatory Organization or of the Commission**

Not applicable.

**9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act**

Not applicable.

**10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act**

Not applicable.

**11. Exhibits**

Exhibit 1. Completed notice of proposed changes for publication in the Federal Register.

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<sup>28</sup> 15 U.S.C. 78s(b)(3).

<sup>29</sup> 17 CFR 240.19b-4(f)(6).

<sup>30</sup> 17 CFR 240.19b-4(f)(6).

<sup>31</sup> 17 CFR 240.19b-4(f)(6)(iii).

Exhibit 3. Revised Filer Form.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-FINRA-2021-002)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Private Placement Filer Form Under FINRA Rules 5122 and 5123

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on , the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing changes to the Private Placement Filer Form (“Filer Form”) that members complete when submitting private placement filings under FINRA Rules 5122 (Private Placements of Securities Issued by Members) or 5123 (Private Placements of Securities). The proposal does not make any changes to the text of FINRA rules.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Rules 5122 and 5123 require a FINRA member to file information regarding private placements in which the member participates.<sup>4</sup> When Rule 5123 became effective on December 3, 2012,<sup>5</sup> FINRA required members to use the Filer Form for filings under both rules.<sup>6</sup> Members submit the Filer Form and relevant offering

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<sup>4</sup> Both Rules 5122 and 5123 provide exemptions from the filing requirement when certain types of securities are sold or securities are sold to certain types of investors. See Rules 5122(c) and 5123(b).

<sup>5</sup> See Securities Exchange Act Release No. 67157 (June 7, 2012), 77 FR 35457 (June 13, 2012) (Notice of Filing of Amendments No. 2 and No. 3 and Order Granting Accelerated Approval of File No. SR-FINRA-2011-057); Regulatory Notice 12-40 (September 2012).

<sup>6</sup> See Regulatory Notice 12-40 (September 2012). See also Regulatory Notice 13-26 (August 2013); Securities Exchange Act Release No. 69843 (June 25, 2013), 78 FR 39367 (July 1, 2013) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Members' Filing Obligations Under FINRA Rule 5123 (Private Placements of Securities) File No. SR-FINRA-2013-026).

documents to FINRA through the FINRA Gateway.<sup>7</sup> On July 1, 2013, FINRA amended Rule 5123 to require members to file the requisite information “in a manner prescribed by FINRA” and also began using an updated version of the Filer Form.<sup>8</sup> On May 22, 2017, FINRA began using a further updated Filer Form.<sup>9</sup> The changes proposed herein would update the version of the Filer Form that has been in use since May 2017 for filings made pursuant to Rule 5122 and Rule 5123.

The proposed changes would represent the fourth version of the Filer Form since Rule 5123 became effective in 2012. Updates to the Filer Form would assist FINRA in fulfilling its regulatory responsibilities by improving the quality of information that is filed with it about the private placement and the member’s role in offering the securities. Specifically, FINRA proposes to clarify questions that may have been unclear to members, and add other questions that, with the benefit of experience, FINRA believes would help it better understand the issues and potential risks associated with a private placement.

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<sup>7</sup> FINRA Gateway is an online compliance tool that provides consolidated access to FINRA applications and allows members to submit required filings electronically to meet their compliance and regulatory obligations.

<sup>8</sup> See Regulatory Notice 13-26 (August 2013) and Securities Exchange Act Release No. 69843 (June 25, 2013), 78 FR 39367 (July 1, 2013) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Members’ Filing Obligations Under FINRA Rule 5123 (Private Placements of Securities) File No. SR-FINRA-2013-026).

<sup>9</sup> See Regulatory Notice 17-17 (April 2017) and Securities Exchange Act Release No. 80321 (March 28, 2017), 82 FR 16245 (April 3, 2017) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Private Placement Filer Form Under FINRA Rules 5122 and 5123 File No. SR-FINRA-2017-008).



The Filer Form has three main components: (1) the “Participating Member Information” section, which seeks information about the members that are selling the private placement; (2) the “Issuer Information” section, which captures basic information about the issuer; and (3) the “Offering Information” section, which seeks information about the offering.<sup>10</sup>

FINRA proposes changes to the Filer Form that would add or clarify questions or other information requested in the Offering Information section. The benefit to members and FINRA would be twofold. When a FINRA review of the submitted Filer Form identifies a potential concern or a need for additional information, it typically leads to follow-up questions by FINRA staff. These inquiries absorb members’ and FINRA’s resources. The proposed changes to the Filer Form would provide more focused and complete information that, in many cases, would obviate the need for these follow-up inquiries. In addition, the proposed changes would enable FINRA to get better information about those issues in private placement transactions that have presented the most risk in disciplinary cases.

The proposed changes address three key categories of offering information that can benefit from more focused or complete information in the Offering Information section of the Filer Form: (i) contingency offerings; (ii) the disciplinary history of the issuer, its principals and related parties; and (iii) the use of proceeds.

FINRA also proposes to add a new question regarding FINRA Rule 3280 (Private Securities Transactions of an Associated Person). In addition, FINRA proposes updates

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<sup>10</sup> FINRA staff also monitor SEC and FINRA disciplinary actions involving private placements. This monitoring enables FINRA to identify issues that frequently occur in private placements.

to existing questions regarding the member's date of first sale or offer, the Securities Act registration exemptions that apply and what type of documents are being filed with FINRA.

The Filer Form does not set standards of disclosure or information gathering requirements for members that participate in private placements.<sup>11</sup> Rather, the information provided by members on the Filer Form assists FINRA in focusing its review on the areas of heightened concern in the private placement market. Based on a review of private placement enforcement actions from 2016 to 2018, FINRA found frequent violations resulting from improper contingency arrangements,<sup>12</sup> inadequate investigations concerning disciplinary history<sup>13</sup> and the issuer's intended use of proceeds,<sup>14</sup> and private

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<sup>11</sup> The scope of a member's obligations to conduct a reasonable investigation of a private placement is addressed in Regulatory Notice 10-22 (April 2010). FINRA Rules 5122 and 5123 and the Filer Form do not impose any additional requirement of reasonable investigation beyond what is discussed in that Notice.

<sup>12</sup> FINRA has found that members failed to safeguard investor funds in offerings that were subject to certain conditions to close or failed to return funds to investors as required when the issuer made material changes to the terms of the contingency or offering. See, e.g., McDonald Partners LLC, FINRA AWC No. 2015043649601 (February 21, 2018); Financial America Securities, Inc., FINRA AWC No. 2014042711601 (May 26, 2016); Dawson James Securities, Inc., FINRA AWC No. 2015044393901 (February 07, 2017); TerraNova Capital Equities, Inc., FINRA AWC No. 2015047958301 (December 21, 2017).

<sup>13</sup> In recent cases, including those involving fraud, FINRA has found that members did not meet their obligation to conduct a reasonable investigation of the offering when they failed to identify or follow up on areas of heightened concern regarding the background of the issuer, its principals, or related parties. See, e.g., First American Securities, Inc., FINRA AWC No. 2015046056405 (November 7, 2016); Richard Gomez, FINRA NAC Decision No. 2011030293503 (March 28, 2018); Carolina Financial Securities, LLC and Bruce V. Roberts, FINRA OHO Decision No. 2014040295201 (May 26, 2017).

<sup>14</sup> In recent cases, including those involving fraud, FINRA has found that members did not meet their obligation to conduct a reasonable investigation of the offering

offerings sold by associated persons away from their firm without proper authorization and oversight.<sup>15</sup>

The proposed Filer Form changes would help address these concerns and streamline the existing information collection procedure that FINRA relies on to fulfill its regulatory responsibility related to private placements.

The questions in the Offering Information section of the Filer Form can generally be answered either by: (i) inputting requested information or responding “unknown”; or (ii) checking one of three “radio buttons” for “yes,” “no,” or “unknown.” The proposed changes to the Filer Form would not alter this general approach. Members would continue to have the option to respond “unknown” to each proposed new or revised question or request for information. Therefore, the Filer Form, as proposed to be modified, would not impose any new obligation on members to seek out information that they do not already have.<sup>16</sup> FINRA also notes that the Filer Form provides (and would continue to provide) a free text box at the end of the form for members that wish to

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when they failed to review or follow up on areas of heightened concern regarding related party transactions or the issuer’s intended use of proceeds. See, e.g., Harold Lee Connell, FINRA AWC No. 2016051493702 (June 12, 2018); Carolina Financial Securities, LLC and Bruce V. Roberts, FINRA OHO Decision No. 2014040295201 (May 26, 2017); Bridge Capital Associates, Inc., FINRA AWC No. 2014039283801 (December 12, 2016).

<sup>15</sup> See, e.g., First American Securities, Inc., FINRA AWC No. 2015046056405 (November 7, 2016); Richard Gomez, FINRA NAC Decision No. 2011030293503 (March 28, 2018); Ahmed Ghassan Gheith, FINRA AWC No. 2016052540603 (April 24, 2018); Brandon D. Gioffre, FINRA AWC No. 2015046448701 (June 23, 2016).

<sup>16</sup> The Filer Form provides that the member submitting the filing must answer the questions “[b]ased on the information contained in the offering document (or if otherwise known by your firm).”

clarify their answers or add other relevant information with regard to particular questions or requests for information.

### Contingency Offerings

The proposed changes to the Offering Information section would add and clarify several questions regarding contingency offerings;<sup>17</sup> FINRA continues to observe numerous instances of non-compliance with this type of offering.<sup>18</sup> The Filer Form today asks if the contingency has been met at the time of filing. The proposed changes to the Filer Form would add three additional questions/requests if the offering is a contingency offering, each with the option to respond “unknown”: (1) a request for the member to provide the date by which the contingency must be met; (2) a question asking if there have been any changes to the original terms of the contingency during the course of the offering (e.g., extension of the date by which the contingency must be met);<sup>19</sup> and (3) a question regarding whether “the subscription process involves your firm receiving or

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<sup>17</sup> For purposes of the Filer Form, a contingency offering is a private placement in which the closing or sale of securities in the private placement is contingent on an event or condition, typically the receipt of orders for a minimum aggregate dollar amount or number of securities by an expiration date. Members participating in contingency offerings must understand and comply with the requirements of SEA Rules 10b-9 and 15c2-4. See Private Placement FAQ #1 under the heading “Filing Form” available on the finra.org website.

<sup>18</sup> See Regulatory Notice 16-08 (February 2016). FINRA’s review of securities offering documents has revealed instances in which broker-dealers have not complied with the contingency offering requirements of SEA Rules 10b-9 and 15c2-4. In the Notice, FINRA provided guidance regarding the requirements of SEA Rules 10b-9 and 15c2-4 and reminded broker-dealers of their responsibility to have procedures reasonably designed to achieve compliance with these rules.

<sup>19</sup> As noted, the member submitting the Filer Form must answer the questions “[b]ased on the information contained in the offering document (or if otherwise known by your firm).” The member may provide further information in the free text box at the end of the Filer Form.

transmitting investor funds in the offering”. This last question would provide FINRA with transparency regarding whether the broker-dealer is subject to the requirements for handling funds under SEA Rule 15c2-4.<sup>20</sup> If the member responds “yes” to this last question, the Filer Form would ask if “your firm is acting as the agent or trustee for investor funds until the contingency is met.” The terms “agent or trustee” are used in SEA Rule 15c2-4, which governs the manner in which a member must handle investors’ funds in a contingency offering. If the member responds “yes” or “unknown” there would be no more questions. If the member responds “no,” the Filer Form would require the member to provide the name of the escrow agent in a free text box or respond “unknown.”

#### Disciplinary History

The Offering Information section also would be revised to add questions regarding disciplinary history. Currently, the Filer Form asks whether the issuer, any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor, or any of the issuer’s affiliates has been the subject of SEC, FINRA or state disciplinary actions or proceedings or criminal complaints within the last 10 years. The proposed revisions to the Filer Form would change the current question to also inquire about “other federal agency” disciplinary actions (in addition to SEC, FINRA and state disciplinary actions or proceedings or criminal complaints) within the last 10 years. If

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<sup>20</sup> Rule 15c2-4 requires that upon receiving money or other consideration from an investor in a contingency offering, a broker-dealer must promptly either (1) deposit those funds into “a separate bank account” for which the broker-dealer is the account holder and is designated as agent or trustee; or (2) transmit those funds to a bank that has agreed in writing to act as the escrow agent for the offering.

the member responds “yes” to the revised question, the Filer Form would request the identification of the individual or entity that was the subject of such action or allow the member to respond “unknown.” For each identified entry, the proposed revisions to the Filer Form would first ask whether the individual or entity has registration records in the Central Registration Depository (“CRD®”). If the member responds “yes” to the CRD question, then the member would enter the name of the individual or entity with no more questions.<sup>21</sup> If instead the member responds “no” or “unknown” to the CRD question, the Filer Form would request that the member provide the name of the individual or entity with the disciplinary history or respond “unknown.” If the member provides the name of the entity or individual with the disciplinary history, the Filer Form’s next requests would be for three pieces of information, each of which includes the option to select “unknown”: (1) the type of action or proceeding (that may be selected from a drop down box); (2) the approximate year that the event was initiated; and (3) the status of the event (that may be selected from a list of options provided in a drop down box). While the information requested in these three questions would assist FINRA’s review of an area of concern, FINRA recognizes that by providing the unknown option, it is possible that some members may not possess definitive information needed to answer the questions. If the member responds “unknown” when requested to provide the name of the entity or individual with the disciplinary history, there are no more questions.

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<sup>21</sup> Using the “CRD lookup” function, the member selects whether the subject is an individual or entity, then enters either the name or CRD number and selects the appropriate result to generate the name and CRD number in the Filer Form.

### Use of Proceeds

The Offering Information section would be revised to include a reformulation of the existing request for information regarding the use of the offering proceeds. Currently, the Filer Form asks whether the issuer is “able to” use offering proceeds to make or repay loans to, or purchase assets from any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor or any of the issuer’s affiliates. The proposed changes to the Filer Form would re-formulate the current question by asking whether the issuer “intends to” use (rather than is “able to” use)<sup>22</sup> offering proceeds to make or repay loans to, or purchase assets from, the listed persons. The proposed changes to the Filer Form also would expand the scope of the current question by asking whether the issuer intends to “otherwise direct investor proceeds” to the listed persons. The question would retain the option to respond “unknown.” If the member responds “yes” to this question despite the option to respond “unknown,” the proposed changes to the Filer Form would add a request for the member to identify the type(s) of payment(s) and the approximate dollar amount, and would provide the option to respond “unknown.”

### Private Securities Transactions

The Offering Information section would be revised to add a question regarding identification of private securities transactions. FINRA seeks to have more information regarding how frequently private offerings are sold by associated persons away from their firm. The proposed changes to the Filer Form would ask “if your firm is filing an

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<sup>22</sup> The replacement of “able to use” with “intends to use” is meant to clarify the question, which seeks information about the member’s understanding of the issuer’s intended use of proceeds. It would not constitute a substantive change to the information required by the Filer Form.

offering that your associated person is selling in a private securities transaction subject to FINRA Rule 3280”.<sup>23</sup> The member may respond “yes”, “no” or “unknown.”

Information Clarification and Accuracy Improvement

Finally, FINRA proposes minor changes to three existing questions in the Offering Information section of the Filer Form in order to clarify the information requested and improve the accuracy of responses. The first proposed change is to the current questions concerning the member’s date of first sale or offer, which FINRA relies upon to assess the timeliness of the filings. For Rule 5123 filings, the current Filer Form requests that the member provide the date of its first sale in the offering (by way of a calendar box) or respond “unknown,” and separately instructs the member to check a box if sales have yet to commence. These questions would be replaced with “Has your firm commenced sales of the offering?” The member may respond “yes,” “no,” or “unknown.” If the member has answered “yes” that it commenced sales, the Filer Form would request that the member enter the date of first sale or respond “unknown.” Likewise, for Rule 5122 filings, the current Filer Form requests that the member provide the date of first offer (by way of a calendar box) or respond “unknown,” and separately instructs the member to check a box if sales have yet to commence. These questions would be replaced with “Has your firm made any offers for the private placement or otherwise provided the offering documents to any investor?” As with the Rule 5123 filings, the member may

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<sup>23</sup> FINRA Rule 3280 (Private Securities Transactions of an Associated Person) requires, prior to participating in any private securities transaction, an associated person to provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein, including if compensation will be received. In the case of a transaction in which the associated person may receive selling compensation, that transaction must be approved in writing by the member.



respond “yes,” “no,” or “unknown.” If the member has answered “yes,” the Filer Form would request the member enter the date of first offer or provision of offering documents to any investor or respond “unknown.”

Second, the proposed changes to the Offering Information section would update the options that a member may select when answering what exemption from registration the issuer is relying upon. The current question allows the member to select Rule 505. Rule 505 was repealed in 2016 and is no longer an available exemption; therefore, the Filer Form would remove that option.<sup>24</sup>

Third, the proposed changes to the Filer Form would amend the process by which the member uploads offering documents that it used in connection with the sale of the offering. For each document the member uploads, the Filer Form would request that the member identify the type of document by selecting an option from a drop down box (e.g., private placement memorandum or term sheet) with an option to identify the document as “other” and the option to select multiple types of documents (e.g., indicate that the document is a term sheet and a private placement memorandum).

### Conclusion

As noted above, the proposed revisions to the Filer Form would assist FINRA in fulfilling its regulatory responsibilities by improving the quality of information that is filed with it about the private placement and the member’s role in offering the securities. Specifically, FINRA proposes to clarify questions that may have been unclear to members, and add other questions that, with the benefit of experience, FINRA believes would help it better understand the issues and potential risks associated with a private

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<sup>24</sup> See Securities Act Release No. 10238 (October 26, 2016), 81 FR 83494 (November 21, 2016).

placement (e.g., an offering with an unmet contingency, an issuer with disciplinary history or associated persons' selling private offerings away from their firms). In addition, the proposed new questions should in many cases obviate the need for follow-up questions after filing and would therefore streamline the existing information collection procedure that FINRA relies on to fulfil its regulatory responsibilities related to private placements.

FINRA has filed the proposed changes for immediate effectiveness. FINRA anticipates that the implementation date will be May 22, 2021.

## 2. Statutory Basis

FINRA believes that the proposed changes to the Filer Form are consistent with the provisions of Section 15A(b)(6) of the Act,<sup>25</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, in that it will assist in FINRA's efforts to detect and prevent fraud in connection with specified private placements. In addition, the proposed changes would assist FINRA in evaluating the specified private placement activities of members and assess whether members are conducting a reasonable investigation and whether members are complying with private placement obligations including regarding contingency offerings for private placement offerings in which they participate.

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<sup>25</sup> 15 U.S.C. 78o-3(b)(6).

B. Self-Regulatory Organization's Statement on Burden on Competition  
Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed changes, their potential economic impacts, including anticipated costs, benefits, and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet FINRA's regulatory objectives.

Regulatory Need

The proposed Filer Form changes are intended to streamline the existing information collection procedure in fulfilling FINRA's regulatory responsibility related to private placements. In particular, in connection with its review of submitted Filer Forms, FINRA spends significant time and resources in making follow-up inquiries to members in areas of heightened concern, including terms of contingency offerings, disciplinary history, and use of proceeds after members submit the Filer Form. Constraints of regulatory resources in this process may lead to unnecessary or prolonged reviews and investigations, thereby imposing extra costs and regulatory uncertainty for members.<sup>26</sup> These constraints may even hinder FINRA's ability to detect fraudulent acts and practices in an accurate and timely manner.

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<sup>26</sup> The private placement filing requirement is a notice filing only and members do not wait for approval from FINRA in connection with a private placement. If FINRA asks questions of the member in response to its filing, the member may become concerned that there may be a potential compliance issue with the private placement.

### Economic Baseline

The economic baseline for the proposed changes is the current Filer Form under FINRA Rules 5122 and 5123, and FINRA’s existing private placement regulatory procedure. FINRA has collected information detailing 2,353 private placement filings submitted by 394 members with initial filing dates between May 1, 2019 and May 1, 2020. The average (maximum) number of filings per member is 6 (157) during the period.<sup>27</sup> Of the 2,353 filings, 48% provided “yes” answers to at least one of the three existing questions identifying whether the filing relates to a contingency offering; whether the issuer, its principals or related parties have disciplinary histories; and whether offering proceeds may be used by the issuer or related parties for certain identified purposes.<sup>28</sup>

According to the current regulatory procedure, FINRA reviews the information provided in the Filer Form along with other data to determine the risk profile of a private placement through its triage program. In the case in which an offering receives a high-risk assessment, FINRA initiates a further review and gathers details about the private placement. FINRA also frequently conducts informational inquiries to members if a review raises further concern and leads to a FINRA investigation. Because of the time and resources needed to respond, these regulatory inquiries can be costly to members. These inquiries also tend to require significant regulatory resources, cause delays in

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<sup>27</sup> Among the filing members, 70% of them are frequent filers who had also filed at least one private placement filing during the period of May 1, 2018 and May 1, 2019.

<sup>28</sup> The rest of the filings provided either “no” or “unknown” answers to these questions.

FINRA reviews and investigations, and impose extra communication costs and regulatory uncertainty on members after the filing process.

#### Economic Impacts

The proposal would add questions in the Filer Form with the option to answer “unknown” pertaining to the issues of heightened concern including contingency offerings, disciplinary history, use of proceeds, and private offerings sold by associated persons away from their firms.<sup>29</sup> In cases where members choose to provide additional information, the further questions or requests for information at the outset would shift the responsibility of information collection on the key issues from FINRA (after the filing) to these members (upon filing). FINRA believes that these members already know the requested information and accordingly would have no increases in relevant costs of information collection or would face relatively low costs of information collection if they do not already know the requested information and perform additional investigation to determine it, instead of answering “unknown.” Subsequent regulatory inquiries to obtain such information based on the existing Filer Form, in comparison, could require significant FINRA resources and impose higher costs and regulatory uncertainty on these members. The proposal could therefore reduce information collection costs as a whole for FINRA and members by avoiding regulatory inquiries to obtain the information requested in the new proposed questions, and thereby streamlining the regulatory process.

The proposal would also help FINRA better understand the scope and severity of existing high-risk matters in private placements. By allowing access to additional

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<sup>29</sup> As mentioned earlier, the proposal would also make minor changes to clarify existing questions and improve the accuracy of responses in the Filer Form.

information in areas of heightened concern, the proposal would assist FINRA in refining its triage program, thereby extending its ability to assess risk profiles and detect fraudulent and manipulative acts and practices in these areas. FINRA believes that members may likely benefit from fewer unnecessary reviews and shortened review and investigation cycles due to a streamlined regulatory process and enhanced regulatory insights. The proposal's benefits, however, may vary depending on how frequently additional information is provided rather than "unknown" responses to the new questions in the Filer Form following the proposal.

The proposed amendments could minimally increase the costs of collecting and providing additional information for members who answer "yes" to one of the three existing questions regarding contingency offerings, the disciplinary history of the issuer, its principals and related parties, and the use of proceeds. FINRA believes that this cost increase to members, however, is relatively low overall compared with the benefit they would receive from reduced regulatory communication costs and uncertainty. In addition, members that would choose to provide "unknown" answers to each new question would not be subject to such a cost increase. FINRA does not expect cost increases will deter member entry to the industry or private placement offerings or result in any significant burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act.

#### Alternatives Considered

An alternative considered by FINRA was to prohibit "unknown" responses in the Filer Form. This alternative may lead to greater benefit, for example, from efficiencies in regulatory procedure and enhanced regulatory insights into high-risk matters. However,

FINRA believes that the alternative would pose higher information collection costs on members. The proposal, therefore, permits “unknown” responses. Members may, however, choose to expend effort and incur associated costs with collecting and reporting additional information.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>30</sup> and Rule 19b-4(f)(6) thereunder.<sup>31</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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<sup>30</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>31</sup> 17 CFR 240.19b-4(f)(6).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2021-002 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2021-002. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3



p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2021-002 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>32</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>32</sup> 17 CFR 200.30-3(a)(12).

[<< Back to Filing Cabinet](#)

# 5122 / 5123 Notification Filing

All fields are mandatory unless noted.

## Identify Rule

Filing Under:

Rule 5122

Rule 5123

## Participating Member Information

Firm Name:

B. C. ZIEGLER AND COMPANY

CRD:

61

Contact Name:

Phone:

Relationship to Issuer or Sponsor:

Affiliate

Non-Affiliate

Is your Firm the exclusive selling agent in the offering?

Yes

No

Unknown

Identify any other members participating in the offering upon whose behalf you are submitting an offering document:

### List of Participating Members

Firm Name ▲

Firm CRD

Relationship to Issuer or Sponsor

Add New

0 Row(s)

## Issuer Information

Issuer Name:

Is the Issuer a reporting company?

Yes

No

Unknown

Issuer's Industry:



Street:

City:

State:  

Postal Code:

Country:

Phone:

Please provide the issuer CIK Number (when applicable):

No CIK

**Offering Information (Please complete based on the information contained in the offering document or if otherwise known by your firm.)**

Maximum Amount to be Raised (in \$):

Unknown

Offering Commencement Date:  

Unknown

Type of security offered?

Debt

Equity

Unknown

Maximum Sales Commission (% rate):

Unknown

Minimum investment amount accepted from an investor (in \$):

Unknown

Can the issuer waive the minimum investment amount?

Yes

No

Unknown

Do(es) the offering document(s) state that the investment will provide an actual or target rate of return for the investor?

Yes

No

Unknown

What exemption(s) from the Securities Act of 1933 is the issuer relying upon?

Rule 504

Rule 506(b)

Rule 506(c)

Section 4(a)(2)

Unknown

Other

Is the Form D filing information available?

Yes

No

Not Applicable

Did your firm use any offering documents in connection with any sales in the offering?

Yes No

| List of Offering Documents     |                              |                                       |
|--------------------------------|------------------------------|---------------------------------------|
| Offering Document ▲            | Document Type                |                                       |
| <a href="#">Document 1.pdf</a> | Term Sheet                   | <input type="button" value="Delete"/> |
| <a href="#">Document 2.pdf</a> | Private Placement Memorandum | <input type="button" value="Delete"/> |
| <a href="#">Document 3.pdf</a> | Other                        | <input type="button" value="Delete"/> |
|                                |                              |                                       |
| Add New   Delete All           |                              | <input type="text" value="3 Row(s)"/> |

Has your firm commenced sales of the offering?

Yes No Unknown

Date of first sale:

Unknown

Is your firm filing an offering that your associated person is selling in a private securities transaction subject to FINRA Rule 3280?

Yes No Unknown

Did your firm sell or will it sell this offering to any non-accredited investors?

Yes No Unknown

Has the issuer raised capital within the preceding 12 months from any source (excluding loans or investments by affiliates)?

Yes No Unknown

Is this a contingency offering?

Yes No Unknown

Does the subscription process involve your firm receiving or transmitting investor funds in the offering?

Yes No Unknown

Is your firm acting as the agent or trustee for investor funds until the contingency is met?

Yes No Unknown

Provide the name of the escrow agent:

Unknown

Provide the date by which the contingency must be met.

Unknown

Has the contingency been met at this time?

Yes No Unknown

Have there been any changes to the original terms of the contingency during the course of the offering (e.g. extension of the date by which the contingency must be met)?

Yes No Unknown

Does the issuer intend to use offering proceeds to make or repay loans to,

Yes No Unknown

purchase assets from, or otherwise direct investor proceeds to any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor or any of the Issuer’s affiliates?

Identify the type(s) of payment(s) and approximate dollar amount. (Select all that apply)

| Payment Type                  | \$                   |                      |
|-------------------------------|----------------------|----------------------|
| Make loan(s)                  | <input type="text"/> | Unknown              |
| Repay loan(s)                 | <input type="text"/> | Unknown              |
| Asset purchase(s)             | <input type="text"/> | Unknown              |
| Fees(s) for services provided | <input type="text"/> | Unknown              |
| Other                         | <input type="text"/> | <input type="text"/> |
| Unknown                       |                      |                      |

|   |     |    |         |
|---|-----|----|---------|
| Has the issuer, any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor or any of the issuer’s affiliates been the subject of FINRA, SEC or other federal agency, or state disciplinary actions or proceedings or criminal complaints within the last 10 years? | Yes | No | Unknown |
|---|-----|----|---------|

**Note: Choosing “Yes” requires at least one entry in the list of events below.**

| List of Events |                |                                      |         |         |                   |
|----------------|----------------|--------------------------------------|---------|---------|-------------------|
| Name ▲         | Type           | Sub-type                             | Year    | Status  |                   |
| Unknown        | N/A            | N/A                                  | N/A     | N/A     | <div>Delete</div> |
| John Doe       | Federal Agency | Securities Exchange Commission (SEC) | 2017    | Ongoing | <div>Delete</div> |
| MERRILL LYNCH  | See CRD        | See CRD                              | See CRD | See CRD | <div>Delete</div> |
| Xyz, Inc.      | State Criminal | Alabama                              | 2012    | Unknown | <div>Delete</div> |
|                |                |                                      |         |         |                   |
| 4 Row(s)       |                |                                      |         |         |                   |

**Add Event** ✕

Does the individual or entity have registration records in the "Central Registration Depository" ("CRD®")? ☐ Yes ☐ No ☒ Unknown

Individual or entity name:  ☒ Unknown

**Add Event** ✕

Does the individual or entity have registration records in the "Central Registration Depository" ("CRD®")? ☐ Yes ☒ No ☐ Unknown

Individual or entity name:  ☐ Unknown

Provide the type of action or proceeding.

Provide the approximate year that the event was initiated.  ☐ Unknown

Provide the status of the event.

**Add Event** ✕

Does the individual or entity have registration records in the "Central Registration Depository" ("CRD®")? ☒ Yes ☐ No ☐ Unknown

Subject Type: ☐ Individual ☒ Entity

Search the name or CRD No. of the entity.

Firm Name:

CRD No:

**Add Event** ✕

Does the individual or entity have registration records in the "Central Registration Depository" ("CRD®")? ☐ Yes ☒ No ☐ Unknown

Individual or entity name:  ☐ Unknown

Provide the type of action or proceeding.   ☐ Unknown

Provide the approximate year that the event was initiated.  ☐ Unknown

Provide the status of the event.