

Public Offering Electronic Filing System Filing Guide

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OVERVIEW

The Corporate Financing Department's (Department) review of public offering filings provides firms with regulatory guidance on what constitutes fair and reasonable underwriting arrangements. The Department's review of public offering filings complements the SEC's registration process for issuers. The SEC defers to FINRA to establish reasonable levels of underwriting compensation and adequate disclosure of the underwriting terms and conflicts.

Corporate Financing Rules

FINRA Rule 5110 governs the underwriting terms and arrangements of a public offering in which a FINRA member firm participates. The rule requires a firm to file certain information with FINRA about the underwriting arrangements of a public offering in which the firm participates. The Department reviews this information prior to commencement of the offering in order to determine whether the underwriting terms and arrangements are fair and reasonable and meet the requirements of applicable FINRA Rules.

FINRA Rule 5121 governs public offerings of securities issued by participating member firms or their affiliates, public offerings in which a member firm or any of its associated persons or affiliates has a conflict of interest and public offerings that result in a member firm becoming a public company.

FINRA Rule 2310 governs the underwriting terms and arrangements of direct participation programs (DPPs) and unlisted real estate investment trusts (REITs) (collectively, investment programs).

The Review Process

Filings are reviewed by the Department's Public Offering Review (POR) staff. POR is responsible for determining the rules that are applicable to the filings and assisting filers with the review process. On average, the review process takes approximately 10 to 20 business days. Once the review process is complete, the staff will post a comment letter in the electronic filing system. Filers can call to check on the status of a filing or review the status through the electronic filing system. All offerings filed with the Department go through a triage process prior to assignment. Once the triage process is completed, the offering is assigned to a first and second reviewer. The first reviewer is responsible for the initial review of a filing and the

entire lifecycle of the filing, including the review of all amendments and responses to the Department's comment letter. The second reviewer provides oversight and guidance to the first reviewer as well as final approval. To retrieve the comment letters issued by the staff, filers must log into the electronic public offering filing system.

What to Expect in the Review Process

The Department issues three primary types of comment letters:

- **Defer Letter.** The Department issues a "Defer" letter if it identifies regulatory concerns and requires clarification or additional documents.
- **Unreasonable Letter.** The Department issues an "Unreasonable" letter if the terms and arrangements governing members' participation and disclosure regarding those terms and arrangements do not appear to comply with the corporate financing rules. Filers may file modifications to the proposed underwriting and other terms and arrangements for further review.

The Department may follow up with telephonic comments or issue another comment letter if it requires additional information or documents. The comment and response process continues until the staff and the filer resolve all comments. Filers can call the first reviewer, whose contact information is included on the comment letter, to discuss the letter. If a filer does not understand a comment or the staff's purpose in issuing a comment, the filer should seek clarification from the first reviewer. Also, the staff may request supplemental information to better understand a regulatory issue. If you have questions that you cannot resolve with the first reviewer, you can request to speak with the second reviewer.

- **No Objections Letter.** When the review process is complete the Department issues a "No Objections" letter. A firm must receive a No Objections Letter before it participates in a distribution of securities to investors.

Filing Tips

The following are suggestions provided by the POR staff which generally result in a shorter review process:

- Submit all engagement letters and/or letters of intent with the initial filing.

- Request a pre-filing opinion on unique or novel underwriting terms and arrangements.
- Submit filings to the Department no later than one business day after filing with the SEC, any state securities commission or other regulatory authority.
- Provide complete responses in a timely manner. The staff requires a reasonable amount of time to review and analyze the responses to comment letters.
- Pursuant to FINRA Rule 5110(b)(6), submit information required to be filed with the initial filing.
- Provide any agreements with consultants or financial advisors identified in the filing with the initial filing.
- Keep the first reviewer abreast of the anticipated pricing or effective date and update the expected timing in the filing system.
- Anticipate potential comments and regulatory issues and be proactive in providing responses and documentation.

Contact Information

For more information, contact FINRA's Corporate Financing Department at (240) 386-4623 or email requests for pre-filing guidance to the managers at PORmanagers@finra.org.

SHELF FILINGS

Changes to the Shelf Review Process

Effective June 4, 2012, FINRA is modifying the review process for shelf filings to simplify the review as well as minimize the amount of information requested by the staff. All shelf filings will be categorized in two types: base or takedown filings. The significant changes to the review process are:

- **Requirement to obtain clearance prior to a member's participation.** FINRA's new shelf filing process is designed so that member(s) can file and obtain clearance prior to participating in a public offering. Consistent with the Same Day Clearance process launched in 2010, filers can submit a filing without documents or with preliminary documents if they are available, and provide a maximum estimate of the offering size and compensation terms. For most filings, the new filing system will display two review options to select when submitting a base or takedown filing:

- o Same Day Clearance, in which filers obtain a No Objections Letter upon acceptance of their filing by FINRA,
- o Pre-Participation Review which offers a voluntary review for those filers who have unique terms or arrangements and timing is not an immediate concern (please see the section with the heading “voluntary pre-participation review” below).

Either option will require clearance before a member participates in the offering, in accordance with FINRA Rule 5110(b)(1).

- **Wider eligibility for same day clearance.** FINRA is expanding same day clearance to all types of shelf filings, including base and takedown filings that list selling security holders or have equity lines of credit.
- **Each takedown must be filed separately.** Each takedown must be filed separately and all base and takedown filings will be assigned a separate filing ID. This change eliminates the “concurrent” filing process. Filings containing multiple takedowns will not be accepted in the new system.
- **Streamlined reviews.** As a part of the Department's effort to streamline the review of shelf filings, the new public offering filing system includes the following changes:
 - o The new system will designate the filing as a base filing or a takedown filing;
 - o A new shelf screen will be available with representations applicable to the type of offering; and
 - o We will no longer require the 8 percent underwriting compensation limitation language in base filings. Compensation received by a member firm(s) in takedowns will be evaluated based on the size and type of the offering as well as the level of risk assumed by the firm.
- **Voluntary pre-participation review.** Filers may elect to submit their filings using either the same day clearance process introduced in 2010 or request a review through the new “pre-participation review” option. When filers choose the pre-participation review option, a no objection letter will not be generated immediately because the staff will review the filing. The staff assigned will issue comments, if applicable, based on the complexity of the offering. For example, a filer may elect to have a pre-participation review if the participating members acquired unregistered securities that would be deemed underwriting compensation within 180 days preceding the filing of a

takedown. This option is also suggested for participating members who seek assurance that their underwriting compensation proposal is not excessive.

Existing Base Filings in COBRADesk

Beginning on June 4, 2012, base filings received and cleared by May 30, 2012, will be available for takedown filings in the new public offering system. These base filings include all filings cleared during the preceding three-year period beginning June 1, 2009, and ending on June 1, 2012. Filings older than three years will have to be re-filed. Questions about re-filing should be directed to the Corporate Financing Department at (240) 386-4623.

EXPEDITED REVIEW GUIDELINES

Changes to the Process for Requesting an Expedited Review

In the new system, the process for requesting an expedited review will be modified for increased efficiency and predictability. A call to a Public Offering Review manager will not be necessary. Instead, firms can complete an expedited review request when submitting the initial filing. Firms should ensure they can meet the following criteria before requesting an expedited review:

- the offering is filed in compliance with the “Requirement for Filing” section of FINRA Rule 5110(b)(4)(A)(i); and
- the anticipated effective or commencement date is within a week or less of the initial filing with the SEC or other regulatory authority.

To request an expedited review, the filer must complete all of the representations and required information in the Expedited Review screen. These include representations regarding compliance with FINRA Rules 5110(f)(2) and 5121, appropriate disclosure of any association or affiliation between the issuer and any member, submission of all relevant documents and the completion of due diligence. All requests will be subject to review and approval after submission.

Please note that shelf offerings, PIPEs, resale offerings distributed on a best efforts basis, non-traded investment programs and offerings in which a participating FINRA

member firm has acquired unregistered securities during the review period will not be eligible for an expedited review.

CONFIDENTIAL FILINGS

The SEC allows issuers to submit a draft registration statement on a confidential basis prior to making the registration statement available to the public. Similarly, other regulatory authorities allow for submission of confidential documents. All confidential filings should be submitted electronically to the Department no later than one business day after the confidential document has been filed with or submitted to the SEC, any state securities commission or other regulatory authority. See FINRA Rule 5110(b)(4)(A)(i) and [Regulatory Notice 12-22](#). All such submissions should be attached as Non-SEC filed documents.

Once a registration statement is made available to the public, the registration statement must be filed as an SEC-filed document. Providing the Department with a draft of the confidential document under this timeline will allow Corporate Financing the time needed to complete the review of the filing prior to a FINRA member firm participating in a public offering of securities. See the User Guide for specific instructions on how to make a confidential filing.

JOBS Act Filings

The timely filing requirements and the confidential filing process are also applicable to filings made with the SEC pursuant to the Jumpstart Our Business Startups Act (JOBS Act) which provides that “emerging growth companies” (generally issuers with less than \$1 billion in annual revenues) prior to their initial public offering may confidentially submit to the SEC a draft registration statement for nonpublic review by the SEC staff, not later than 21 days before the date the issuer conducts a road show, as that term is defined in section 230.433(h)(4) of title 17 of the Code of Federal Regulations.