

Private Placements of Securities

SEC Approves New FINRA Rule 5123 Regarding Private Placements of Securities

Effective Date: December 3, 2012

Executive Summary

The SEC approved new FINRA Rule 5123 to require each FINRA member firm that sells an issuer's securities in a private placement, subject to certain exemptions, to file with FINRA a copy of any private placement memorandum, term sheet or other offering document the firm used within 15 calendar days of the date of the sale, or indicate that it did not use any such offering documents.¹ Firms must file the required offering documents electronically with FINRA through the FINRA Firm Gateway.² The rule becomes effective December 3, 2012, and applies prospectively to private placements that begin selling efforts on or after that date.

In addition, effective December 3, 2012, firms must submit filings regarding member firm private offerings (MPOs), as required by FINRA Rule 5122 (Private Placements of Securities Issued By Members), through the Firm Gateway.³

The text of Rule 5123 is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

- ▶ Joseph E. Price, Senior Vice President, Corporate Financing/Advertising Regulation, at (240) 386-4623;
- ▶ Paul Mathews, Director, Corporate Financing Department, at (240) 386-4623;
- ▶ Lisa Jones Toms, Associate Director and Senior Counsel, Corporate Financing Department, at (240) 386-4661; or
- ▶ Stan Macel, Assistant General Counsel, Office of General Counsel (OGC), at (202) 728-8056.

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Notice Type

- ▶ New Rule

Suggested Routing

- ▶ Compliance
- ▶ Corporate Finance
- ▶ Legal
- ▶ Operations
- ▶ Senior Management

Key Topics

- ▶ Institutional Accounts
- ▶ Private Placement Memorandum
- ▶ Private Placements
- ▶ Regulation D

Referenced Rules & Notices

- ▶ FINRA Rule 5110
- ▶ FINRA Rule 5122
- ▶ FINRA Rule 5123
- ▶ Regulatory Notice 09-27
- ▶ Regulatory Notice 10-22

Background & Discussion

FINRA Rule 5123 is part of a multi-pronged approach to enhance oversight and investor protection in private placements. In Rule 5122, FINRA established standards on disclosure, use of proceeds and a filing requirement for private placements issued by a member firm or a control entity. FINRA also has previously provided guidance on the scope of a firm's responsibility to conduct a reasonable investigation of private placement issuers in [Regulatory Notice 10-22](#).

Rule 5123 will provide FINRA with more timely and complete information about the private placement activities of firms on behalf of other issuers. Under the rule, each firm that sells a security in a private placement, subject to certain exemptions, must file a copy of the offering document with FINRA within 15 calendar days of the date of the first sale.⁴ If a firm sells a private placement without using any offering documents, then the firm should indicate that it did not use any such offering documents. The rule requires firms to file any materially amended versions of the documents originally filed.

The rule exempts some private placements sold solely to qualified purchasers, institutional purchasers and other sophisticated investors.

Private Placement Filing System

FINRA is developing a private placement filing system to receive the offering documents that firms must file under the new rule. The filing system, which firms will access through the Firm Gateway, will provide an efficient way for firms to electronically submit the filings in searchable Portable Document Format (PDF) to FINRA. In response to comments during the rulemaking process, the filing system will allow a firm to submit a filing on behalf of other firms involved in the sale of the private placement. A firm that makes a filing on behalf of itself and other firms must identify the other firms as part of its submission.

Notice Filings

On December 3, 2012, when the new filing system becomes operational, firms that file offering documents pursuant to Rule 5122 must use the new filing system. Firms are reminded that filings under Rules 5123 and 5122 are "notice" type filings. As such, FINRA will not respond to the filings with a comment letter or provide a clearance letter.

Confidential Treatment and Exemptions

Similar to Rule 5122, FINRA will accord confidential treatment to all documents and information filed pursuant to Rule 5123. The rule also provides firms with a method to apply for an exemption from its provisions for good cause pursuant to the Rule 9600 Series.

Endnotes

1. 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).
2. Firm Gateway is an online compliance tool that provides consolidated access to FINRA applications and allows firms to submit required filings electronically to meet their compliance and regulatory obligations.
3. Offering documents for MPOs are currently filed with the Corporate Financing Department via email. See *Regulatory Notice 09-27*, which announced the effective date for Rule 5122 and provided details concerning the filing requirements for the private placement memoranda or other offering documents.
4. This 15-day time period tracks the filing requirement for issuers under SEC Form D. See SEC Form D (Notice of Exempt Offering of Securities) General Instructions (“An issuer must file a new notice with the SEC for each new offering of securities no later than 15 calendar days after the “date of first sale” of securities in the offering...).

Attachment A

5100. SECURITIES OFFERINGS, UNDERWRITING AND COMPENSATION

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5120. Offerings of Members' Securities

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5123. Private Placements of Securities

(a) Filing Requirements

Each member that sells a security in a non-public offering in reliance on an available exemption from registration under the Securities Act ("private placement") must: (i) submit to FINRA, or have submitted on its behalf by a designated member, a copy of any private placement memorandum, term sheet or other offering document, including any materially amended versions thereof, used in connection with such sale within 15 calendar days of the date of first sale; or (ii) indicate to FINRA that no such offering documents were used.

(b) Exemptions

The following private placements are exempt from the requirements of this Rule:

(1) offerings sold by the member or person associated with the member solely to any one or more of the following:

- (A) institutional accounts, as defined in Rule 4512(c);
- (B) qualified purchasers, as defined in Section 2(a)(51)(A) of the Investment Company Act;
- (C) qualified institutional buyers, as defined in Securities Act Rule 144A;
- (D) investment companies, as defined in Section 3 of the Investment Company Act;
- (E) an entity composed exclusively of qualified institutional buyers, as defined in Securities Act Rule 144A;
- (F) banks, as defined in Section 3(a)(2) of the Securities Act;
- (G) employees and affiliates, as defined in Rule 5121, of the issuer;

- (H) knowledgeable employees as defined in Investment Company Act Rule 3c-5;
 - (I) eligible contract participants, as defined in Section 3(a)(65) of the Exchange Act; and
 - (J) accredited investors described in Securities Act Rule 501(a)(1), (2), (3) or (7).
- (2) offerings of exempted securities, as defined in Section 3(a)(12) of the Exchange Act;
 - (3) offerings made pursuant to Securities Act Rule 144A or SEC Regulation S;
 - (4) offerings of exempt securities with short term maturities under Section 3(a)(3) of the Securities Act and debt securities sold by members pursuant to Section 4(2) of the Securities Act so long as the maturity does not exceed 397 days and the securities are issued in minimum denominations of \$150,000 (or the equivalent thereof in another currency);
 - (5) offerings of subordinated loans under SEA Rule 15c3-1, Appendix D (see NASD Notice to Members 02-32 (June 2002));
 - (6) offerings of “variable contracts,” as defined in Rule 2320(b)(2);
 - (7) offerings of modified guaranteed annuity contracts and modified guaranteed life insurance policies, as referenced in Rule 5110(b)(8)(E);
 - (8) offerings of non-convertible debt or preferred securities that meet the transaction eligibility criteria for registering primary offerings of non-convertible securities on Forms S-3 and F-3;
 - (9) offerings of securities issued in conversions, stock splits and restructuring transactions that are executed by an already existing investor without the need for additional consideration or investments on the part of the investor;
 - (10) offerings of securities of a commodity pool operated by a commodity pool operator, as defined under Section 1a(11) of the Commodity Exchange Act;
 - (11) business combination transactions as defined in Securities Act Rule 165(f);
 - (12) offerings of registered investment companies;

(13) standardized options, as defined in Securities Act Rule 238; and

(14) offerings filed with FINRA under Rules 2310, 5110, 5121 and 5122, or exempt from filing thereunder in accordance with Rule 5110(b)(7).

(c) Confidential Treatment

FINRA shall accord confidential treatment to all documents and information filed pursuant to this Rule and shall utilize such documents and information solely for the purpose of review to determine compliance with the provisions of applicable FINRA rules or for other regulatory purposes deemed appropriate by FINRA.

(d) Application for Exemption

Pursuant to the Rule 9600 Series, FINRA may exempt a member or associated person from the provisions of this Rule for good cause shown.

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