

Corporate Financing Rule

SEC Approves Amendments to FINRA Rule 5110 to Permit Termination Fees and Rights of First Refusal; Provide an Exemption From the Filing Requirements for Certain Collective Investment Vehicles; and Clarify the Electronic Filing Requirement

Effective Date: May 15, 2014

Executive Summary

The SEC approved amendments to FINRA Rule 5110 (Corporate Financing Rule — Underwriting Terms and Arrangements) to expand the circumstances in which termination fees and rights of first refusal are permissible; exempt from the filing requirements certain collective investment vehicles that are not registered as investment companies; and make clarifying, non-substantive changes regarding documents filed through FINRA's electronic filing system.¹ The amendments become effective May 15, 2014.

The text of the rule amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

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Notice Type

- ▶ Rule Amendment

Suggested Routing

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

Key Topics

- ▶ Electronic Filing
- ▶ Exchange-Traded Funds
- ▶ Investment Banking
- ▶ Rights of First Refusal
- ▶ Termination Fees
- ▶ Underwriting

Referenced Rules & Notices

- ▶ FINRA Rule 2310
- ▶ FINRA Rule 5110
- ▶ FINRA Rule 5121

Background & Discussion

FINRA Rule 5110, among other things, regulates underwriting compensation, requires the filing of specified information in connection with public offerings in which firms will participate, and prohibits unfair arrangements in connection with public offerings of securities. FINRA amended Rule 5110's provisions regarding unfair arrangements to (1) expand the circumstances under which firms and issuers may negotiate termination fees and rights of first refusal (ROFR), with specified conditions; (2) exempt from the filing requirements certain collective investment vehicles that are not registered as investment companies; and (3) clarify the electronic filing requirement.

Termination Fees and Rights of First Refusal

FINRA Rule 5110(f) (Unreasonable Terms and Arrangements) sets forth terms and arrangements that, when proposed in connection with a public offering of securities, are considered unfair and unreasonable. FINRA amended its requirements regarding termination fees and ROFR to provide firms with a greater degree of flexibility in negotiating the terms of their agreements for terminated offerings, while also providing protection for issuers if a firm fails materially to perform the underwriting services contemplated in the written agreement. FINRA amended Rule 5110(f)(2)(D) (Prohibited Arrangements) to permit, in the event the public offering is not completed, termination fees or a ROFR in a written agreement between the issuer and the participating member, provided that:

1. the agreement specifies that the issuer has a right of "termination for cause," which shall include the participating member's material failure to provide the underwriting services contemplated in the written agreement;²
2. the issuer's exercise of its right of "termination for cause" eliminates any obligations with respect to the payment of any termination fee or provision of any ROFR;³
3. the amount of any specified termination fee must be reasonable in relation to the underwriting services contemplated in the agreement, and any fees arising from underwriting services provided under a ROFR must be customary for those types of services; and
4. the issuer shall not be responsible for paying the termination fee unless an offering or other type of transaction (as set forth in the agreement) is consummated within two years of the date the engagement is terminated by the issuer.

Rule 5110 would continue to provide that the duration of any ROFR may not be for more than three years from the date of commencement of sales of the public offering (in the case of a successful offering). In the case of a terminated offering, FINRA amended Rule 5110(f)(2)(E) to provide that the duration of an ROFR may not be for more than three years from the date the issuer terminates the engagement. In both cases, the agreement may not provide for more than one opportunity to waive or terminate the ROFR in consideration of any payment or fee.⁴

Filing Requirements for Certain Exchange-Traded Funds

Rule 5110(b)(8) (Exempt Offerings) generally provides an exemption for investment companies from the filing requirements of the rule.⁵ Due to this exemption, exchange-traded funds (ETF) that are structured as investment companies generally are exempt. However, this exemption does not include certain other ETF that are not investment companies. FINRA believes it is appropriate to add an exemption for these products even if they do not fall under the definition of an investment company. Accordingly, FINRA amended Rule 5110(b)(7) to exempt from the filing requirements of Rule 5110 offerings of securities issued by a pooled investment vehicle, whether formed as a trust, partnership, corporation, limited liability company or other collective investment vehicle, that is not registered as an investment company under the Investment Company Act and has a class of equity securities listed for trading on a national securities exchange, provided that such equity securities may be created or redeemed on any business day at their net asset value per share.

Electronic Filing

Rule 5110(b) (Filing Requirements) generally provides that no firm or person associated with a firm shall participate in any manner in a public offering of securities subject to FINRA Rules 2310, 5110 or 5121 unless the specified documents and information relating to the offering have been filed with and reviewed by FINRA. FINRA amended Rule 5110(b) (5) to make clarifying, non-substantive changes regarding documents filed through FINRA's electronic filing system.⁶

Endnotes

1. See Securities Exchange Act Release No. 72114 (May 7, 2014), 79 FR 27355 (May 13, 2014) (Order Approving SR-FINRA-2014-004).
2. The specific meaning of “termination for cause” would be dictated by the agreement. For purposes of the rule, a “termination for cause” would include a firm’s material failure to perform the underwriting services contemplated in the written agreement.
3. Firms would continue to be permitted to receive reimbursement of out-of-pocket, bona fide, accountable expenses actually incurred by the participating firm in connection with a terminated offering as provided in amended Rule 5110(f)(2)(D)(i).
4. Rule 5110(f)(2)(G) is redesignated as Rule 5110(f)(2)(F), which prohibits any payment or fee to waive or terminate a ROFR regarding future public offerings, private placements or other financings that exceed specified values or that are not paid in cash.
5. Rule 5110(b)(8)(C) exempts from the rule’s filing requirements securities of “open-end” investment companies as defined in Section 5(a)(1) of the Investment Company Act of 1940 (“Investment Company Act”) and securities of any “closed-end” investment company as defined in Section 5(a)(2) of the Investment Company Act that (1) makes periodic repurchase offers pursuant to Rule 23c-3(b) under the Investment Company Act and (2) offers its shares on a continuous basis pursuant to Rule 415(a)(1)(xi) of SEC Regulation C.
6. The effective date of the electronic filing requirements under Rule 5110 was July 12, 2002. See [Notice to Members 02-26](#).

Attachment A

New language is underlined; deletions are in brackets.

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5000. SECURITIES OFFERING AND TRADING STANDARDS AND PRACTICES

5100. SECURITIES OFFERINGS, UNDERWRITING AND COMPENSATION

5110. Corporate Financing Rule — Underwriting Terms and Arrangements

(a) No Change.

(b) Filing Requirements

(1) through (4) No Change.

(5) Documents to be Filed

(A) The following documents relating to all proposed public offerings of securities that are required to be filed under paragraph (b)(4) above shall be filed [with] through FINRA's electronic filing system for review:

(i) [Three copies of the] The registration statement, offering circular, offering memorandum, notification of filing, notice of intention, application for conversion and/or any other document used to offer securities to the public;

(ii) [Three copies of any] Any proposed underwriting agreement, agreement among underwriters, selected dealers agreement, agency agreement, purchase agreement, letter of intent, consulting agreement, partnership agreement, underwriter's warrant agreement, escrow agreement, and any other document that describes the underwriting or other arrangements in connection with or related to the distribution, and the terms and conditions relating thereto; and any other information or documents that may be material to or part of the said arrangements, terms and conditions and that may have a bearing on FINRA's review;

(iii) [Three copies of each] Each pre- and post-effective amendment to the registration statement or other offering document, [one] with a copy marked to show changes; and [three (3) copies of] any other amended document previously filed pursuant to subparagraphs (i) and (ii) above, [one] with a copy marked to show changes; and

(iv) [Three copies of the] The final registration statement declared effective by the SEC or equivalent final offering document and a list of the members of the underwriting syndicate, if not indicated therein, and one copy of the executed form of the final underwriting documents and any other document submitted to FINRA for review.

(B) [All documents] Documents that are filed with the SEC through the SEC's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") System that are referenced in FINRA's electronic filing system shall be treated as filed with FINRA.

(6) No Change.

(7) Offerings Exempt from Filing

Notwithstanding the provisions of subparagraph (1) above, documents and information related to the following public offerings need not be filed with FINRA for review, unless subject to the provisions of Rule 5121(a)(2). However, it shall be deemed a violation of this Rule or Rule 2310, for a member to participate in any way in such public offerings if the underwriting or other arrangements in connection with the offering are not in compliance with this Rule or Rule 2310, as applicable:

(A) through (E) No Change.

(F) exchange offers of securities where:

(i) No Change.

(ii) the company issuing securities qualifies to register securities with the SEC on registration statement Forms S-3, F-3, or F-10, pursuant to the standards for those Forms as set forth in subparagraphs (C)(i) and (ii) of this paragraph; [and]

(G) offerings of securities by a church or other charitable institution that is exempt from SEC registration pursuant to Section 3(a)(4) of the Securities Act[.]; and

(H) offerings of securities issued by a pooled investment vehicle, whether formed as a trust, partnership, corporation, limited liability company or other collective investment vehicle, that is not registered as an investment company under the Investment Company Act and has a class of equity securities listed for trading on a national securities exchange; provided that such equity securities may be created or redeemed on any business day at their net asset value per share.

(8) through (9) No Change.

(c) Underwriting Compensation and Arrangements

(1) No Change.

(2) Amount of Underwriting Compensation

(A) No Change.

(B) For purposes of determining the amount of underwriting compensation, all items of value received or to be received from any source by the underwriter and related persons which are deemed to be in connection with or related to the distribution of the public offering as determined pursuant to subparagraph[s] (3) [and (4)] below shall be included.

(C) through (E) No Change.

(3) No Change.

(d) through (e) No Change.

(f) Unreasonable Terms and Arrangements

(1) No Change.

(2) Prohibited Arrangements

Without limiting the foregoing, the following terms and arrangements, when proposed in connection with a public offering of securities, shall be unfair and unreasonable.

(A) through (C) No Change.

(D) [The payment of any] Any compensation by an issuer to a member or person associated with a member in connection with an offering of securities that is not completed according to the terms of agreement between the issuer and underwriter, except: [those negotiated and paid in connection with a transaction that occurs in lieu of the proposed offering as a result of the efforts of the underwriter and related persons and provided, however, that]

(i) the reimbursement of out-of-pocket accountable, bona fide expenses actually incurred by the member or person associated with a member [shall not be presumed to be unfair or unreasonable under normal circumstances.]; and

(ii) a termination fee or a right of first refusal, as set forth in a written agreement between the issuer and the participating member, provided that:

a. the agreement specifies that the issuer has a right of “termination for cause,” which shall include the participating member’s material failure to provide the underwriting services contemplated in the written agreement;

b. an issuer’s exercise of its right of “termination for cause” eliminates any obligations with respect to the payment of any termination fee or provision of any right of first refusal;

c. the amount of any termination fee must be reasonable in relation to the underwriting services contemplated in the agreement and any fees arising from underwriting services provided under a right of first refusal must be customary for those types of services; and

d. the issuer shall not be responsible for paying the termination fee unless an offering or other type of transaction (as set forth in the agreement) is consummated within two years of the date the engagement is terminated by the issuer.

[(E) Any “tail fee” arrangement granted to the underwriter and related persons that has a duration of more than two years from the date the member’s services are terminated, in the event that the offering is not completed in accordance with the agreement between the issuer and the underwriter and the issuer subsequently consummates a similar transaction, except that a member may demonstrate on the basis of information satisfactory to FINRA that an arrangement of more than two years is not unfair or unreasonable under the circumstances.]

[(F)](E) Any right of first refusal provided to the underwriter or related persons to underwrite or participate in future public offerings, private placements or other financings that:

(i) has a duration of more than three years from the date of [effectiveness or] commencement of sales of the public offering or the termination date of the engagement between the issuer and underwriter; or

(ii) has more than one opportunity to waive or terminate the right of first refusal in consideration of any payment or fee.

(G) through (I) redesignated as (F) through (H).

~~[(J)](I)~~ When proposed in connection with the distribution of a public offering of securities on a “firm commitment” basis, any over[] allotment option providing for the over[] allotment of more than 15% of the amount of securities being offered, computed excluding any securities offered pursuant to the over[] allotment option.

(K) through (M) redesignated as (J) through (L).

(g) Lock-Up Restriction on Securities

(1) No Change.

(2) Exceptions to Lock-Up Restriction

Notwithstanding paragraph (g)(1) above, the following shall not be prohibited:

(A) the transfer of any security:

(i) through (ii) No Change.

(iii) if the aggregate amount of securities of the issuer held by the underwriter [or] and related persons do not exceed 1% of the securities being offered;

(iv) through (viii) No Change.

(B) No Change.

(h) Non-Cash Compensation

(1) No Change.

(2) Restrictions on Non-Cash Compensation

In connection with the sale and distribution of a public offering of securities, no member or person associated with a member shall directly or indirectly accept or make payments or offers of payments of any non-cash compensation, except as provided in this provision. Non-cash compensation arrangements are limited to the following:

(A) through (B) No Change.

(C) Payment or reimbursement by offerors in connection with meetings held by an offeror or by a member for the purpose of training or education of associated persons of a member, provided that:

(i) associated persons obtain the member's prior approval to attend the meeting and attendance by a member's associated persons is not conditioned by the member on the achievement of a sales target or any other incentives pursuant to a non-cash compensation arrangement permitted by paragraph ([d]h)(2)(D);

(ii) through (iii) No Change.

(iv) the payment or reimbursement by the issuer or affiliate of the issuer is not conditioned by the issuer or an affiliate of the issuer on the achievement of a sales target or any other non-cash compensation arrangement permitted by paragraph ([d]h)(2)(D).

(D) No Change.

(E) Contributions by a non-member company or other member to a non-cash compensation arrangement between a member and its associated persons, provided that the arrangement meets the criteria in paragraph ([d]h)(2)(D).

A member shall maintain records of all non-cash compensation received by the member or its associated persons in arrangements permitted by paragraphs ([d]h)(2)(C) through (E). The records shall include: the names of the offerors, non-members or other members making the non-cash compensation contributions; the names of the associated persons participating in the arrangements; the nature and value of non-cash compensation received; the location of training and education meetings; and any other information that proves compliance by the member and its associated persons with paragraphs ([d]h)(2)(C) through (E).

(i) No Change.

1 No Change.

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