

New FINRA Rule 5123 Requires Notice Filing for Certain Private Placements

On December 3, 2012, Rule 5123¹ of the Financial Industry Regulatory Authority (“FINRA”) became effective. Rule 5123 requires FINRA members that participate in a private placement of securities of a non-member, subject to certain exceptions, to submit a notice filing to FINRA within 15 calendar days of the first sale in the private placement. As a result of exemptions from the Rule relating to institutional investors, the Rule should primarily apply to private offerings to retail investors. Note that there is no exemption from Rule 5123 for private placements to accredited investors who are natural persons.

I. Filing Requirement

Rule 5123 requires, subject to the exemptions summarized below, that each member of FINRA that sells a security of an issuer in a private placement², either (i) submit to FINRA, or have submitted on its behalf by a designated member of FINRA, a copy of any private placement memorandum, term sheet or other offering document, including any materially amended version thereof, used in connection with such sale within 15 days of the date of first sale or (ii) indicate to FINRA that no such offering documents were used.

All documents and information filed pursuant to Rule 5123 will be accorded confidential treatment by FINRA.

II. Purpose of Rule 5123

Rule 5123 provides that documents and information filed pursuant to Rule 5123 will be used by FINRA 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. Filings pursuant to Rule 5123 are notice filings and will not be subject to the approval of FINRA.

III. Exemptions

Exemptions from Rule 5123 include, among others:

- offerings to institutional accounts as defined in FINRA Rule 4512(c)³, qualified purchasers as defined in Section 2(a)(51)(A) of the Investment Company Act of 1940, qualified institutional buyers as

¹ Rule 5123 is available at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=14688&element_id=10753&highlight=5123#14688

² Defined as a non-public offering in reliance on an available exemption from registration under the Securities Act of 1933, as amended (the “Securities Act”).

³ Rule 4512(c) defines institutional accounts as

- (1) a bank, savings and loan association, insurance company or registered investment company;
- (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or
- (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million.

defined in Rule 144A under the Securities Act and entities composed exclusively of qualified institutional buyers, investment companies as defined in Section 3 of the Investment Company Act, banks as defined in Section 3(a)(2) of the Securities Act, employees and affiliates of the issuer, and institutional accredited investors described in Rule 501(a)(1), (2), (3) or (7) under the Securities Act;

- offerings made pursuant to Rule 144A and Regulation S under the Securities Act; and
- offerings filed with FINRA under other FINRA rules (including Rule 5122⁴ which requires filings with respect to private placements by FINRA members of their own securities or securities of their affiliates).

A list of all the exemptions from Rule 5123 is set forth on Annex A to this memorandum.

IV. FINRA Guidance Regarding Rule 5123

FINRA has provided FAQs⁵ and a user guide⁶ relating to Rule 5123 filings. The FAQs provide practical guidance on how to make the filing and contact information at FINRA for filers who have interpretative questions or system-related issues.

The FAQs also provide the following interpretative guidance:

- For purposes of determining the “date of first sale,” FINRA will apply the same standard the SEC has stated for Form D filings: “the date of first sale is the date on which the investor is contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor’s subscription agreement or check”;
- Rule 5123 has no specific disclosure requirements;
- There is no exemption from Rule 5123 for private placements to accredited investors who are natural persons; and
- Crowdfunding offerings under the JOBS Act are not required to be filed pursuant to Rule 5123.

The user guide provides detailed instructions on how to access the FINRA Private Placement Filing System and on how to make a filing pursuant to Rule 5123. Third parties, including law firms, may make filings under Rule 5123 on behalf of FINRA member firms.

⁴ Rule 5122 is available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=6837

⁵ The FAQs are available at <http://www.finra.org/Industry/Compliance/RegulatoryFilings/PrivatePlacements/FAQ/index.htm>.

⁶ The FINRA Private Placement Filing System User Guide is available at <http://www.finra.org/web/groups/industry/@ip/@comp/@rf/documents/appsupportdocs/p197411.pdf>.

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If you have any questions about the issues addressed in this memorandum or if you would like any of the materials mentioned, please do not hesitate to call or email Charles A. Gillman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; Mary Stokinger at 212.701.3430 or mstokinger@cahill.com; or Lindsay Flora at 212.701.3429 or lflora@cahill.com.

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The following private placements are exempt from the requirements of Rule 5123:

- (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 FINRA 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 FINRA 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(a)(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 Securities Exchange Act Rule 15c3-1, Appendix D (see NASD Notice to Members 02-32 (June 2002));
- (6) offerings of “variable contracts,” as defined in FINRA Rule 2320(b)(2);
- (7) offerings of modified guaranteed annuity contracts and modified guaranteed life insurance policies, as referenced in FINRA 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;

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- (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 (applicable to direct participation programs), 5110 (applicable to underwriting terms and arrangements for public offerings), 5121 (applicable to public offerings of securities with conflicts of interest) and 5122 (applicable to private placements of securities issued by FINRA members), or exempt from filing thereunder in accordance with Rule 5110(b)(7).