

Securities Alert

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New FINRA Rule 5123 Regarding Private Placements of Securities Effective December 3, 2012

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In an effort to enhance oversight and investor protection over private placement activity of firms on behalf of other issuers, new Financial Industry Regulatory Authority, Inc. (FINRA) Rule 5123 became effective on December 3, 2012.¹ Under new FINRA Rule 5123, each FINRA member firm that sells an issuer's securities in a private placement will be required, subject to certain exemptions (which include private offerings to most types of institutional investors, as outlined below), to either:

- file with FINRA a copy of any offering documents used to sell such private placement, such as private placement memoranda, term sheets or other offering documents; or
- indicate that no offering documents were used.

Member firms must make this filing within 15 calendar days from the date the firm makes the first sale of securities in such private placement. New FINRA Rule 5123 also requires that firms file any materially amended versions of offering documents originally filed.

In practice, new FINRA Rule 5123 will be limited primarily to private placements involving individual accredited and non-accredited investors² who are not exempt from the Rule's filing requirements.

Each member firm that participates as a placement agent in the offering is responsible for filing under new FINRA Rule 5123, but one member firm may be designated to file on behalf of the other participating member firms so long as all participating member firms are listed in the FINRA filing. However, each firm relying on a designated filer should receive confirmation of the filing from the designated filer to satisfy its own filing obligation. Further, exemptions are applied on a firm-by-firm basis, such that different firms in the same private placement may be subject to differing filing obligations. Firms must electronically file the requisite offering documents in searchable PDF format with FINRA through the Private Placement Filing System on the FINRA Firm Gateway.³

It should be noted that new FINRA Rule 5123 imposes no specific disclosure requirements for such filings. FINRA has provided that firms should comply with the disclosure requirements in the exemption that they are relying upon from the registration requirements of the Securities Act of 1933. Further, all information filed pursuant to the requirements of new FINRA Rule 5123 will receive confidential treatment by FINRA.

Available Exemptions

New FINRA Rule 5123 expands the list of exemptions to include private placement offerings solely to one or more of the following purchasers:

- Institutional accounts;⁴
- Qualified purchasers;⁵

- Qualified institutional buyers;⁶
- Investment companies;⁷
- An entity composed exclusively of qualified institutional buyers;⁸
- Banks;⁹
- Employees and affiliates¹⁰ of the issuer;
- Knowledgeable employees;¹¹
- Eligible contract participants;¹² and
- Institutional “accredited investors.”¹³

Other private placements that are exempt from filing under new FINRA Rule 5123 include, among others, offerings of exempt securities,¹⁴ Rule 144A and Regulation S offerings, and offerings of interests in commodity pools operated by a registered commodity pool operator. New FINRA Rule 5123 will, in practice, be limited primarily to private placements involving individual accredited and non-accredited investors,¹⁵ who are not exempt from the Rule’s filing requirements.

Timing

New FINRA Rule 5123 became effective on December 3, 2012, and applies only prospectively to private placements that begin selling efforts on or after that date.

Rule 5122

Under Rule 5122, FINRA outlines standards on disclosure, use of proceeds and filing requirements for private placements of securities issued by member firms themselves, rather than sales of securities by other issuers. Also effective December 3, 2012, firms must submit filings regarding member firm private offerings, as required by FINRA Rule 5122, through the FINRA Firm Gateway.¹⁶

Notice Filings

Both filings under new FINRA Rule 5123 and Rule 5122 are considered “notice” type filings, and as such, FINRA will not respond to the filings with a comment letter or provide a clearance letter.

* * *

Please contact the Mintz Levin attorney who is responsible for your corporate and securities law matters if you have any questions or comments regarding this information. We will continue to keep our clients and friends informed as to further developments in this area.

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Endnotes

¹ New FINRA Rule 5123 is available on [FINRA's website](#).

² See Securities Act Rule 501(a)(4), (5) and (6).

³ For more specific details on the Private Placement Filing System and the FINRA Firm Gateway procedures, see the

frequently asked questions issued by FINRA on [FINRA's website](#) and the [User Guide](#).

- ⁴ As defined in FINRA Rule 4512(c).
- ⁵ As defined in Section 2(a)(51)(A) of the Investment Company Act of 1940 (the "Investment Company Act").
- ⁶ As defined in Rule 144A under the Securities Act of 1933 (the "Securities Act").
- ⁷ As defined in Section 3 of the Investment Company Act.
- ⁸ As defined in Securities Act Rule 144A.
- ⁹ As defined in Section 3(a)(2) of the Securities Act.
- ¹⁰ As defined in FINRA Rule 5121.
- ¹¹ As defined in Investment Company Act Rule 3c-5.
- ¹² As defined in Section 3(a)(65) of the Securities Exchange Act of 1934 ("Exchange Act").
- ¹³ The term "accredited investor" is described in Rule 501(a)(1), (2), (3) or (7) under the Securities Act.
- ¹⁴ As defined in Section 3(a)(12) of the Exchange Act.
- ¹⁵ See Securities Act Rule 501(a)(4), (5) and (6).
- ¹⁶ FINRA Regulatory Notice 12-40 (September 2012).

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