

## Private Placement Filer Form

### FINRA Updates Private Placement Filer Form Pursuant to FINRA Rules 5122 and 5123

Effective Date: May 22, 2021

#### Summary

FINRA has updated the form that members must use to file offering documents and information pursuant to FINRA Rules 5122 (Private Placements of Securities Issued by Members) and 5123 (Private Placements of Securities) (Filer Form). The updated Filer Form will be accessible in the FINRA Gateway beginning May 22, 2021, and includes new and updated questions that will facilitate review of the filed material.<sup>1</sup> Beginning on May 22, 2021, members will be required to complete the updated Filer Form for all new filings, as well as for new amendments to filings.

See [Attachment A](#) for a copy of the updated Filer Form. In addition, this *Notice* informs members about the information that may be requested during a FINRA examination concerning the member's private placement business. See [Attachment B](#) for a copy of the "Unregistered Offering List" template.

Questions regarding this *Notice* may be directed to:

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- ▶ Janet Boysen, Manager, Corporate Financing, at (240) 386-5101 or [Janet.Boysen@finra.org](mailto:Janet.Boysen@finra.org); or
- ▶ Kathryn Moore, Associate General Counsel, Office of General Counsel, at (202) 728-8200 or [Kathryn.Moore@finra.org](mailto:Kathryn.Moore@finra.org).

#### Background and Discussion

FINRA Rule 5122 establishes disclosure and filing requirements for members that sell a private placement of an unregistered security issued by a broker-dealer or a control entity. Its companion rule, FINRA Rule 5123, requires members that sell a private placement to file a copy of any offering documents with FINRA within 15 calendar days of the first sale, subject to various exemptions.<sup>2</sup> FINRA requires members to submit the Filer Form that contains information about the member selling the private placement

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#### Notice Type

- ▶ Guidance

#### Suggested Routing

- ▶ Compliance
- ▶ Corporate Finance
- ▶ Legal
- ▶ Operations
- ▶ Private Placement
- ▶ Registered Representatives
- ▶ Senior Management
- ▶ Underwriting

#### Key Topics

- ▶ Private Placement
- ▶ Underwriting

#### Referenced Rules & Notices

- ▶ FINRA Rule 3280
- ▶ FINRA Rule 5122
- ▶ FINRA Rule 5123
- ▶ Regulatory Notice 10-22

securities, the issuer and the offering terms as well as any offering documents, if applicable, electronically through the FINRA Gateway.<sup>3</sup> If more than one firm is selling, a firm can make the required filing on behalf of others.

The Filer Form has three main components: the “Participating Member Information” section; the “Issuer Information” section; and the “Offering Information” section.

On May 22, 2021, FINRA will begin using an updated Filer Form that adds new questions, and clarifies certain existing questions and requests for information in the Offering Information section. The updates are designed to enhance oversight in particular areas of risk in the private placement market. Collecting targeted information in these areas will enhance investor protection and efficiency. For example, the updated Filer Form addresses the most relevant information at the outset, reducing the possibility that members will need to respond to additional FINRA information requests. FINRA describes these changes below. Attachment A is a copy of the revised Filer Form.

## Contingency Offerings

FINRA is adding the following questions concerning contingency offerings:

- ▶ the date by which the contingency must be met;
- ▶ whether there have been any changes to the original terms of the contingency during the course of the offering (*e.g.*, extension of the date by which the contingency must be met); and
- ▶ whether the subscription process involves the member receiving or transmitting investor funds in the offering. If so, there will be a follow-up question to identify what entity is acting as the escrow agent or trustee for investor funds, and to provide the name of the escrow agent if applicable.

## Disciplinary History of the Issuer, its Principals and Affiliates

FINRA is adding questions to obtain clarification on the disciplinary history of the issuer, the issuer’s principals and affiliates. FINRA reminds members of their obligation to conduct a reasonable investigation of the issuer and securities they recommend.<sup>4</sup>

FINRA is amending the existing question to include actions or proceedings involving any federal agency, not just the SEC. The revised question is as follows (changes in bold):

Has the issuer, any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor or any of the issuer’s affiliates been the subject of FINRA, SEC **or other federal agency**, or state disciplinary actions or proceedings or criminal complaints within the last 10 years?

If the member answers yes, this section will request identifying information about the person or entity that is the subject of the action, proceeding or complaint. If such person or entity has registration records in CRD, the member may enter the CRD information for identification purposes and there are no further questions. Otherwise, the section will request the name of the individual or entity with the disciplinary history; additional information concerning the type of proceeding (*e.g.*, FINRA, federal agency, state, criminal); the approximate date of the proceeding; and the current status.

### Intended Use of Proceeds

FINRA is amending the question about the intended use of offering proceeds as follows (changes in bold):

**Does the issuer intend** to use offering proceeds to make or repay loans to, purchase assets from, or **otherwise direct investor proceeds** to any officer, director, or executive management of the issuer, sponsor, general partner, manager, advisor, or any of the Issuer's affiliates?

If the member responds yes to this question, this section will request additional information concerning the type of payment and approximate dollar amount of offering proceeds that is intended for that purpose. The responsibility of members to conduct a reasonable investigation of the offering includes review of the intended use of proceeds.<sup>5</sup>

### Private Securities Transactions

The Offering Information section also asks the member to identify whether the filing is for an offering that its associated person is selling in a private securities transaction subject to FINRA Rule 3280.

### Additional Changes

FINRA is also making changes to three existing questions in order to clarify the information requested, make relevant updates, and improve data collection.

First, FINRA asks whether the member has commenced sales (applicable to FINRA Rule 5123 filings) or offers or provided offering documents to investors (FINRA Rule 5122 filings). If yes, FINRA will request the date of first sale (or offer or provided documents).

Second, the Offering Information section removes Rule 505 from the list of exemptions from registration. Rule 505 was repealed in 2016 and is no longer an available exemption.

Finally, the Filer Form amends the process by which the member uploads offering documents that it used in connection with the sale of the offering. For each document that the member uploads, the Filer Form requests that the member identify the type of document using a check-box. The member has the option to select more than one type of document.

### Member Supervision Examinations

In keeping with the changes to the Filer Form discussed above, FINRA believes that additional transparency on examinations of members that conduct private placement business may promote efficiency. During the course of an examination of a member that engages in a private placement business, FINRA staff may request information related to that activity. These requests generally seek information not already provided by members in their FINRA Rule 5122 and 5123 filings, and in some cases may include offerings exempted from filing under FINRA Rules 5122 or 5123.

Members that conduct a private placement business can expect FINRA staff to request a list of private placements they are selling or have sold and certain data pertaining to each. The staff uses this information to assess and evaluate the risks associated with the member's private placement activities. To assist members in preparing for these requests, please see Attachment B, "Unregistered Offering List Request" template, that lists the types of information that FINRA will request from members as part of an examination.

### Endnotes

1. See Securities Exchange Act Release No. 91047 (February 3, 2021); 86 FR 8819 (February 9, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2021-002).
2. FINRA Rule 5123(a) requires broker-dealers to "provide FINRA with the required documents or notification and related information, if known, by filing an electronic form in a manner prescribed by FINRA."
3. If a member sells a private placement without using an offering document, the member must state that fact.
4. See [Regulatory Notice 10-22](#) (April 2010).
5. *Id.*