

## Private Placement Retail Communications

### FINRA Amends Rules 5122 and 5123 Filing Requirements to Include Retail Communications That Promote or Recommend Private Placements

Implementation Date: October 1, 2021

#### Summary

FINRA has adopted changes to FINRA Rules 5122 (Private Placements of Securities Issued by Members) and 5123 (Private Placements of Securities) to require members to file retail communications that promote or recommend private placement offerings that are subject to those rules' filing requirements.<sup>1</sup> The new filing requirements become effective on October 1, 2021.

The amended text of the rules is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

- ▶ Paul Mathews, Vice President, Corporate Financing, at (240) 386-4639 or [paul.mathews@finra.org](mailto:paul.mathews@finra.org);
- ▶ Amy Sochard, Vice President, Advertising Regulation, at (240) 386-4508 or [amy.sochard@finra.org](mailto:amy.sochard@finra.org); or
- ▶ Joseph P. Savage, Vice President, Office of General Counsel, at (240) 386-4534 or [joe.savage@finra.org](mailto:joe.savage@finra.org).

#### Background and Discussion

##### FINRA Rules 5122 and 5123

Rule 5122 applies to private placements of unregistered securities issued by a member or a control entity<sup>2</sup> ("member private offerings"). The rule requires the member or control entity to provide prospective investors with a private placement memorandum (PPM), term sheet, or other offering document that discloses the intended use of the offering proceeds, the offering expenses and the amount of selling compensation that will be paid to the member and its associated persons.

July 15, 2021

#### Notice Type

- ▶ Rule Amendment

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Senior Management

#### Key Topics

- ▶ Advertising Regulation
- ▶ Communications with the Public
- ▶ Corporate Financing
- ▶ Private Placements
- ▶ Retail Communications

#### Referenced Rules and Notices

- ▶ FINRA Rule 2210
- ▶ FINRA Rule 4512
- ▶ FINRA Rule 5122
- ▶ FINRA Rule 5123
- ▶ FINRA Rule 5130
- ▶ Regulatory Notice 09-27
- ▶ Regulatory Notice 20-21
- ▶ Securities Act Rule 144A

The rule also requires a member to file the PPM, term sheet or other offering document with the FINRA Corporate Financing Department (“Corp Fin”) at or prior to the first time the document is provided to any prospective investor.<sup>3</sup> Many member private offerings are exempt from the rule’s requirements, including among others, offerings sold only to institutional accounts, as defined in FINRA Rule 4512(c),<sup>4</sup> qualified purchasers, as defined in the Investment Company Act of 1940,<sup>5</sup> and qualified institutional buyers,<sup>6</sup> as defined in Rule 144A under the Securities Act of 1933 (“Securities Act”).<sup>7</sup>

Rule 5123 requires members to file with FINRA any PPM, term sheet or other offering document, including any material amended versions thereof, used in connection with a private placement of securities within 15 calendar days of the date of first sale. Rule 5123 exempts private placements that are filed under other FINRA Corporate Financing Rules, as well as most of the same categories of private placements that are exempt from filing under Rule 5122.<sup>8</sup> As a result of these exemptions, both rules apply predominately to private placements sold to retail investors.

Members that sell private placements may use a PPM or term sheet alone, or may use a variety of other offering documents in addition to, or instead of, a PPM or term sheet. Although, prior to these amendments, Rules 5122 and 5123 did not require retail communications governed by Rule 2210 (Communications with the Public) to be filed, many members filed these communications with their required documents.<sup>9</sup> Examples of these retail communications have included web pages, slide presentations, pitch decks, one-page “teasers,” fact sheets, sales brochures, executive summaries and investor packets.<sup>10</sup>

FINRA has amended Rules 5122 and 5123 to require firms to file with Corp Fin retail communications that promote or recommend a private placement offering subject to those rules’ filing requirements, in addition to the currently required PPMs, term sheets and other offering documents.<sup>11</sup> The amendments do not apply to any offerings that are currently exempt from filing, such as sales exclusively to institutional accounts.<sup>12</sup> The amendments will require a member to file such retail communications with Corp Fin no later than the date on which the member must file the private placement offering documents under Rules 5122 and 5123.<sup>13</sup>

FINRA expects that members will file most retail communications with Corp Fin at the same time and in the same manner that they file their PPMs, term sheets and other offering documents. The rules’ requirements that members file material amendments to offering documents also will apply to material amendments to retail communications.

The amendments to FINRA Rules 5122 and 5123 become effective on October 1, 2021.

## Endnotes

1. See Securities Exchange Act Release No. 92133 (June 9, 2021), 86 FR 31764 (June 15, 2021) (SR-FINRA-2020-038) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to FINRA Rules 5122 (Private Placements of Securities Issued by Members) and 5123 (Private Placements of Securities) That Would Require Members to File Retail Communications Concerning Private Placement Offerings That Are Subject to Those Rules' Filing Requirements).
2. A "control entity" means any entity that controls or is under common control with a member, or that is controlled by a member or its associated persons. See FINRA Rule 5122(a)(2). Control means beneficial interest, as defined in FINRA Rule 5130(i)(1), of more than 50 percent of the outstanding voting securities of a corporation, or the right to more than 50 percent of the distributable profits or losses of a partnership or other non-corporate legal entity. Control is determined immediately after the closing of an offering, and in the case of an offering with multiple intended closings, immediately following each closing. See FINRA Rule 5122(a)(3).
3. Rule 5122 also requires the filing of any amendments or exhibits to such documents within 10 days of being provided to any investor or prospective investor. See FINRA Rule 5122(b)(2).
4. Rule 4512(c) defines "institutional account" as the account of:
  - (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.
5. See 15 U.S.C. 80a-2(a)(51).
6. See 17 CFR 230.144A(a)(1).
7. See Rule 5122(c) for a complete list of exempt member private offerings.
8. See FINRA Rule 5123(b) for a complete list of exempt private placements.
9. [Regulatory Notice 09-27](#) (May 2009), which announced SEC approval of Rule 5122, stated that the rule imposes no additional requirements regarding the filing of advertisements or sales materials. However, as noted, many firms have, in fact, filed retail communications that promote or recommend private placements under Rules 5122 and 5123.
10. In [Regulatory Notice 20-21](#) (July 1, 2020), FINRA provided guidance to help member firms comply with Rule 2210 when creating, reviewing, approving, distributing, or using retail communications concerning private placement offerings.
11. Members must file the offering documents and retail communications via FINRA's Private Placement Filing System in Firm Gateway.
12. See *supra* notes 7 and 8.
13. As discussed above, Rule 5122 requires a member subject to the rule to file the PPM, term sheet or other offering document with FINRA at or no later than the first time the document is provided to a prospective investor. Any amendments or exhibits to such offering documents also must be filed with FINRA within 10 days of being provided to any investor or prospective investor. See Rule 5122(b)(2). Rule 5123 requires a member subject to the rule to submit to FINRA, or have submitted on its behalf by a designated member, the PPM, term sheet or other offering document, including any materially amended versions thereof, used in connection with the sale of securities covered by the rule within 15 calendar days of the date of first sale, or notify FINRA that no such offering documents were used. See Rule 5123(a).

## Attachment A

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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### 5100. SECURITIES OFFERINGS, UNDERWRITING AND COMPENSATION

#### 5120. OFFERINGS OF MEMBERS' SECURITIES

\* \* \* \* \*

#### 5122. Private Placements of Securities Issued by Members

- (a) No Change.
- (b) Requirements

No member or associated person may offer or sell any security in a Member Private Offering unless the following conditions have been met:

- (1) No Change.
- (2) Filing Requirements

A member must file the private placement memorandum, term sheet, or [such] other offering document, and any retail communication (as defined under Rule 2210) that promotes or recommends the member private offering with the Corporate Financing Department at or prior to the first time the document or retail communication is provided to any prospective investor. Any amendment(s) or exhibit(s) to the private placement memorandum, term sheet, [or] other offering document or retail communication also must be filed with the Department within ten days of being provided to any investor or prospective investor.

- (3) No Change.
- (c) through (e) No Change.

#### ••• Supplementary Material: -----

No Change.

### 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, and any retail communication (as defined in Rule 2210) that promotes or recommends the private placement, including any materially amended versions thereof, used in connection with such sale within 15 calendar days of the date of first sale; or (ii) notify FINRA that no such offering documents or retail communications were used. Members must provide FINRA with the required documents, retail communications, or notification and related information, if known, by filing an electronic form in the manner prescribed by FINRA.

(b) through (d) No Change.

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