



FINRA to Repropose Rule Addressing Participation of Broker-Dealers in Private Placements

On April 16, 2011, at the American Bar Association Business Law Section's Spring Meeting in Boston, representatives of the Financial Industry Regulatory Authority ("FINRA") announced that the Board of Governors had approved a reproposal of the recent proposal by FINRA to expand FINRA Rule 5122 to govern all private placements in which a member firm participates—not just those in which the member firm (or its control entity) is the issuer.¹ The reproposal is in response to the 35 comment letters that addressed the original proposal.² The most critical proposed revisions for participation of broker-dealers in offerings of unaffiliated entities are:

- Eliminating the provision that 85% of the proceeds (i) be used for the business purposes disclosed in the offering document, and (ii) not be used to pay offering costs, commissions or other compensation to participating broker-dealers and their associated persons;
- Requiring disclosure of use of proceeds;
- Changing the date of filing of the private placement memorandum ("PPM") to 15 days after either commencement or first offer (not first sale), in order to avoid affecting the capital formation process;
- Creating a new Rule 5123 to address participation of broker-dealers in offerings by unaffiliated entities, thereby leaving the provisions of current Rule 5122 in place (including the 85% use of proceeds provision) for participation in offerings by affiliated entities;
- Retaining the expanded definition of "participation" (from Rule 5110(f)(5)); and
- Possibly adding an exemption for M&A transactions.

The existing Rule 5122 would not be changed.

We will provide further analysis of the reproposal when it is filed with the Securities and Exchange Commission.

¹ See FINRA Regulatory Notice 11-04 "Private Placements of Securities – FINRA Requests Comment on Proposed Amendments to FINRA Rule 5122 to Address Member Firm Participation in Private Placements" (January 2011), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122787.pdf>. See our News Bulletin, "FINRA Proposes Amendments to FINRA Rule 5122 to Address Member Firm Participation in Private Placements," available at <http://www.mofo.com/files/Uploads/Images/110215-FINRA-Rule-5122.pdf>.

² The comments are available on FINRA's website: <http://www.finra.org/Industry/Regulation/Notices/2011/P122788>.

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