



FINRA Issues Guidance for Private Placement Filings

On December 3, 2012, FINRA's new Rule 5123 went into effect.¹ The Rule requires members selling securities issued by non-members in a private placement to file the private placement memorandum, term sheet or other offering documents with FINRA within 15 days of the date of the first sale of securities, or indicate that there were no offering documents used. In connection with the effectiveness of the Rule, FINRA issued frequently asked questions (the "Private Placement FAQs") on the process as well as rolled out the Private Placement Filing System in the FINRA Firm Gateway.

Private Placement FAQs

The Private Placement FAQs are a mix of technical filing requirements and substantive guidance. The technical questions address how firms gain access to the Private Placement Filing System, the use of third parties, such as law firms and consultants, to make the required filings, the requirement that offering documents be filed in searchable PDF format, and the maximum size of individual documents. In addition, while a firm can designate another member participating in the private placement to file on its behalf, it should arrange to receive confirmation from the designated filer in order to satisfy its own filing obligation.

The substantive FAQs include the following:

- If there have been material changes to the offering documents that were originally filed, the amended version must be filed. FINRA notes that "Typically, the issuer will offer rescission rights to investors if there is a material change in the offering document."
- In a contingency offering involving an escrow, FINRA, based on SEC guidance in respect of filings of Form D, takes the position that the "date of first sale" is the date on which the investor is irrevocably contractually committed to invest," which could be the date the issuer receives the investor's subscription agreement or check.²
- Exemptions are applied on a firm-by-firm basis; different firms in the same private placement may have different filing obligations. For example, a firm that sells solely to institutional accredited investors (Rule 501(b)(1), (2), (3) or (7)), would not have to file pursuant to Rule 5123(b)(1)(J) but another firm in the same offering that sold to accredited investors that are natural persons would be required to file under Rule 5123.

¹ Rule 5123 is available on FINRA's website at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=14688&element_id=10753&highlight=5123#r14688. See also our Client Alert, *SEC Adopts New FINRA Rule 5123 on Private Placements*, June 15, 2012, available at <http://www.mofo.com/files/Uploads/Images/120615-FINRA-Rule-5123.pdf>.

² FINRA cites SEC Release 33-8891 (February 6, 2008) and SEC Release No. 33-6455, at Question 82 (March 4, 1983).

- Whether a firm that introduces a prospective investor to an issuer and receives a fee is required to file under Rule 5123 depends on the relevant facts and circumstances; there was no specific guidance beyond that warning.
- Firms participating in crowdfunding offerings under the JOBS Act will not be required to file under Rule 5123.

FINRA also notes in the Private Placement FAQs that Rule 5123 has no specific disclosure requirements, and reminds firms that they should comply with the applicable disclosure requirements of the relevant exemptions from the registration requirements of the Securities Act of 1933. FINRA also reminds firms that the antifraud provisions of the federal securities laws are applicable to the private placement offering documents.

Private Placement Filing System

Firms must file the applicable private placement offering documents (or provide notice that there are no such documents) via the Private Placement Filing System in order to satisfy their filing obligations under both new Rule 5123 and existing Rule 5122, which applies to private placements of members' securities. The new Private Placement Filing System is similar in operation to the Public Offering System implemented by FINRA in June 2012. Firms and third parties must obtain access to the FINRA Firm Gateway. FINRA has published a User Guide to the new system.³ On its website, FINRA also states that Rule 5122 and 5123 filings are "notice" filings, and that, as such, FINRA will not respond to the filings with a comment letter or provide a clearance letter.

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³ The User Guide is available at <http://www.finra.org/web/groups/industry/@ip/@comp/@rf/documents/appsupportdocs/p197411.pdf>.