

FINRA Members, Get Those Offering Documents Ready for Filing

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Starting Monday, December 3, 2012, FINRA member firms that sell issuers' securities in a private placement^[1] will have to file a copy of any private placement memorandum, term sheet, or other offering document with FINRA, and any materially amended versions of documents originally filed, through FINRA's Firm Gateway, within 15 calendar days from the date of sale (for sales on or after December 3rd) or tell FINRA it used no such offering documents. FINRA Rule 5123. There are, of course, a bevy of exemptions for sales made to certain accounts/investors and for specific offerings:

Exemption to Filing Requirement: Where Sales Are Made to Certain Accounts/Investors

Where a member firm, or persons associated with it, sell to any of the following it does not need to abide by the filing requirement of FINRA Rule 5123:

- Institutional accounts, *i.e.*, accounts of a bank, savings and loan association, insurance company, registered investment company, state- or SEC-registered investment adviser, or of a natural person, corporation, partnership, trust or otherwise with total assets of at least \$50 million, FINRA Rule 4512(c);
- Investments companies,^[2] knowledgeable employees,^[3] or qualified purchasers^[4] under the Investment Company Act of 1940, 15 U.S.C. § 80a *et seq.* ("Investment Company Act");
- Accredited investors,^[5] banks,^[6] eligible contract participants,^[7] qualified institutional buyers ("QIBs"),^[8] or an entity composed exclusively of QIBs as defined in the Securities Act;^[9] or
- Employees of the issuer and the issuer's affiliates, *i.e.*, any entities that control, are controlled by, or are under common control with the issuer, FINRA Rule 5121(f)(1). FINRA Rule 5123(b).

Exemption to Filing Requirement: Certain Offerings

Where a member firm, or persons associated with it, sell the following types of offerings, it does not need to abide by the filing requirement of FINRA Rule 5123:

- Exempted securities offerings, as defined in Section 3(a)(12) of the Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (the "Exchange Act");
- Securities Act Rule 144A or SEC Regulation S offerings;

- Offerings of exempt securities with short term maturities under Section 3(a)(3) of the Securities Act and debt securities sold by members pursuant to Section 4(2) of the Securities Act so long as the maturity does not exceed 397 days and the securities are issued in minimum denominations of \$150,000 (or the equivalent thereof in another currency);
- Subordinated loan offerings under Securities Exchange Act Rule 15c3-1;
- “Variable contract” offerings, *i.e.*, offerings of contracts providing for benefits or values which may vary according to the investment experience of any separate or segregated account or accounts maintained by an insurance company, FINRA Rule 2320(b)(2);
- Offerings of modified guaranteed annuity contracts and modified guaranteed life insurance policies, *i.e.*, deferred annuity contracts or life insurance policies the value of which are guaranteed if held for specified periods, and the nonforfeiture value of which are based upon a market-value adjustment formula for withdrawals made before the end of any specified period, FINRA Rule 5110(b)(8)(E);
- Forms S-3 and F-3 non-convertible debt or preferred securities offerings;
- Offerings of securities issued in conversions, stock splits, and restructuring transactions that are executed by an already existing investor without the need for additional consideration or investments on the part of the investor;
- Offerings of securities of a commodity pool operated by a commodity pool operator, as defined under Section 1a(11) of the Commodity Exchange Act;
- Business combination transactions as defined in Securities Act Rule 165(f);
- Offerings of registered investment companies;
- Standardized options, as defined in Securities Act Rule 238; and
- Offerings filed with FINRA under FINRA Rules 2310 (Direct Participation Programs), 5110 and 5121 (Public Offerings), and 5122 (Members’ Private Placements), or exempt from filing thereunder in accordance with FINRA Rule 5110(b)(7). FINRA Rule 5123(b).

If a member or associated person has good cause, an exemption from Rule 5123’s filing requirements may be sought, through application, the procedure for which is set out in the FINRA Rule 9600 Series. FINRA Rule 5123(d).

Given the large number of exemptions, the Rule may only require a filing with FINRA for the sale of private placements to non-accredited investors, generally speaking. It appears that FINRA has attempted to carve out of the Rule’s requirements, the filing of offering materials already required to be filed with the SEC or FINRA. Even so, as explained in FINRA Regulatory Notice 12-40, FINRA expects that the new filings will provide it with more timely and complete information about firms’ private placement activities on behalf of other issuers. All documents filed through FINRA’s Firm Gateway will be accorded confidential treatment, but, after documents are filed through FINRA’s Firm Gateway, FINRA will not respond to the filings with a comment letter or provide a clearance letter.

For more information about this advisory, please contact:

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^[1] FINRA defines “private placement” as a non-public offering in reliance on an available exemption from registration under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (the “Securities Act”). FINRA Rule 5123(a).

^[2] Investment Company Act, Section 3(a)(1).

^[3] Investment Company Act, Rule 3c-5.

^[4] Investment Company Act, Section 2(a)(51)(A).

^[5] Securities Act, Rule 501(a)(1), (2), (3) or (7).

^[6] Securities Act, Section 3(a)(2).

^[7] *Id.* at 3(a)(65).

^[8] Securities Act, Rule 144A.

^[9] Securities Act, Rule 144A.