

June 25, 2013

Private Placement Update: FINRA Proposes Form of Electronic Filing for Private Placements Under Rule 5123

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Contacts

Russell D. Sacks

New York
+1.212.848.7585
rsacks@shearman.com

Charles S. Gittleman

New York
+1.212.848.7317
cgittleman@shearman.com

Barnabas W.B. Reynolds

London
+44.20.7655.5528
barney.reynolds@shearman.com

Thomas Donegan

London
+44.20.7655.5566
thomas.donegan@shearman.com

On June 20, 2013, the U.S. Financial Industry Regulatory Authority, Inc. (“FINRA”) filed a proposed rule change with the Securities and Exchange Commission (“SEC”) concerning the obligations of members under FINRA Rule 5123 to provide notice when participating in certain private placements of securities.¹ The rule change would require members covered by Rule 5123 to electronically file the Private Placement Form (“Form”) via FINRA Firm Gateway.² It also expands the Form to include disclosure of specified additional information if known to the member. Notably, FINRA has requested that the rule change become effective immediately upon filing.

Introduction

On June 7, 2012, the SEC approved FINRA’s proposed Rule 5123, which, as adopted, significantly expands the scope of FINRA’s regulation of broker-dealer participation in

- ¹ For more information regarding Rule 5123, see “FINRA Seeks to Expand Regulation of Private Placements,” October 2011, available at: <http://www.shearman.com/FINRA-Seeks-to-Expand-Regulation-of-Private-Placements-10-31-2011>; “FINRA Amends Proposed Private Placements Rule; SEC Takes Rare Step of Instituting Proceedings to Determine Whether to Approve or Disapprove,” April 2012, available at: <http://www.shearman.com/finra-amends-proposed-private-placements-rule-sec-takes-rare-step-of-instituting-proceedings-to-determine-whether-to-approve-or-disapprove-04-2012>; “Private Placement Update: SEC Approves FINRA Private Placement Rule,” June 2012, available at: <http://www.shearman.com/private-placement-update-sec-approves-finra-private-placement-rule-06-28-2012>.
- ² Proposed Rule Change Relating to Members’ Filing Obligations Under FINRA Rule 5123 (Private Placements of Securities), available at: <http://www.finra.org/Industry/Regulation/RuleFilings/2013/P285315>.

certain private placements.³ Among other things, the Rule imposes a notice filing requirement on member firms participating in a private placement.

Specifically, Rule 5123 requires each member that sells a security in a Covered Offering to: (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 used in connection with such sale within 15 calendar days of the date of first sale, as well as any material amendments to a previously filed document within 15 calendar days of the date such document is provided to any investor; or (ii) indicate to FINRA that no such offering documents were used. While FINRA has indicated that the filing requirement is principally meant to allow the collection of data in respect of Covered Offerings, nothing in the Rule prohibits FINRA from inquiring further in respect of any Covered Offering. A Covered Offering is a non-public offering in reliance on an available exemption from registration under the Securities Act of 1933 (the “Securities Act”).

Rule 5123 provides valuable exemptions to its applicability, including exemptions for various categories of offerings and offerings sold exclusively to institutional and sophisticated investors. These exemptions are based on either the type of purchaser or the type of offering and effectively limit Rule 5123’s applicability to non-institutional private placements.⁴

The Proposed Form

FINRA’s proposed rule change does two things. First, it requires members to file the Form electronically via FINRA Firm Gateway. Second, it expands the type of information covered by the Form. Currently, the Form only requests identifying and contact information for the member and the issuer, information regarding the existence of an affiliate relationship between the member and the issuer, and information about the general nature of the offering. The proposed rule change will add the following questions to the Form:

- Is this a contingency offering?
- Does the issuer have any independently audited financial statements for the most recent fiscal year?
- Is the issuer able to use offering proceeds to make or repay loans to, or purchase assets from, any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor or any of the issuer’s affiliates?
- Does the issuer have a board of directors comprised of a majority of independent directors or a general partner that is unaffiliated with the firm?
- Has the issuer engaged, or do you anticipate that the issuer will engage, in a general solicitation in connection with the offering or sale of the securities?

³ See “Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendments No. 2 and No. 3 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendments No. 1, No. 2, and No. 3 to Adopt FINRA Rule 5123 (Private Placements of Securities) in the Consolidated FINRA Rulebook,” SEC Release No. 34-67157 (June 7, 2012), 77 Fed. Regulation. 114 p. 35457.

⁴ For a more detailed list of the exemptions, see “Private Placement Update: SEC Approves FINRA Private Placement Rule,” June 2012, available at: <http://www.shearman.com/private-placement-update-sec-approves-finra-private-placement-rule-06-28-2012>.

- 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 SEC, FINRA, or state disciplinary actions or proceedings or criminal complaints within the last 10 years?

Importantly, the new Form only seeks information to the extent it is known by members and allows members to respond "unknown" to most questions. The only questions that must be definitively answered are those seeking identifying and contact information, whether the Form D filing information is available, and whether the firm used a Private Placement Memorandum in the offering. Because the new Form permits brokers to respond "unknown" to nearly every substantive question, FINRA believes that the rule change will not create additional burdens for broker-dealers acting in private placements.⁵ A copy of the proposed Form is attached to this client publication.

Timing of Effectiveness

FINRA has requested that the proposed rule become effective immediately upon filing.

Conclusion

With this proposed rule change, FINRA seeks to increase its oversight of the private placement market while minimizing the burden on members. Those in the broker-dealer community must remain vigilant as FINRA expands regulation into this area.

⁵ An issue that remains unaddressed is whether FINRA reserves the right to consider the response "unknown" as evidence of failure to conduct appropriate diligence. For more information about FINRA's views on the diligence required by broker-dealers engaged in private placements, see "FINRA Guidance: Member Firms' Responsibilities in Regulation D Offerings," June 3, 2010, available at: <http://www.shearman.com/finra-guidance-member-firms-responsibilities-in-regulation-d-offerings-06-03-2010/>.

ABU DHABI | BEIJING | BRUSSELS | FRANKFURT | HONG KONG | LONDON | MILAN | NEW YORK | PALO ALTO
PARIS | ROME | SAN FRANCISCO | SÃO PAULO | SHANGHAI | SINGAPORE | TOKYO | TORONTO | WASHINGTON, DC

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069

Copyright © 2013 Shearman & Sterling LLP. Shearman & Sterling LLP is a limited liability partnership organized under the laws of the State of Delaware, with an affiliated limited liability partnership organized for the practice of law in the United Kingdom and Italy and an affiliated partnership organized for the practice of law in Hong Kong.

Exhibit 3

5122 / 5123 Notification Filing

All fields marked with an * are mandatory.

Identify Rule

* Filing Under: Rule 5122 Rule 5123

Participating Member Information

* Firm Name: CRD:
* Contact Name: * Contact Title:
* Email: Phone:
* Relationship to Issuer or Sponsor: Affiliate Non-Affiliate

Identify any other members participating in the offering upon whose behalf you are submitting an offering document:

List of Participating Members				
Firm Name	Firm CRD	Contact Name	Title	Phone

Add New 0 Row(s)

Issuer Information

* Issuer Name:
* Contact Name: * Title:
* Street: * City: State:
Postal Code: * Country:
Email: * Phone:
* Please provide the issuer CIK Number No CIK (when applicable):

Based on the information contained in the offering document (or if otherwise known by your firm), please select an industry category for the offered securities:

* Select the industry:

Offering Information

- * Maximum Amount to be Raised (in \$): Unknown

- * Anticipated Offering Period:
 - * Commencement Date: Unknown
 - * Conclusion Date: Unknown Continuous

- * Maximum Sales Commission (% rate): Unknown

- * Aggregate amount of any other compensation to registered persons disclosed in the offering document: \$ Amount % Rate Unknown

- * Stated or Target Rate of Return as disclosed in the offering document (%): Unknown Not Applicable

- * Is the Form D filing information available? Yes No

- * Did your firm use a private placement memorandum in connection with any sales in the offering? Yes No

Based on the information contained in the offering document (or if otherwise known by your firm):

- * Is this a contingency offering? Yes No Unknown

- * Does the issuer have any independently audited financial statements for the most recent fiscal year? Yes No Unknown

- * Is the issuer able to use offering proceeds to make or repay loans to, or purchase assets from, any officer, director or executive management of the issuer, sponsor, general partner, manager, advisor or any of the issuer's affiliates? Yes No Unknown

- * Does the issuer have a board of directors comprised of a majority of independent directors or a general partner that is unaffiliated with the firm? Yes No Unknown

- * Has the issuer engaged, or do you anticipate that the issuer will engage, in a general solicitation in connection with the offering or sale of the securities? Yes No Unknown

- * 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 SEC, FINRA, or state disciplinary actions or proceedings or criminal complaints within the last 10 years? Yes No Unknown

Please enter any additional information you would like to provide to facilitate FINRA's review:

You have 3500 character(s) left.