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SEC Approves FINRA Rule 5123 on Notice Filings for Private Placements

The Securities and Exchange Commission (the “SEC”) has approved on an accelerated basis new Rule 5123 (Private Placements of Securities) proposed by the Financial Industry Regulatory Authority (“FINRA”). Rule 5123 will require FINRA member firms (“members”)¹ to submit to FINRA copies of any offering documents, including any materially amended versions of such documents, used in connection with a private placement, or to indicate to FINRA that no offering documents were used. Rule 5123 will be effective no later than 180 days after SEC approval.

Rule 5123 as approved by the SEC differs substantially from the original proposal. As originally proposed, the rule would have required members to provide specific disclosures to investors. The disclosure provisions have been eliminated.

Rule 5123 will require each member that sells a security in a non-public offering in reliance on an available exemption from registration under the Securities Act of 1933 (the “Securities Act”) to file with FINRA a copy of any private placement memorandum, term sheet or other offering document, including any materially amended versions thereof, used in connection with such sale within 15 calendar days of the first sale, or to indicate to FINRA that no such offering documents were used.

FINRA indicated that it believes that the filing requirement would provide it with timely and detailed information about the private placement activities of its members that would enhance its oversight functions and the protection of investors. In particular, the information would assist its efforts to identify problematic terms and conditions in private placements, and help, in FINRA’s view, to detect and prevent fraudulent or manipulative acts and practices.

Exemptions. Rule 5123 exempts the following types of private placements from the filing requirement:

Exemptions based on the type of purchaser include, among others, offerings sold only to any one or more of the following purchasers:

- institutional accounts, as defined in FINRA Rule 4512(c);
- qualified purchasers, as defined in Section 2(a)(51)(A) of the Investment Company Act of 1940 (the “1940 Act”);

¹ Generally, FINRA members include SEC registered broker-dealers and their associated persons, among others.

- qualified institutional buyers (“QIBs”), as defined in Rule 144A promulgated under the Securities Act (“Rule 144A”), or an entity owned exclusively by QIBs;
- investment companies, as defined in Section 3 of the 1940 Act;
- banks, as defined in Section 3(a)(2) of the Securities Act;
- accredited investors, as described in Rule 501(a)(1), (2), (3), or (7) promulgated under the Securities Act; and
- issuer employees and affiliates.

Exemptions based on the type of offerings include, among others:

- offerings made pursuant to Rule 144A or Regulation S promulgated under the Securities Act;
- offerings of exempted securities, as defined in Section 3(a)(12) of the U.S. Securities Exchange Act of 1934;
- offerings of exempt securities with short-term maturities under Section 3(a)(3) of the Securities Act (*i.e.*, commercial paper);
- offerings of debt securities sold under Section 4(2) of the Securities Act, so long the maturity is below 397 days and the minimum denomination is \$150,000 (or the equivalent in other currencies);
- offerings of non-convertible debt or preferred securities by issuers that meet the eligibility criteria for registering primary offerings of non-convertible securities on SEC Forms S-3 and F-3;
- offerings of securities issued in conversions, stock splits and restructuring transactions to existing investors without the need for additional consideration or investments on the part of the investors;
- offerings of securities in business combination transactions, such as exchange offers and transactions covered by Rule 145 promulgated under the Securities Act (statutory mergers and consolidations, reclassifications and asset transfers); and
- offerings subject to FINRA filing requirements under its suitability rule (Rule 2310), corporate financing rule (Rule 5110), a conflicts of interest rule (Rule 5121); and
- private placements by members (which are subject to Rule 5122).

In addition, members may apply for exemptions from the provisions of the rule for “good cause.”

FINRA will afford confidential treatment to all documents and information filed pursuant to the rule, and will use these materials only for the purpose of determining compliance with FINRA rules or other appropriate regulatory purposes.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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