

PUBLICATION

Member Private Offerings - Proposed Disclosure Rule

July 31, 2008

The Financial Industry Regulatory Authority (FINRA) has proposed the addition of Rule 5122 to their regulations. FINRA has stated that the purpose of the new rule is to address problems FINRA has identified with private placements by members of their own securities or securities of an affiliate of a member (referred to as "Member Private Offerings" or MPOs). Proposed Rule 5122 would require a member that issues its own (or a control entity's) unregistered securities through a private placement to make disclosures to investors in a private placement memorandum (PPM), file the PPM with FINRA and commit that at least 85 percent of the offering proceeds be used for the business purposes identified in the PPM.

The proposed rule requires that a PPM be provided to every investor, whether accredited or not. Further, the PPM must disclose the intended use of the offering proceeds as well as the offering expenses and selling compensation. The rule does not specifically limit the total amount of underwriting compensation. However, the amount of underwriter compensation is limited indirectly by the requirement that at least 85 percent of the offering proceeds be used for the business purposes identified.

FINRA, in its discussion of the proposed rule, affirmed that PPMs filed pursuant to Rule 5122 will be subject to confidential treatment.

Proposed Rule 5122 provides exemptions for MPOs sold solely to the following types of investors:

- Institutional accounts (as defined in NASD Rule 3110);
- Qualified purchasers (as defined in the Investment Company Act of 1940);
- Qualified institutional buyers (as defined in the Securities Act of 1933);
- Investment companies (as defined in the Securities Act of 1933); and
- Banks (as defined in the Securities Act of 1933).

Additional exemptions are available based upon the type of security being offered. Members should refer to the rule for guidance based on the specific characteristics of their offering.