NATIONAL INVESTMENT BANKING ASSOCIATION

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filed via e-mail to rules-comments@sec.gov

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Release No. 34-66203; File No. SR-FINRA-2011-057

Dear Ms. Murphy:

The National Investment Banking Association ("NIBA") thanks you for the opportunity to provide additional comments related to Financial Industry Regulatory Authority, Inc.'s ("FINRA") Partial Amendment No. 1 to proposed FINRA Rule 5123 ("Amended Proposed Rule"), as follow-on to the comments we provided last year.

NIBA (www.nibanet.org) is an eleemosynary organization comprised of several hundred FINRA member firms ("member firms"), approximately 95% of which are defined by FINRA as Small firms[1]. These firms employ approximately 8,800 registered persons; have been responsible for the underwriting or placement of over $10 Billion in equity and debt for predominantly Small Issuers, as that term is defined by the Commission, and Small Businesses, as that term is defined by the Small Business Administration; have been responsible for approximately 90% of the underwritten IPO's or primary and secondary registered offerings of under $20 million per offering; represent approximately 60 different industry sectors and services; and manage approximately $78 Billion in client assets, at the retail and smaller institutional levels.

This comment letter addresses some of the provisions of AMENDED PROPOSED RULE 5123, and addresses issues that represent a limited portion of the problems 5123 is intended to solve, even though some of these problems are not addressed in 5123.

In essence, NIBA believes that the problems that exist related to private placements can only partially be solved by FINRA oversight, and that the set of issues related to member firms fall substantively short of providing the intended result without the Commission's simultaneous introduction of rules applying to issuers as well as unregulated entities and persons, who provide essentially the same services.

FINRA has no oversight of issuers, except as provided by the more recent requirements of certain issuers to report specific material corporate events prior to implementation

[1] Firms representing 1 to less than 150 registered persons.

(Rule 6490). It governs only member firms and dually licensed Registered Investment Advisors, which by definition excludes non-registered or non-licensed firms and persons.

Unfortunately, the number of unregulated persons and entities conducting activities requiring licensing and registration far outnumber the approximately 4,400 plus member firms and approximately 200,000 investment advisers, overseen by FINRA.

The comments below address some of these issues as well as specific references to sections of the AMENDED PROPOSED RULE 5123.

The following provisions copied from AMENDED PROPOSED RULE 5123 proposed language below are addressed herein.

Issue #1 = EXEMPTIONS

"Proposed Rule 5123(c) would exempt from the requirements of the Rule several types of private placements."

Issue #2 = COMPETITION

"FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act."

Issue # 3 = ACCESS TO MEMBER INFORMATION

"The proposed filing requirement would nevertheless provide FINRA staff with timely access to information about the private placement business of FINRA members. The proposal would require that each member that participates in a private placement make the requisite filing."

AND,

"Rule FINRA 5123 also would require that the PPM, term sheet or other disclosure document, and any exhibits thereto, be filed with FINRA no later than 15 calendar days after the date of the first sale, and any material amendments to such document, or any amendments to the disclosures mandated by the Rule, be filed no later than 15 calendar days after the date such document is provided to any investor or prospective investor."

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Issue # 4 = EFFECT ON CAPITAL FORMATION

"……the proposed rule change will not unduly restrict capital formation through the private placement offering process. The relatively modest "burden" of the proposed rule change is both necessary and appropriate in helping to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. "

Issue #5 – OBLIGATIONS OF BROKER DEALERS & BURDEN OF LIABILITY

"While FINRA continues to believe that the manner in which offering proceeds are used is critically important in a private placement – and that offerings in which a large percentage of offering proceeds are for other than business purposes raise regulatory concerns – FINRA believes that these concerns can be addressed through the obligations of broker-dealers, under the suitability and anti-fraud provisions of the securities laws and FINRA rules, to conduct a reasonable inquiry of an issuer."

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NIBA COMMENTS:

Issue #1 EXEMPTIONS AVAILABLE

NIBA concurs with the exemptions to 5123 as written, and applaud their inclusion, except as described in the narrative that follows the proposed FINRA language related to exemptions to 5123.

Proposed Rule 5123(c) would exempt from the requirements of the Rule several types of private placements. Exemptions include offerings sold only to any one or more of the following purchasers: institutional accounts, as defined in NASD Rule 3110(c)(4);[2]

NASD Rule *3110(c)(4*] referenced above, was replaced by FINRA Rule 4512 (c), although the language remained identical. However, this 4512 (c) language includes an abbreviated definition[2] of institutional type entities or individuals that varies from existing language in 144A of the '33 Act as amended[3], which defines Qualified Institutional Buyers[4] [i] ("QIB's"); and, the language in Section 2(a)(51)(A) of the Investment Company Act of '40, which defines Qualified Purchasers[5] [ii] ("QP's"); with both types of entities existing as exempt entities for purposes of private placements.

[2] 4512 (c) (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with **total assets of at least $50 million.**
[3] The Securities Act of 1933, as amended.
[4] See endnotes
[5] See endnotes

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While both these sections are referenced in proposed language for 5123, NIBA believes FINRA's Rule 4512 (c) itself, is both superfluous and confusing, as the pre-existing definitions provided by 144A and 2 (a)(51)(A) establish different monetary guidelines for the establishment of an entity's qualification as either a QIB or a QP. The $50,000,000 guideline promulgated by FINRA in Rule 4512 (c) is a third set of monetary guidelines which varies significantly from 144A and 2 (a)(51)(A), for no apparent purpose, and introduces confusion in that the $50mm guideline is greater than required for QP's, and less than required for most QIB's.

In practice, it is an unnecessary additional monetary guideline, as 144A and 2 (a)(51)(A) adequately define and provide monetary guidance for all institutional type investors.

The other 2 sub-sections, 4512 (c) (1 &2), are already covered in much greater detail than 4512(c) (1 &2), in 144A and 2 (a)(51)(A), furthering the complexity of the existing language of 4512 (c).

NIBA urges the Commission to:

1) remove this FINRA definition in 4512 (c), and insert in its place the definition of institutional exemptions and institutional entities as provided for QIB's as defined in rule 144A of the Securities Act of 1933, as amended, and the definition of QP's, as defined in section 2 (a) (51) (A) of the Investment Company Act of 1940, as amended, to provide consistency and clarity as intended by congress, and to comply with existing commission rules and regulations; and

2) remove reference to NASD Rule 3110(c)(4] entirely from the list of entities exempt from AMENDED PROPOSED RULE 5123, while retaining all other exempt entities or categories.

This change to Rule 4512 (c) would:

1) create consistency of FINRA definitions and monetary guidelines with both the '33 Act and the IC Act of '40, resulting in consistency between FINRA Rules for MEMBER FIRM practical application and existing law;

2) allow for a single set of monetary guidelines for institutional accounts already envisioned by the '33 Act as amended, and the IC Act of '40, as amended; and

3) Allow for one set of clear guidelines for member firms.

Any existing institutional account should be unaffected in practice, as either they are 0within the domain of either the guidelines of the '33 Act or the '40 Act, since the

FINRA guideline is set above the ’40 Act guideline, and below the ’33 Act guideline. As such, from a practical matter, a member firm is still providing institutional level account maintenance requirements for the Qualified Purchaser sub-set, as well as the QIB sub-set; while at a level of disclosure for private placements as referenced within this AMENDED PROPOSED RULE 5123, they are both exempt entities.

In FINRA’S recent NTM 12-03, related to complex products and their sale to retail investors, FINRA clearly recognizes the need for clarity and transparency in disclosure that can be readily understood regarding relatively complex terms and conditions; yet, its proffering of a third level of monetary definition of “institutional” in 4512 (c) defies its own fundamental logic of the purposes promulgated within the intentions of NTM 12-03, vs. its intent in AMENDED PROPOSED RULE 5123.

NIBA requests a consistent application, devoid of unnecessary complexity and confusion.

Issue # 2. COMPETITIVE ISSUES

“FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.”

One of the ongoing burdens carried by all member firms who are required to be licensed pursuant to the appropriate levels of examination is competition from unregistered agents and firms who (i) introduce funding or sources of funding to issuers and/or, (ii) participate in illicit activities related to investment banking, corporate finance, or activity related to M&A transactions.

The Commission, by its own public statements, has limited resources to pursue the hundreds of thousands of unregistered practitioners and has taken few actions over the last decade, despite an increase in the number of those practitioners who directly compete with member firms.

NIBA recognizes that FINRA does not maintain jurisdiction over unregistered persons and entities, as that is a role delegated to the Commission and other state and federal jurisdictions. Therefore, the Commission should address, and not FINRA, the competitive effect aspects of FINRA’s AMENDED PROPOSED RULE 5123, and more importantly, take actions to regulate and enforce issuers and non-registered practitioners’ activities related to private placements, which represent the greatest competition to duly registered member firms.

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In recent years, NIBA has observed a significant change in the business activities of its membership, and has witnessed:

1. a decrease in the ability and willingness of its members to conduct both registered and private offerings;

2. an increase in issuers who are conducting more self-offerings;

3. an increase in issuers who are conducting off shore offerings, not through member firms;

4. an increase in issuers who have organized foreign entities from which to issue securities, again not through member firms; and

5. a substantive increase in costs to its member firms in conducting "Best Practices" due diligence investigations related to issuers; and, a universal reluctance on the part of issuers to fund such increased costs, or to comply with the evidentiary requirements of member firms' control procedures on behalf of investors and to comply with the myriad of FINRA rules and notices governing private placements.

The compendium of such existing rules and regulations affect the basis and underlying purpose of private placements in the capital formation process, and more unequally and adversely affect Small firms, as well as the Small Issuers and Small Business' they represent. The AMENDED PROPOSED RULE 5123 adversely affects Small firms, Small Issuers and Small Business' more directly than Large and Medium sized firms, both of whom are predominantly absent from participation in under $50mm retail private placements for small or newer issuers. The transaction sizes of private placements at Large and Medium sized member firms are typically tens of millions of dollars larger than transactions undertaken by Small member firms; and, the issuers are typically much larger and more experienced issuers than the transactions undertaken by Small member firms.

NIBA understands that the issue of unregulated practitioners is more prevalent with transactions below $50mm, of all types, as larger transactions are predominantly out of reach for such unregulated practitioners. The approximately 384[6] Large and Medium sized member firms, as defined by FINRA, which are also the Tier I and Tier II sized firms in terms of transaction size capabilities, are less adversely affected, or entirely unaffected, by firms or persons engaging in illicit activities: it is largely an issue affecting the approximately 4,066[7] Small firms, as defined by FINRA.

[6] According to the Jan 9, 2012, records of the FINRA Office of Member Relations.
[7] According to the Jan 9, 2012, records of the FINRA Office of Member Relations

NIBA believes that all sections of new rules which affect capital formation conducted by the Small firms for issuers predominantly in the under $50mm size category, are unequally impacted by restraints or conditions for which issuers are utilizing the exempt private placement type of transaction. Further, from our observation of issuers using NIBA services or member firms over the last 20 or more years, it appears that the preponderance of offerings and private placements in the under $50mm transaction size are conducted by Small Issuers. Therefore, Small Issuers and Small Businesses seeking capital rightly deploy private placement methods to raise capital, but FINRA member firms are being required to accept liabilities which should rightly be placed first upon the issuer, as member firms' already are subject to a myriad of other FINRA and SEC requirements, especially as it relates to offering due diligence investigations, disclosures, and filing obligations. This is not to be confused with any perceived reluctance of member firms to comply with existing rules, or future rules, like this AMENDED PROPOSED RULE 5123, where member firms should be expected to provide "best practices" level disclosure and due diligence prior to accepting subscription agreements for offerings from retail investors; rather, it is the liability issue which is being transposed upon member firms whereby issuers accept the proceeds of offerings, while member firms are merely compensated a relatively small percentage as fees and commissions, but bear the brunt of restitution of entire investment amounts. Juxtaposed with these increases in liabilities, recent rules which provide for arbitration panels comprised entirely of non-industry panelists have further increased the member firms' liabilities in disputed situations. This also raises the issue of member firms' ability to rely on a due diligence defense where it appears that FINRA is imposing strict liability.

NIBA believes that the Commission should be proposing language and conditions that requires issuers, over whom they have jurisdiction, to be responsible and liable for disclosure of the items recited above in this AMENDED PROPOSED RULE 5123, as it relates to any filing with FINRA related to private placements or the accuracy of the information provided to the FINRA member in its investigative process associated with due diligence related to that issuer. FINRA addressing their jurisdiction of member firms may be appropriate, but the FINRA rule is readily circumvented by issuers by merely not utilizing FINRA member firms for their capital formation and other types of activities which fall generally into the private placement category.

So the rule, as proposed, does not have the effect or impact for which it is intended.

NIBA suggests that the Commission should prohibit all issuers who intend to seek capital in private placements, or engage in corporate finance related transactions, such as M&A activities, from paying any form of compensation, whether in goods, services, cash or securities, to any 3rd party entity or person who is not an exchange or FINRA member or associated person; and, require disclosure to each investor or participant in any capital or M&A event privately placed that: (a) no such compensation is to be provided to any non-

FINRA or exchange member firm or person; and, (b) that all proceeds or securities, goods or services resultant of any private transaction are utilized without compensation in the future to non-FINRA or exchange member entities or persons.

NIBA believes that acceptance of the AMENDED PROPOSED RULE 5123 mandates for member firms should only be effective simultaneously with an SEC rule requiring equal conditions and mandates for all issuers seeking capital or investment banking transactions within exemptions afforded by existing law. The playing field must be level, to protect investors, to assign responsibility and liability where it should rightly rest, and to protect member firms from unnecessary and often ancillary arbitration or litigation.

Issue # 3. ACCESS BY MEMBER FIRMS OF MEMBER PROVIDED INFORMATION & FILING REQUIREMENTS BY EACH FIRM

"The proposed filing requirement would nevertheless provide FINRA staff with timely access to information about the private placement business of FINRA members. The proposal would require that each member that participates in a private placement make the requisite filing."

AND

"Rule FINRA 5123 also would require that the PPM, term sheet or other disclosure document, and any exhibits thereto, be filed with FINRA no later than 15 calendar days after the date of the first sale, and any material amendments to such document, or any amendments to the disclosures mandated by the Rule, be filed no later than 15 calendar days after the date such document is provided to any investor or prospective investor."

For many decades, the NASD, and now FINRA, has failed to offer a level of access or transparency to its own members related to the activities of its members in the capital formation process, be it offering related, licensing related, or other investment banking and corporate finance activities.

PROBLEM:

Neither the members' only access parts of the FINRA web site, nor the CRD section of the Gateway, provides member firms access to the member enablement levels by product or the business types of each member, or with access to information related to the types of business firms are engaged in at the time of the inquiry. The *BrokerCheck* section open to the general public is insufficient for member firms in many regards, and is cumbersome to work with on a universal scale for member firms, as its intent was not member firms use, but general public use.

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With the requirement that each firm participating in a private placement make a separate filing, this is an appropriate opportunity to allow member firms, when accessing the members' access information on the FINRA WEB site, to be able to also access information related to the firms that have filed to participate in a particular private placement. Recently, a number of FINRA Governors and executives encouraged support of such an initiative.

SOLUTION:

NIBA believes that Member firms contemplating participation should be able to access the same information that FINRA is provided, except for any personal information concerning individuals at Member firms that may be provided as part of the FINRA required filing. A member firm should be able to see that:

1) the firm participating as a result of the filing with FINRA is first and foremost enabled to participate, by the enablements granted by FINRA in its member agreement with the participating member, *i.e.*, that FINRA has approved that firm to conduct private placements; and

2) the firm participating is active in its participation, and has not yet withdrawn or terminated its placement activity.

Member firms should be able to view the placement participation activity of other member firms participating in any given private placement. If there are participating firms that filed with FINRA, this page should list the firms that have filed, whereby the other filing member firm is able to ascertain whether the filing member firm was previously approved by FINRA to conduct private placements in accordance with the firm's membership agreement. Also, members should have the ability to view the date the firm filed with FINRA to participate, and the contact telephone number or email, or both, of the contact person provided to FINRA in that firm's FINRA filing related to that private placement. If there are no firms participating except for the initial Managing Broker Dealer filing, then a page would have been generated for that placement, and an ID# assigned, and this page would simply state, "no other participants filed as of this date."

The list should be searchable by either the name of the placement, or its FINRA generated ID # and by the MEMBER FIRM name and/or CRD number.

The list by name of placement or ID # should contain the information for all the member firms who have filed with FINRA to date.

The MEMBER FIRM list should list all private placements for which that firm has filed a participation filing with FINRA, including the name and or ID#. Providing a link by ID # or name would be a useful tool as well.

This method not only ensures transparency for members, but assists members with its FINRA obligations related to private placements in general. By enabling the member to access such information, more members contemplating participation would be able to share concerns, due diligence investigation information and pertinent marketing issues with other participating members, and will be more readily capable of less costly compliance and ongoing due diligence responsibilities related to both the issuer, as well as each member participating. For firms already participating, monitoring the placements' filing members as to additions or withdrawal also provides necessary ongoing marketing information for sales and compliance purposes.

It would also short circuit the ability of issuers to "embellish" their transaction's acceptance by other member firms, since a firm would be able to readily access information on the firms' filings with FINRA.

The "sword sweeps in both directions;" in this case, what is valuable for FINRA to learn and codify about the activities of its members, is just as valuable for its members who conduct private placements to know about the participants and issuers as filed with FINRA.

NIBA believes it is time for FINRA to facilitate true transparency and start ridding itself of its one way mirror.

Withdrawal notices

Implicit in the requirement of filing a participation notice, logically, is the converse side of filing a notice of withdrawal of participation. If a member is required to file related to participation, they should also file when they withdraw or terminate, or when the transaction is complete, so that FINRA and other members are aware that the firm is no longer participating. Just filing to participate might help FINRA see who and how many are initially participating in all deals, and per deal, but it is equally important to know, both at the FINRA level and the member level, when a firm ends its participation. The participation termination filing should be a filing that indicates whether:

1) a member firm sold any securities in the offering without any reference to the amount sold prior to its withdrawal or termination; or

2) the member firm did not sell securities in the offering prior to its withdrawal or termination; and

3) the offering is continuing after a member firm withdraws or terminates; or

4) the offering itself is terminated or completed.

Since all the information is filed with FINRA utilizing "searchable" software, this will enable FINRA to better track members' actual participation, not just intended participation, a goal it emphasizes in several references within AMENDED PROPOSED RULE 5123, and completes a member's overall business objective in transparency. It also enables members, when viewing information of participating firms in a transaction, or historical transactions, to view the activity of other member firms that withdrew officially from a transaction, whether the transaction was complete or not, and whether the other firms actually sold securities in the transaction or not.

Again, FINRA, in its quest for transparency, should be in a position to facilitate member firms' inclusion in the transparency process. Engineering wise, such modifications are not burdensome for FINRA to provide its members.

The added costs, time, liabilities and expense to member firms should be partly offset by member firms attaining access to information that they should know, just as they would know in any registered transaction regarding members of an underwriting group.

Let's take this opportunity to break the one-way mirror and install natural glass.

Issue # 4. CAPITAL FORMATION EFFECT

"As noted above, the proposed rule change will not unduly restrict capital formation through the private placement offering process. The relatively modest "burden" of the proposed rule change is both necessary and appropriate in helping to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest."

Clearly, no one can argue that member firms should utilize "Best Practices" for due diligence investigations and disclosure information related to securities sales or exchanges of all types to ANY investors, retail inclusive.

Conversely, no one can argue that the brunt of liabilities, costs, increased time and labor, and cross-compliance rulings have affected the approximately 4,066 FINRA defined Small member firms unequally. These Small member firms have fewer persons within each firm to conduct the activities required by the new rules and compliance measures, and fewer resources available to add software, personnel and supervisory controls. Most cannot meet the personnel and economic impact of regulations, so more firms are exiting the private placement sector, thus reducing the number of transactions and capital raises that could have been otherwise completed.

Since the Small member firms provide the majority of member firms' activity related to transactions of all types under $50mm, and virtually all activity of member firms' related to transactions of all types under $20mm (a size of transaction that Tier I & II firms are virtually absent of participation), it would be impossible at this time for the Commission, FINRA, the NASAA, or any state regulatory authority, to speculate on the effect to smaller transactions by small issuers or small businesses of most new rules or guidelines related to private placements, and therefore, the resultant effect on future capital formation within the small issuer and small business sector. In recent years, small issuers and small businesses have experienced a material decrease in underwritings of less than $50mm, and an even more significant decrease in underwritings of less than $20mm. The use of private placements for these issuers has increased.

NIBA believes that part of this decrease is a result of fewer FINRA member firms that are enabled to underwrite offerings, or financially capable of doing so, or willing to do so, as witnessed within our membership.

Member Firms do not know exactly who is still able to underwrite offerings because FINRA does not provide that information to its members, just as FINRA does not provide the information to its members on which member firms may conduct private placements.

The burdens of each new rule which imposes any additional requirements upon member firms and does nothing to impose additional requirements upon the Issuers, and/or does nothing to reduce the activities of illicit practitioners, places an unfair burden on Small member firms, with no additional practical resultant benefit to the capital formation process or to the investing public.

NIBA believes that the Commission, rather than FINRA, become more proactive in addressing the concerns of the FINRA response letter related to 5123, and in this comment letter, incorporating more issuer related requirements which are beyond the scope of FINRA jurisdiction, and explore with member firms the steps and actions that can be accomplished in the near term to reduce the activities of illicit practitioners.

NIBA member firm representatives stand willing and able to consult with the Commission or FINRA to further this process, so that effective rulemaking may be promulgated by the Commission.

Issue #5 – OBLIGATIONS OF BROKER DEALERS

"While FINRA continues to believe that the manner in which offering proceeds are used is critically important in a private placement – and that offerings in which a large percentage of offering proceeds are for other than business purposes raise regulatory concerns – FINRA believes that these concerns can be addressed through the obligations

of broker-dealers, under the suitability and anti-fraud provisions of the securities laws and FINRA rules, to conduct a reasonable inquiry of an issuer."

'SISTER RULE FROM THE COMMISSION'

NIBA believes that the burden of placing all responsibility on member firms' obligations related to disclosure and reasonable inquiries related to issuers, is only part of the problem, and addresses only part of the solution. FINRA rules only address a part of the problem intended to be corrected by the AMENDED PROPOSED RULE 5123.

NIBA believes that the Commission should issue a "sister" ruling governing issuers that will simultaneously impact better protections for investors, better enforcement related to issuers and illicit nonregistered practitioners, as discussed elsewhere in these comments.

NIBA believes that the language in this AMENDED PROPOSED RULE should allow a "Safe Harbor" upon which member firms can rely. NIBA believes that a "Safe Harbor" provision should be implicit within the language of the Rule when finalized, allowing clarity of action to be taken by member firms, as well as removal of any interpretation of consequences "after the fact." The rule should also not result in the imposition of impractical and expensive obstacles to FINRA members that would further drive more issuers into the domain of the thousands of illicit practitioners, who far outnumber, in every state, the total number of all FINRA member firms.

The solution must include broader requirements for the issuers of private placements, and more widespread and extensive enforcement against unregulated practitioners. The intent of the Commission in furthering investor protections, in implementing Dodd Frank requirements, and approving all SRO initiatives, cannot increase the probability of issuer circumvention, and further reduce the available licensed membership capable of, and financially prepared, to conduct viable transactions for compliant and qualified issuers.

MEMBER FIRM PENALTIES

NIBA believes that the statement by FINRA has stated in its response to the last set of comments that the penalties or consequences of each violation of the AMENDED PROPOSED RULE by a member firm be determined separately.

Member firms should be immune from these types of arbitrary consequences, and FINRA needs to provide, at this time, clear guidelines in the language of the AMENDED PROPOSED RULE. As it relates to the filing requirements of member firms within the 15 day period, NIBA believes:

1) that FINRA should incorporate information about the anticipated penalties into the Amended Proposed Rule language so member firms understand how FINRA expects to enforce the filing requirements including whether filing penalties will be considered administrative in nature, and therefore, not require disclosure on a firm's disclosure reporting page ("DRP"), or whether penalties will be considered investment related and subject to disclosure reporting;

2) that any level of non-compliance with filing requirements will have a significant impact on how member firms modify their policies and procedures to ensure compliance;

3) that principals or compliance officers are unaware of their liability, even when not directly involved in the filing process of member firms;

4) that member firms are unaware if the non-compliance will be considered by FINRA or the Commission to be "administrative" or "investment related" for DRP purposes on U-4's and Form BD;

5) that member firms are unaware of the consequences related to exemptions available to their issuer clients as a result of member firms non-compliance;

6) that member firms are unaware of the effect on compliant filers related to the non-compliance of other firms; and

7) that the factors that FINRA considers should be pre-determined within the language of the amended proposed rule, and not be arbitrarily determined after the fact by enforcement personnel that are not involved in the intent of the creation of the proposed rule.

Therefore, NIBA proposes the following solutions related to filing requirements within the 15 day period, should the filing requirement as written be approved by the Commission:

1) ALL filing obligations should be defined as "administrative," and not "investment related" violations. It would be an inappropriately inequitable characterization of any such type filing violation to be characterized as "investment related." That wasn't what was envisioned when the term "investment related" was applied in other appropriate circumstances, despite recent attempts by FINRA and the Commission to expand the utilization of the term to administrative affairs.

2) FINRA should have an obligation to remind a member firm of its filing obligation, by email, should it learn of a member firm's participation in a private

placement for which the firm has not filed a notice of participation, without penalty to the member firm for the 1st such violation.

3) A member firm's failure to comply in a timely manner, by the filing of a late notice of participation, should be without penalty to the member firm for the 1st such violation, or in any late filing in which the member believes that the filing within the 15 day period would cause its filing to be incomplete or lacking in information that could not be accurately provided within the 15 day period.

4) Member Firms that do not file in a timely manner more than once should be censured first, before FINRA penalizes the member firm by either monetary fines or suspension from private placement activity for any period of time. Monetary fines or suspensions from conducting private placements should be reserved for only repeat offenders with apparently intentional action to circumvent or ignore the filing requirement.

5) Principals and compliance officers should be immune from personal liability, fines or censures related to the timing of the filings of participation in any private placement filing requirements, including any personal liability for DRP disclosure on their personal U-4 filings.

6) FINRA should specifically state that no member firm filing as required shall be affected by the non-compliance of a firm that has not filed appropriately within the group of filers for a specific private placement.

7) FINRA should specifically state that no member firm's non-compliance with the filing timing requirement would impact any issuers' reliance upon allowable exemptions from registration.

8) FINRA's language related to all the solutions above should provide a "safe harbor" upon which member firms may rely.

NIBA recognizes that the set of circumstances involving member firm potential penalties related to the disclosure requirements of the AMENDED PROPOSED RULE of the information within the documents being filed by a member firm are more complex than the circumstances related to potential penalties related to the timing of such filings. Nonetheless, NIBA believes that certain minimum standards and guidelines be proposed by FINRA for the purposes of the AMENDED PROPOSED RULE related to content within the documents filed.

NIBA proposes the following related to content compliance for a member filing:

1) ALL filing obligations should be defined as "administrative," and not "investment related" violations. For content, the Commission and not FINRA, should be requiring a filing obligation of the Issuer, and member firms should be immune from "investment related" characterization of any filing requirement.

2) Principals and compliance officers should be immune from personal liability, fines or censures related to the content of the filed documents related to a filing of participation in any private placement filing, including any personal liability for DRP disclosure on their personal U-4 filings.

3) Member Firms should be immune to any penalty for the information related to, or provided by, an issuer, or any member firm edited or modified content, that is corrected, deleted or modified in any responsive amended member filing as a result of FINRA comment to the member firm.

4) Member Firms should be immune to any penalty where a due diligence defense may be utilized as a result of a firm's demonstrated compliance with FINRA's due diligence investigation rules and regulations.

CONCLUSION

NIBA repeats its willingness to provide representatives of its membership who are most experienced and familiar with the issues representing the AMENDED PROPOSED RULE 5123 to FINRA staff to further assist in the practical aspects of implementing effective formulation of this AMENDED PROPOSED RULE 5123.

Thank you for the opportunity to share our viewpoint related to these important issues.

Sincerely and Respectfully Submitted,

The Board of Directors of the National Investment Banking Association

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ENDNOTES

[i] Sales may also be made to "qualified institutional buyers" as such term is defined in Rule 144A under the Securities Act_hereunder which have the following suitability standards (Any of the following entities, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the Company):

- **Any insurance company** as defined in Section 2(a)(13) of the Securities Act (Note: A purchase by an insurance company for one or more of its separate accounts, as defined by Section 2(a)(37) of the Investment Company Act of 1940 (the "Investment Company Act"), which are neither registered under Section 8 of the Investment Company Act nor required to be so registered, shall be deemed to be a purchase for the account of such insurance company);

- **Any investment company** registered under the **Investment Company Act** or any **business development company** as defined in Section 2(a)(48)of that Act;

- **Any *Small Business Investment Company*** licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958;

- **Any plan** established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, **for the benefit of its employees;**

- **Any employee benefit** plan within the meaning of title I of the Employee Retirement Income Security Act of 1974;

- **Any trust fund whose trustee is a bank or trust company** and whose **participants are exclusively plans** of the types identified in paragraph (a)(1)(i)(D) or (E) of this section, except trust funds that include as participants individual retirement accounts or H.R. 10 plans;

- **Any business development company** as defined in Section 202(a)(22) of the **Investment Advisers Act of 1940**;

- **Any organization** described in section 501(c) (3) of the Internal Revenue Code, **corporation** (other than a bank as defined in **Section 3(a)(2)** of the Act or a **savings and loan association or other institution** referenced in **Section 3(a)(5)(A)** of the Act or a foreign bank or savings and loan association or equivalent institution), **partnership, or Massachusetts or similar business trust;** and

- **Any investment adviser registered under the Investment Advisers Act**.

- Any *dealer* registered pursuant to section 15 of the Exchange Act, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $10 million of securities of issuers that are not affiliated with the dealer, *Provided*, That securities constituting the whole or a part of an unsold allotment to or subscription by a dealer as a participant in a public offering shall not be deemed to be owned by such dealer;

- Any *dealer* registered pursuant to section 15 of the Exchange Act acting in a riskless principal transaction on behalf of a qualified institutional buyer;

  Note: A registered dealer may act as agent, on a non-discretionary basis, in a transaction

with a qualified institutional buyer without itself having to be a qualified institutional buyer.

- Any investment company registered under the Investment Company Act, acting for its own account or for the accounts of other qualified institutional buyers, that is part of a family of investment companies which own in the aggregate at least $100 million in securities of issuers, other than issuers that are affiliated with the investment company or are part of such family of investment companies. *Family of investment companies* means any two or more investment companies registered under the Investment Company Act, except for a unit investment trust whose assets consist solely of shares of one or more registered investment companies, that have the same investment adviser (or, in the case of unit investment trusts, the same depositor), Provided That, for purposes of this section:
    - Each series of a series company (as defined in Rule 18f-2 under the Investment Company Act) shall be deemed to be a separate investment company;
    - Investment companies shall be deemed to have the same adviser (or depositor) if their advisers (or depositors) are majority-owned subsidiaries of the same parent, or if one investment company's adviser (or depositor) is a majority-owned subsidiary of the other investment company's adviser (or depositor);
    - Any entity, all of the equity owners of which are qualified institutional buyers, acting for its own account or the accounts of other qualified institutional buyers; and
    - Any *bank* as defined in section 3(a)(2) of the Act, any savings and loan association or other institution as referenced in section 3(a)(5)(A) of the Act, or any foreign bank or savings and loan association **or** equivalent institution, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with it and that has an audited net worth of at least $25 million as demonstrated in its latest annual financial statements, as of a date not more than 16 months preceding the date of sale under the Rule in the case of a U.S. bank or savings and loan association, and not more than 18 months preceding such date of sale for a foreign bank or savings and loan association or equivalent institution.

Remaining 144a rules

a.

1. In determining the aggregate amount of securities owned and invested on a discretionary basis by an entity, the following instruments and interests shall be excluded: bank deposit notes and certificates of deposit; loan participations; repurchase

agreements; securities owned but subject to a repurchase agreement; and currency, interest rate and commodity swaps.

2. The aggregate value of securities owned and invested on a discretionary basis by an entity shall be the cost of such securities, except where the entity reports its securities holdings in its financial statements on the basis of their market value, and no current information with respect to the cost of those securities has been published. In the latter event, the securities may be valued at market for purposes of this section.

3. In determining the aggregate amount of securities owned by an entity and invested on a discretionary basis, securities owned by subsidiaries of the entity that are consolidated with the entity in its financial statements prepared in accordance with generally accepted accounting principles may be included if the investments of such subsidiaries are managed under the direction of the entity, except that, unless the entity is a reporting company under section 13 or 15(d) of the Exchange Act, securities owned by such subsidiaries may not be included if the entity itself is a majority-owned subsidiary that would be included in the consolidated financial statements of another enterprise.

4. For purposes of this section, *riskless principal transaction* means a transaction in which a dealer buys a security from any person and makes a simultaneous offsetting sale of such security to a qualified institutional

5. Buyer, including another dealer acting as riskless principal for a qualified institutional buyer.

6. For purposes of this section, *effective conversion premium* means the amount, expressed as a percentage of the security's conversion value, by which the price at issuance of a convertible security exceeds its conversion value.

7. For purposes of this section, *effective exercise premium* means the amount, expressed as a percentage of the warrant's exercise value, by which the sum of the price at issuance and the exercise price of a warrant exceeds its exercise value.

b. *Sales by persons other than issuers or dealers.* Any person, other than the issuer or a dealer, who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter of such securities within the meaning of sections 2(a)(11) and 4(1) of the Act.

c. *Sales by Dealers.* Any dealer who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be a participant in a distribution of such securities within the meaning of section 4(3)(C) of the Act and not to be an underwriter of such securities within the meaning of section 2 (11) of the Act, and such securities shall be deemed not to have been offered to the public within the meaning of section 4(3)(A) of the Act.

d. *Conditions to be met.* To qualify for exemption under this section, an offer or sale must meet the following conditions:

1. The securities are offered or sold only to a qualified institutional buyer or to an offeree or purchaser that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer. In determining whether a prospective purchaser is a qualified institutional buyer, the seller and any person acting on its behalf shall be entitled to rely upon the following non-exclusive methods of establishing the prospective purchaser's ownership and discretionary investments of securities:

    i. The prospective purchaser's most recent publicly available financial statements, *Provided* That such statements present the information as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser;

    ii. The most recent publicly available information appearing in documents filed by the prospective purchaser with the Commission or another United States federal, state, or local governmental agency or self-regulatory organization, or with a foreign governmental agency or self-regulatory organization, *Provided* That any such information is as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser;

    iii. The most recent publicly available information appearing in a recognized securities manual, *Provided* That such information is as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser; or

    iv. A certification by the chief financial officer, a person fulfilling an equivalent function, or other executive officer of the purchaser, specifying the amount of securities owned and invested on a discretionary basis by the purchaser as of a specific date on or since the close of the purchaser's most recent fiscal year, or, in the case of a purchaser that is a member of a family of investment companies, a certification by an executive officer of the investment adviser specifying the amount of securities owned by the family of investment companies as of a specific date on or since the close of the purchaser's most recent fiscal year;

2. The seller and any person acting on its behalf takes reasonable steps to ensure that the purchaser is aware that the seller may rely on the exemption from the provisions of section 5 of the Act provided by this section;

3. The securities offered or sold:

    i. Were not, when issued, of the same class as securities listed on a national securities exchange registered under section 6 of the Exchange Act or quoted in a U.S. automated inter-dealer quotation system; *Provided*, That securities that are convertible or exchangeable into securities so listed or quoted at the time of issuance and that had an effective conversion

premium of less than 10 percent, shall be treated as securities of the class into which they are convertible or exchangeable; and that warrants that may be exercised for securities so listed or quoted at the time of issuance, for a period of less than 3 years from the date of issuance, or that had an effective exercise premium of less than 10 percent, shall be treated as securities of the class to be issued upon exercise; and *Provided further*, That the Commission may from time to time, taking into account then-existing market practices, designate additional securities and classes of securities that will not be deemed of the same class as securities listed on a national securities exchange or quoted in a U.S. automated inter-dealer quotation system; and

ii. Are not securities of an open-end investment company, unit investment trust or face-amount certificate company that is or is required to be registered under section 8 of the Investment Company Act; and

4.

i. In the case of securities of an issuer that is neither subject to section 13 or 15(d) of the Exchange Act, nor exempt from reporting pursuant to Rule 12g3-2(b) under the Exchange Act, nor a foreign government as defined in Rule 405 eligible to

ii. register securities under Schedule B of the Act, the holder and a prospective purchaser designated by the holder have the right to obtain from the issuer, upon request of the holder, and the prospective purchaser has received from the issuer, the seller, or a person acting on either of their behalf, at or prior to the time of sale, upon such prospective purchaser's request to the holder or the issuer, the following information (which shall be reasonably current in relation to the date of resale under this section): a very brief statement of the nature of the business of the issuer and the products and services it offers; and the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited to the extent reasonably available).

iii. The requirement that the information be *reasonably current* will be presumed to be satisfied if:

A. The balance sheet is as of a date less than 16 months before the date of resale, the statements of profit and loss and retained earnings are for the 12 months preceding the date of such balance sheet, and if such balance sheet is not as of a date less than 6 months before the date of resale, it shall be accompanied by additional statements of profit and loss and retained earnings for the period from the date of such balance sheet to a date less than 6 months before the date of resale; and

B. The statement of the nature of the issuer's business and its products and services offered is as of a date within 12 months prior to the date of resale; or

C. With regard to foreign private issuers, the required information meets the timing requirements of the issuer's home country or principal trading markets.

e. Offers and sales of securities pursuant to this section shall be deemed not to affect the availability of any exemption or safe harbor relating to any previous or subsequent offer or sale of such securities by the issuer or any prior or subsequent holder thereof.

f. IC act ’40 Sec 2 (51)(A) ‘‘Qualified purchaser’’ means—

(i) any natural person (including any person who holds a joint, community property, or other similar shared ownership interest in an issuer that is excepted under section 3(c)(7) with that person’s qualified purchaser spouse) who owns not less than $5,000,000 in investments, as defined by the Commission;

(ii) any company that owns not less than $5,000,000 in investments and that is owned directly or indirectly by or for 2 or more natural persons who are related as siblings or spouse (including former spouses), or direct lineal descendants by birth or adoption, spouses of such persons, the estates of such persons, or foundations, charitable organizations, or trusts established by or for the benefit of such persons;

(iii) any trust that is not covered by clause (ii) and that was not formed for the specific purpose of acquiring the securities offered, as to which the trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a person described in clause (i), (ii), or (iv); or

(iv) any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than $25,000,000 in investments.