



VOICE OF INDEPENDENT BROKER-DEALERS
AND INDEPENDENT FINANCIAL ADVISORS

www.financialservices.org

VIA ELECTRONIC MAIL

November 14, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: SR-FINRA-2011-057 - Proposed Rule Change to Adopt New FINRA Rule 5123 (Private Placements of Securities)

Dear Ms. Murphy:

On October 5, 2011, the Financial Industry Regulatory Authority (FINRA) filed with the Securities and Exchange Commission (SEC) SR-FINRA-2011-057 proposing the adoption of FINRA Rule 5123 regarding private placements of securities (Proposed Rule).¹ Under the Proposed Rule, FINRA would require members, and associated persons, that offer or sell private placements or participate in the preparation of private placement memoranda (PPMs), term sheets or disclosure documents in connection with a private placement, to provide disclosures to investors prior to sale describing the use of offering proceeds and amount of offering expenses and compensation. Furthermore, the Proposed Rule would also require such disclosures to be filed with FINRA within 15 calendar days after the date of first sale.

The Financial Services Institute (FSI)² welcomes the opportunity to comment on the Proposed Rule. We generally support the Proposed Rule as it will provide an enhanced level of disclosure to investors participating in private placements of securities. In addition, we applaud FINRA for responding to several of the concerns we raised previously. However, we continue to have concerns regarding certain aspects of the Proposed Rule. These concerns are outlined in detail below.

Background on FSI Members

The independent broker-dealer (IBD) community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a

¹ Available at <http://www.finra.org/Industry/Regulation/RuleFilings/2011/P124600>.

² The Financial Services Institute is an advocacy organization for the financial services industry – the only one of its kind – FSI is the voice of independent broker-dealers and independent financial advisors in Washington, D.C. Established in January 2004, FSI's mission is to create a healthier regulatory environment for their members through aggressive and effective advocacy, education and public awareness. FSI represents more than 125 independent broker-dealers and more than 31,000 independent financial advisors, reaching more than 15 million households. FSI is headquartered in Atlanta, GA with an office in Washington, D.C.

comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 201,000 independent financial advisors – or approximately 64% percent of all practicing registered representatives – operate in the IBD channel.³ These financial advisors are self-employed independent contractors, rather than employees of the IBD firms. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisors are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisors affiliated with IBDs is comprised of clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisors are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.⁴ Independent financial advisors get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisors have a strong incentive to make the achievement of their clients' investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisors. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisors play in helping Americans plan for and achieve their financial goals. FSI's primary goal is to insure our members operate in a regulatory environment that is fair and balanced. FSI's advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

Comments on the Proposed Amendments

As noted above, FSI welcomes the opportunity to comment on the Proposed Rule. We applaud FINRA for responding to concerns that we raised previously. Particularly, we commend FINRA for recognizing the difficulties that the requirement to use 85 percent of offering proceeds for business purposes would have imposed on broker-dealers had it been adopted. We applaud FINRA for replacing this requirement with a disclosure-based approach instead. While we approve of FINRA's response on that issue, we continue to have significant concerns with the rule.

Under the Proposed Rule, FINRA seeks to adopt the following approach regarding the filing of offering documents used in connection with a private placement of securities:

The private placement memorandum, term sheet or such other offering document, and any amendments thereto, must be filed

³ Cerulli Associates at <http://www.cerulli.com/>

⁴ These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisors.

with FINRA by the participating member or associated person no later than 15 calendar days after the date of first sale. Any material amendments to the private placement memorandum, term sheet or other disclosure document, or any amendments to the disclosures mandated by this Rule, must be filed with FINRA no later than 15 calendar days after the date such document is provided to any investor or prospective investor.⁵

In response to this proposed requirement, we noted in our initial comment letter that such a construction would create ambiguity regarding which member of the selling group would be obligated to file the private placement memorandum, term sheet, or such other offering document with FINRA. The proposal would result in every broker-dealer who participates in the sale and distribution of a private placement filing the same document(s) with FINRA in order to comply with this provision. As an alternative to the Proposed Amendment, we urged FINRA to adopt a different approach, one which would permit the managing broker-dealer of a private placement to file the required document(s).

FINRA responded to our comments by noting that the Proposed Rule would in fact require each member that participates in a private placement of securities to make the required filing. Furthermore, FINRA indicated that it had considered requiring a single member to provide the necessary filing, but that such an approach would "limit its ability to gain timely access to information about the private placement business of FINRA members that might not file."⁶ We respectfully disagree.

We urge FINRA to adopt an approach that would permit the managing broker-dealer to file the required document(s) and include a list of the selling group participants. After making the required filing, the managing broker-dealer would then provide selling group participants with certification that the filing was made, with the accompanying right of selling group members to rely on such a certification. Such an approach would permit FINRA to access information about the private placement business of all FINRA members involved in the private placement while also providing lower costs through elimination of duplicative filing. As a result, we urge FINRA to adopt this approach to the filing of private placement memorandums.

⁵ SR-FINRA-2011-057, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p124598.pdf>.

⁶ Id.

Conclusion

We remain committed to constructive engagement in the regulatory process and welcome the opportunity to work with FINRA and the SEC to enhance investor protection and broker-dealer compliance efforts.

Thank you for your consideration of our comments. Should you have any questions, please contact me at 770 980-8488.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. T. Bellaire". The signature is fluid and cursive, with a large initial "D" and "T" followed by "Bellaire".

David T. Bellaire, Esq.
General Counsel and Director of Government Affairs