



This proposal while admirable in its intent fails two major needs of small business i.e. to avoid complexity and provide for certainty. It also fails to completely explain how these securities are distributed thereby adding to the complexity for those who have not followed this issue over the years. We also believe that the proposal should address the distinction between a suitable investment under the new FINRA rule and an accredited investor especially in the context of issuer distributions as described infra.

<http://sec.gov/rules/proposed/2012/33-9354.pdf>

We note first that the staff is no longer using the word sophisticated to describe accredited investors as they never were and never will be for all the reasons noted in comments suggesting that the definition be changed. See fn 27. If those assets or salaries were earned in a non financial business or inherited they say nothing about financial sophistication while the finance professor who cannot meet the limits is arguably sophisticated. However the Commission makes very clear they do not want to revisit this issue so we can only add our support to those who have recommended that they do.

Private placements are distributed by registered brokers and by issuer direct placements under Rule 3a4-1 and to a large but unknown extent by unregistered finders. Brokers will have a suitability requirement if they recommend the security but those without a broker have no such protection.

On June 7, 2012, the SEC approved FINRA Rule 5123, which creates new filing requirements for FINRA members that sell securities in a private placement. The new rule will go into effect on December 12, 2012. FINRA believes the information obtained through compliance with these new requirements will help detect and prevent fraud in connection with private placements.

Under this new rule, a FINRA member selling securities in a private placement is required to submit to FINRA a copy of any private placement memorandum (PPM), term sheet or other offering document (including exhibits) used in connection with such a sale. These documents must be submitted within 15 calendar days of the date of the first sale by that member. Any material amendments to a previously filed

document must also be submitted within 15 days of the date such document is provided to any investor. If no such offering documents were used, the firm must indicate this to FINRA.

However much of this release is encumbered by discussing how the broker or issuer can be certain that the investor meets the accredited definition. Most specifically it asks whether reasonably reliable third party certification works especially in view of investor privacy concerns. We suggest that the use of five categories of certifiers should provide a safe harbor for issuers. Those would include registered brokers, registered IA's, certified financial planners, attorneys and accountants. Possibly CFA's could also be acceptable. We also believe that these certifiers should also confirm that the investment is suitable or reasonable for their clients. Whatever descriptive term is used it should be more than evaluating the merits and risks of the investment under rule 506. These individuals have every incentive not to place their clients' assets at risk. This policy would be understandable and reasonable and can be in addition to whatever else might be allowed and this would be a clear statement that should not require legal fees to interpret. These professionals can if needed work out additional fees from their clients for this representation/certification but they will be ultimately responsible to their own clients. It is hard to envision an accredited investor that does not have or could not develop a relationship with one of these professionals. If not they should have to provide their very personal information needed to qualify.

While much has been written about the potential harm to such investors little data has been offered that they are in more danger than those who have invested in registered offerings during the recent financial crisis. We think the Commission can and should make this a workable and protective policy.

Larry Tabb has recently analyzed FINRA'S new suitability rule in a manner similar to the accredited investor analysis being proposed here:

http://tabbforum.com/opinions/how-should-broker-dealers-leverage-finra-rule-2111?utm_source=TabbFORUM+Alerts&utm_campaign=b4ffb950be-UA-12160392-1&utm_medium=email

"The new FINRA Rule 2111 stipulates that a firm or advisor must "have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence." The new rule makes it clear that a broker-dealer lacking a complete understanding of both the product and the customer is in violation of the rule. Rule 2111 therefore drastically changes the brokerage onboarding process through transformation to a more dynamic and perpetual "know-your-customer" experience. The reasonable basis analysis for concluding that a given strategy or product recommendation is suitable will likely be a collaborative data process - which is a substantial shift from the traditional account opening process.

Safe harbors, which constitute a legal provision to reduce or eliminate liability, are often used as a part of a compliance strategy. For example, Rule 2111 requires broker-dealers and associated persons, for both retail and institutional accounts, to document with specificity their reasonable basis for believing that a given profile data element is either not relevant, or alternatively, customer-provided with a reliance on the accuracy of the customer's submission. The reliance on the submission as part of a rules-based collaborative onboarding process constitutes reasonable basis – provided no red flag or suspicious activity is detected. Because of the ongoing and perpetual suitability requirement, the collaboration feature is likely the next generation of onboarding intelligence.

Rule 2111, in part, is comprised of reasonable-basis suitability. The reasonable-basis obligation requires a broker-dealer or associated person to have a reasonable basis to believe that the product or strategy recommendation is suitable for at least some investors. FINRA, through its guidance, stated that “[b]rokers cannot fulfill their suitability responsibilities ... when they fail to understand the securities and investment strategies they recommend.” Where the broker-dealer's repository already contains product and strategy data, the rules-based query engine could easily harmonize the data (for cross-selling purposes), and/or evaluate profile suitability (for compliance purposes). The collaboration rules are necessary to allow for any after-the-fact determination that may narrow or widen the customer/counterparty risk tolerance, time perspective, or other data element.

Suitability is an often misunderstood concept. Many misapply the suitability test as a subjective determination and attribute the analysis to a single customer – and an anticipated product. This oversimplification effectively wastes useful aggregated customer profile data by failing to leverage system-based profile range analysis.

FINRA Rule 2111 has made customer onboarding more complex. First, the data must be more time-sensitive and dynamic to account for changes in customer risk tolerance, circumstance, or investment strategies. Second, Rule 2111 expands the scope of customer recommendation. The suitability rule applies to any recommendation to a customer. “Customer” is defined broadly as anyone who is not a “broker or dealer” and includes an individual or entity (including institutional customers) with whom a broker-dealer has a business relationship related to brokerage services. Even a non-transactional business relationship where no account was opened, nor any transaction effectuated, under the rules, will constitute a broker-customer relationship.

A rules-based processing engine is necessary to account for changes in customer risk tolerance, circumstance, or investment strategies as required by Rule 2111. Data elements that contribute to customer profiles should be leveraged in advance, while the onboarding solution proactively aligns customers with strategies and simultaneously measures real-time suitability. The collaboration feature must be flexible and rules-based to account for individual circumstances and proprietary business methods.”

We believe therefore that the use of the 5 categories of professionals above will constitute a similar reasonable basis for concluding that a customer is accredited and that the investment is reasonable or suitable and will provide the same protections to issuer distributed offerings as are present in bd solicited offerings and certainty to those issuers. Finally the Commission should use this opportunity to continue to analyze the finder question and to find a solution to it perhaps within the context of these certifiers.

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