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November 23, 2020

Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Via E-Mail

File No. SR-FINRA-2020-038

Dear Sir or Madam:

North Capital Private Securities Corp. and Public Brokers, LLC are both SEC-registered broker-dealers focused on private placements and other exempt securities offerings. Both firms are wholly-owned subsidiaries of North Capital Investment Technology Inc., a financial technology company focused on improving the access, liquidity, and transparency of exempt securities through the development and deployment of technology infrastructure.

We appreciate the opportunity to comment on the proposed amendments to FINRA Rules 5122 (Private Placements of Securities Issued by Members) and 5123 (Private Placements of Securities) that Would Require Members to File Retail Communications Concerning Private Placement Offerings that are Subject to Those Rules' Filing Requirements.

We support the proposed amendments for the following reasons: first, FINRA and SEC rules *already* require member firms to maintain detailed records regarding the advertising review and approvals process. These records are subject to Staff review and are routinely requested during the course of cycle examinations and deal-specific inquiries. Second, to the extent that regular, systematic submissions of advertising material facilitate the review process, we see no reason not to modify the Firms' procedures to include submissions as a part of the Rule 5122 and Rule 5123 document submission process.

However, we respectfully request that the Commission use the opportunity of this FINRA Rule amendment to provide definitive guidance to FINRA and member firms with respect to two elements of Rule 2210:

(1). Rule 2210 speaks for itself. It covers "...correspondence, retail communications and institutional communications."¹ As a FINRA rule, it applies to members and their associated persons (i.e., communications by member firms or individual registered representatives). Since the passage of the JOBS Act in 2012, and the growth of non-private exempt offerings conducted under Regulation D, 506(c) of the Securities Act of 1933, there has been a proliferation of advertising and standardized communications with the public by exempt securities issuers. These communications may occur prior

¹ 2210. Communications with the Public - <https://www.finra.org/rules-guidance/rulebooks/finra-rules/2210>.

to engagement of a broker-dealer, concurrent with the engagement of a broker-dealer, or after such engagement has been terminated. Over the past eight years, in cases where a member firm has been retained by an issuer as placement agent, FINRA Staff have increasingly moved to conflate communications produced and disseminated *by the issuer itself* with communications created or disseminated by the member firm, regardless of the level of involvement of the member firm or its registered representatives in producing such communications.²

This puts the member firm in the untenable position of being required to answer for communications over which it has limited control. After we have been engaged by an issuer as a placement agent, we review issuer-prepared material (including offering documents, marketing material, and advertising) to ensure that it does not contain material misstatements or material omissions. If there is problematic language, we work with the issuer to modify it. If there are missing risk disclosures, we require them to be included or produce separate disclosures to supplement the issuer's own materials. While we always retain the option to terminate our representation of an issuer, in case we run into issues that cannot be rectified, this "death penalty" can only be applied after the fact. It also is of limited effectiveness. When should it be applied...if the issuer sends any advertisement that does not comply with Rule 2210? What about materials produced and disseminated prior the engagement of a broker-dealer? What if the issuer disagrees with the member firm whether a particular statement is materially misleading, or whether the omission of a fact would constitute a material omission? In most cases, we are able to explain to the issuer to accept our view on these matters. But is it the Commission's view that *any and all issuer communication* should be subject to Rule 2210, whether or not a member firm has participated in creating or disseminating it? What about the corner case where a member firm instructs an issuer to include certain language, and issuer's counsel does not permit the change? If the member firm knows for certain that AdReg will flag the language, must the member firm terminate the relationship?

We respectfully request that the Commission clarify the applicability of Rule 2210 to materials *prepared and disseminated by an issuer* to the public, without the involvement of a member firm or its registered representatives. Given that the proposed amendment suggests that heightened

² FINRA, through its examination process, has flagged as Rule 2210 violations, communications prepared and disseminated *by an issuer without input or involvement* of the Firm. In another case a FINRA examiner implied that the member *should review and archive communications between an issuer and its prospective investors*, whether the Firm or its registered personnel were involved in the communication or solicitation process. FINRA Regulatory Notice 20-21 further expanded the scope of Rule 2210: "In addition, FINRA has observed that some issuer-prepared private placement memoranda (PPMs) are bound or presented as one electronic file with retail communications, such as cover pages or exhibits. Such retail communications are distinguishable by their marketing or promotional content from the factual descriptions and financial information about the issuer generally disclosed in the PPMs. Regardless of whether a member firm distributes a retail communication that is attached to a PPM or as a standalone document, it constitutes a communication of the member firm subject to Rule 2210." FINRA has applied this interpretive guidance even more broadly, to cases where the issuer has engaged a broker-dealer but *produces and disseminates* its own offering documents, sales material, and advertisements (for example, via an issuer-controlled website platform and social media posts), *without involvement of the member or its associated persons*. In other words, if the information is disseminated by *anyone*, it is presumptively disseminated by and the responsibility of the member firm.



supervision by FINRA will be forthcoming, the Commission should make clear how far a member firm's obligations will stretch.

(2). We respectfully request that the Commission provide clear interpretive guidance regarding the specific terminology and scope of Rule 2210. We share the Commission's and FINRA's objective of promoting investor protection with regard to exempt securities offerings. As the rules governing issuer-direct offerings have diverged from the rules applied to offerings conducted by registered broker-dealers,³ the motivation of issuers to "opt out" of regulation has become intense⁴ and member firms are being unfairly penalized and are losing business. While the language and intent of Rule 2210 dovetails with SEA Rule 10b-5, FINRA has provided interpretive guidance that is far more restrictive than Rule 2210 itself or Rule 10b-5. For example, consider the following statement from a real estate sponsor's private offering memorandum:

"The Sponsor has underwritten the Project based upon current market conditions, the Sponsor's budgetary assumptions, post-occupancy rental market assumptions, and a return objective of 15%. However, the Project is high risk and could fail to achieve the Sponsor's objective. Specifically, the Project could experience cost overruns, market conditions could deteriorate, or the Sponsor's underwriting assumptions could prove to be incomplete or flawed. As such, the investor could realize a negative return, up to and including a total loss of their investment."

Rule 2210(d)(1)(F) states: "Communications [with the public by the member firm] may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast."

The statement above about the project's return objective, produced by the sponsor in its own offering documents, would be deemed by FINRA to be a violation of Rule 2210 because it references a performance objective, even though it is not a prediction or projection, does not imply specific performance, and does not make any exaggerated or unwarranted claim, opinion or forecast. Two-thirds of the statement are risk disclosures and balancing statements. The issuer can make this statement without violating any regulation, including Rule 10b-5, but if a member firm were involved as placement agent for the offering, this statement would not be permitted.

We respectfully request that the Commission level the playing field. If the goal of the Commission is to prevent statements in offering materials or communications with the public like the captioned statement above, then we ask the Commission to provide regulatory guidance to all issuers of exempt securities that such statements constitute a 10b-5 violation. If not, then we ask the

³ Rule 10b-5 of the Securities and Exchange Act of 1934, referred to in the industry as the "anti-fraud" rule, is the principal compliance rule for issuers, while registered broker-dealers are subject to both Rule 10b-5 and all FINRA regulations that are designed to complement it, including Rule 2210.

⁴ North Capital Private Securities Corporation and other firms involved in exempt offerings regularly encounter scenarios where issuers elect not to work with a broker-dealer because the cost of compliance is too high.



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Commission to provide appropriate guidance to FINRA and its member firms to ensure a consistent application of regulations.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "James P. Dowd", with a long horizontal flourish extending to the right.

James P. Dowd
North Capital Private Securities Corp.
Public Brokers, LLC

