

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-91066; File No. SR-FINRA-2020-038)

February 4, 2021

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change, as modified by Amendment No. 1, 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

I. Introduction

On October 28, 2020, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change SR-FINRA-2020-038 ("Proposed Rule Change") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4² thereunder to amend FINRA Rules 5122 (Private Placements of Securities Issued by Members) and 5123 (Private Placements of Securities) to require members to file retail communications concerning private placement offerings that are subject to those rules' filing requirements.³ The Proposed Rule Change was published for public comment in the Federal Register on November 6, 2020.⁴ On December 11, 2020, FINRA consented to an extension of the time period in which the Commission must approve the Proposed Rule Change, disapprove the Proposed Rule Change, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See infra note 4.

⁴ See Exchange Act Release No. 90302 (Nov. 2, 2020), 85 FR 71120 (Nov. 6, 2020) (File No. SR-FINRA-2020-038) ("Notice").

February 4, 2021.⁵ On January 12, 2021, FINRA filed an amendment to modify the Proposed Rule Change (“Amendment No. 1”).⁶ The Commission is publishing this order pursuant to Section 19(b)(2)(B) of the Exchange Act⁷ to solicit comments on Amendment No. 1 from interested persons and to institute proceedings to determine whether to approve or disapprove the Proposed Rule Change, as modified by Amendment No.1 (“Amended Proposed Rule Change”).

II. Description of the Amended Proposed Rule Change

For certain private placements of unregistered securities issued by a FINRA member or a control entity⁸ (“member private offerings”), FINRA Rule 5122 requires the member or control entity to provide prospective investors⁹ with a private placement memorandum (“PPM”), term sheet or other offering document that discloses the intended use of the offering proceeds, the offering expenses and the amount of selling compensation that will be paid to the member and its associated persons. Among other things, the current rule also requires a member to file the PPM, term sheet or other offering document with the FINRA Corporate Financing Department at or

⁵ See letter from Joseph Savage, Vice President, Office of General Counsel Regulatory Policy, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated December 11, 2020.

⁶ Amendment No. 1 is available at <https://www.finra.org/sites/default/files/2021-01/SR-FINRA-2020-038-Amendment1.pdf>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ A “control entity” means any entity that controls or is under common control with a member, or that is controlled by a member or its associated persons. See FINRA Rule 5122(a)(2)-(3); see also Notice at note 3.

⁹ Because of the types of private placements exempt from the application of Rule 5122, FINRA believes that the rule applies predominately to private placements sold to retail investors. See Notice at 71121.

prior to the first time the document is provided to any prospective investor, as well as any amendments to such documents within 10 days of being provided to any investor or prospective investor.¹⁰ Similarly, for certain private placements¹¹ of unregistered securities issued by a non-member, FINRA Rule 5123 requires members or control persons to file with FINRA any PPM, term sheet or other offering document,¹² including any material amended versions thereof, used in connection with an offering within 15 calendar days of the date of first sale.

FINRA proposes amendments to Rules 5122 and 5123 to require members or control persons to file private placement retail communications¹³ with FINRA, in addition to the currently required PPMs, term sheets, and other offering documents. Specifically, the Amended Proposed Rule Change would require members or control persons to file with the FINRA

¹⁰ See Notice at 71120.

¹¹ See supra note 9.

¹² Rules 5122 and 5123 do not enumerate the types of information that might be considered “other offering documents.” However, FINRA has stated previously that an example of “other offering document” is “[a]ny other type of document that sets forth the terms of the offering.” See “Frequently Asked Questions (FAQ) About Private Placements,” Question #10, available on www.finra.org. The terms of an offering include facts such as the amount of proceeds that the issuer intends to raise, the type of security, descriptions or illustrations of the intended use of proceeds, and explanations of tax benefits or other information that would be relevant to an investor when deciding whether to make an investment. See Notice at 71121.

¹³ Rule 2210(a)(5) defines a “retail communication” as any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period. See Regulatory Notice 20-21 (July 2020) (stating that a member firm that assists in the preparation of a private placement memorandum or other offering document should expect that it will be considered a communication with the public by that member firm for purposes of Rule 2210 (Communications with the Public)); see also letter from Joseph P. Savage, Vice President and Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated January 12, 2021, available at <https://www.sec.gov/comments/sr-finra-2020-038/srfinra2020038-8233135-227749.pdf>.

Corporate Financing Department at, or prior to, the first time the document is provided to any prospective investor, any retail communication that “promotes or recommends” a private placement, rather than any retail communication that “concerns” a private placement, as originally proposed.¹⁴

III. Proceedings to Determine Whether to Approve or Disapprove File No. SR-FINRA-2020-038 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to determine whether the Amended Proposed Rule Change should be approved or disapproved.¹⁵ Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Amended Proposed Rule Change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to the Amended Proposed Rule Change.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,¹⁶ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis and input concerning whether the Amended Proposed Rule Change is consistent with the Exchange Act and the rules thereunder.

¹⁴ Specifically, Amendment No. 1 would limit the filing requirement of the Proposed Rule Change to those retail communications that “promote or recommend” a private placement, rather than any retail communication that “concerns” a private placement, as originally proposed.

¹⁵ 15 U.S.C. 78s(b)(2)(B).

¹⁶ Id.

IV. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Amended Proposed Rule Change. Specifically, the Commission is requesting comment on whether the Amended Proposed Rule Change adequately addresses commenters' concerns regarding the scope of the proposed filing requirement in light of the regulatory goals of improving the quality of broker-dealer private placement communications and strengthening FINRA's ability to monitor for potential violations of its rules governing members' communications with the public. In particular, the Commission invites the written views of interested persons concerning whether the Amended Proposed Rule Change is consistent with the Exchange Act and the rules thereunder.

Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.¹⁷

Interested persons are invited to submit written data, views, and arguments regarding whether the Amended Proposed Rule Change should be approved or disapproved by [insert date 14 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 24 days from publication in the Federal Register].

¹⁷ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR- FINRA-2020-038 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. SR-FINRA-2020-038. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the Amended Proposed Rule Change that are filed with the Commission, and all written communications relating to the Amended Proposed Rule Change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File No. SR-FINRA-2020-038 and should be submitted on or before [insert date 14 days from publication in the Federal Register]. If comments are received, any rebuttal comments should be submitted on or before [insert date 24 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

J. Matthew DeLesDernier
Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(57).