



NASAA

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NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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November 24, 2020

By email to: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

J. Matthew DeLesDernier  
Assistant Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: **File Number SR-FINRA-2020-038: Notice of Filing of 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**

Dear Mr. DeLesDernier:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),<sup>1</sup> I am writing in response to U.S. Securities and Exchange Commission (“SEC” or “Commission”) Release No. 34-90302, *Notice of Filing of 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*, File No. SR-FINRA-2020-038 (the “Proposal”).<sup>2</sup> NASAA supports the Proposal and encourages its approval by the Commission.

The Proposal would amend two rules of the Financial Industry Regulatory Authority, Inc. (“FINRA”). These rules, FINRA Rules 5122 and 5123, require broker-dealers to file certain private placement offering materials with FINRA’s Corporation Finance Department. Specifically, FINRA member firms must file copies of any private placement memoranda (“PPMs”), term sheets or other offering materials used in a private placement in which the firms

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<sup>1</sup> Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

<sup>2</sup> The Proposal is available at <https://www.sec.gov/rules/sro/finra/2020/34-90302.pdf>.

participate. Importantly, though, Rules 5122 and 5123 do not require broker-dealers to file copies of advertising materials used in those same private placements. Private placement advertising materials thus are able to escape regulatory review by FINRA.<sup>3</sup>

As stated in the Proposal, in 2018 FINRA conducted a “spot check” of advertising materials being used in private placements. This spot check “revealed significant and pervasive violations” of FINRA’s standards for communications with the public under FINRA Rule 2210: of over 1,000 communications reviewed in the spot check, 76% did not comply with Rule 2210.<sup>4</sup> What is more, many of these advertising violations were material, including false or misleading investment projections or risk/reward statements. FINRA’s spot check demonstrates that increased regulatory scrutiny is needed for these types of communications.<sup>5</sup>

NASAA members have also observed significant, recurring problems with private placements. NASAA has repeatedly informed the Commission of the prevalence of abuse in these offerings.<sup>6</sup> With the SEC’s recent regulatory changes to the private offering marketplace, by broadening the accredited investor definition<sup>7</sup> and expanding the capacity for issuers to raise capital through exempt offerings,<sup>8</sup> the need for increased regulatory scrutiny of private placement advertisements is even more acute.

The Proposal’s answer to this pressing issue – requiring that advertisements be filed for review by FINRA at the same time as members file offering materials under Rules 5122 and 5123 – is a reasonable regulatory response.<sup>9</sup> Many broker-dealers already file their private placement advertisements with FINRA, voluntarily submitting them for regulatory scrutiny. But all FINRA

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<sup>3</sup> The Proposal notes that many broker-dealers voluntarily provide private placement advertising materials to FINRA for review, though they are not required to do so. *See* Proposal at 6, 11.

<sup>4</sup> *See id.* at 7.

<sup>5</sup> NASAA members welcome referrals of these matters from FINRA for further investigation.

<sup>6</sup> *See, e.g.,* Letter from NASAA President Lisa Hopkins to Vanessa Countryman, *Re: File No. S7-13-20: Notice of Proposed Exemptive Order Granting Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Finders*, at 2 (Nov. 12, 2020), available at <https://www.sec.gov/comments/s7-13-20/s71320-8011724-225390.pdf>.

<sup>7</sup> *Amending the “Accredited Investor” Definition*, SEC Rel. No. 33-10824 (Aug. 26, 2020), available at <https://www.sec.gov/rules/final/2020/33-10824.pdf>.

<sup>8</sup> *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, SEC Rel. No. 33-10884 (Nov. 2, 2020), available at <https://www.sec.gov/rules/final/2020/33-10844.pdf>.

<sup>9</sup> Although not part of the Proposal, NASAA believes FINRA should amend Rule 5123 and align it with Rule 5122 to require that all Rule 5123 materials be filed with FINRA at or before their first use with the public. Rule 5123’s current standard of allowing advertising materials to be filed within fifteen days of the first sale permits potentially fraudulent materials to be distributed to investors with no opportunity for regulatory review. *See* Proposal at 3-4 (discussing regulatory filing and review processes under Rules 5122 and 5123).

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firms should do so. The Proposal is a good step towards remediating some of the problems inherent in the private placement market and, for these reasons, should be approved by the Commission.

Thank you for considering these views. NASAA looks forward to continuing to work with FINRA and the Commission in the shared mission to protect investors. Should you have questions, please contact either the undersigned or NASAA's General Counsel, Vince Martinez, at (202) 737-0900.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa Hopkins", written in a cursive style.

Lisa Hopkins  
NASAA President  
General Counsel and Senior Deputy  
Commissioner of Securities, West Virginia