



PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

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November 27, 2020

via email to rule-comments@sec.gov
Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: SR-FINRA-2020-038 - Proposed Rule Change to Amend
FINRA Rules 5122 (Private Placements of Securities Issued by Members)
and 5123 (Private Placements of Securities)**

Dear Ms. Countryman:

I write on behalf of the Public Investors Arbitration Bar Association (“PIABA”), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority (“FINRA”) relating to both investor protection and disclosure. As such, PIABA frequently comments upon proposed rule changes and retrospective rule reviews in order to protect the rights and fair treatment of the investing public.

In SR-FINRA-2020-038, FINRA proposes to change Rules 5122 and 5123 regarding private placements (“Rule Proposal”). In particular, the changes would require members to file retail communications concerning private placement offerings with FINRA. PIABA supports the Rule Proposal.

SR-FINRA-2020-038 indicates that there is a significant problem with retail communications related to private placements. As noted in Page 12 of the Rule Proposal, a 2018 spot check of retail communications revealed that 76% of these communications had “significant violations” of FINRA Rule 2210, which governs communications with the public. This included: 45% of these communications using prohibited projections or unreasonable forecasts; 44.6% exhibited a failure to balance the benefits with the risks; 39.9% failed to adequately disclose general risks of the investment; and 21.8% had readily apparent false or misleading claims. Footnote 12 noted that 13% of retail communications contained such serious Rule violations that FINRA mandated that the firm not use that particular communication.

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These numbers are troubling, considering that private placements are, by their nature, private and information about them is limited. Investors seeking information about publicly-traded investments have many sources to gather information about the particular investment or company. If the investing public wants to get information about a private investment, the only sources of information about the investment come from: the issuer (usually in lengthy, boilerplate private placement memoranda with legalese that is only understood by a small percentage of the population); the Form D filing with the SEC (which usually contains little information about the offering or the underlying company); or the advisor/brokerage firm selling the products to the investor. Since most investors are relying on the information provided by their advisor or brokerage firm, FINRA needs this rule to ensure that accurate and meaningful information is being provided to investors. The Rule Proposal would enable FINRA to ensure that all of the materials provided to investors are accurate, transparent, and consistent with regulatory standards. Further, the Rule Proposal would extend FINRA's ability to understand the scope and severity of existing issues in a more accurate and efficient manner, which would further enhance FINRA's surveillance and enforcement activities and discover significant violations *before* the sale of the security. This Rule gives FINRA the ability to prevent investor harm before it occurs.

FINRA must keep an eye of private placement sales abuses, because the numbers of persons who can invest in private placements has increased substantially over the last several decades. The SEC first established standards for "accredited" investors in 1982. This accredited investor standard included having a \$1 million net worth or an income of \$200,000 per year for individuals (or \$300,000 per year for joint filers). By these standards, in 1982, only 1.8% of American households qualified as "accredited", while in 2013, this number had risen to 9.9%. *See* Commissioner Luis Aguilar's Statement on "Revisiting the 'Accredited Investor' Definition to Better Protect Investors at fn 3 (Dec. 17, 2014) (available at https://www.sec.gov/news/statement/spch121714laa.html#_edn3). In a December 2019 statement, Commissioner Allison Herren Lee estimated that this accredited investor pool will grow to 22.7% of American households in the next decade. *See* Commissioner Allison Herren Lee's "Statement on the Proposed Expansion of the Accredited Investor Definition" (Dec. 18, 2019) (available at https://www.sec.gov/news/public-statement/statement-lee-2019-12-18-accredited-investor#_ftnref6). The growing pool of "accredited" investors stems from a variety sources, but including inflationary pressures, and does not translate to an increase in sophistication or experience with investing. With more "accredited" investors in the pool there are more investors susceptible to abusive sales practices. The Rule Proposal will increase the pressure on members and issuers to provide consistent and accurate information, thereby enhancing investors' ability to adequately ascertain the risks of these investments.

These numbers will only worsen if FINRA does not enact the proposed changes to Rules 5122 and 5123. FINRA must be mindful of these challenges and devote adequate resources to policing these abuses. While the Rule Proposal would increase FINRA's oversight of private placement offerings, there would be little to no economic impact to firms and issuers, because they are already required to file private placement offerings with FINRA. The predominant impact would be to the benefit of the investing public.

Ms. Vanessa Countryman, Secretary

October 23, 2020

Page 3

In summary, PIABA supports the proposed changes to Rule 5122 and 5123 and hopes that FINRA can do more to curb abuses of sales of private placements.

Sincerely,

A handwritten signature in blue ink, appearing to read "David P. Meyer", with a long horizontal flourish extending to the right.

David P. Meyer, President
Public Investors Advocate Bar Association