
February 17, 2009

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

*Re: Exchange Act Release No. 34-59262, related to SR-FINRA-2008-20 concerning Member Private Offerings.*

Dear Ms. Murphy:

The Investment Program Association ("IPA")[1] appreciates this opportunity to respond to the request of the Securities and Exchange Commission (the "Commission") for comments on the above referenced rule proposal (the "Proposal"), as published for comments by the Commission pursuant to Exchange Act Release no. 34-59262. Capitalized terms used herein are defined in the Proposal, except as otherwise set forth herein.

**1. Description of the Proposal**

This proposal is the latest amendment of a proposal set forth initially in NASD Notice to Members 07-27 (June 2007) (the "NTM"). The NTM proposed filing, disclosure and use-of-proceeds requirements on a Member Private Offering ("MPO"), which is defined in the Proposal as a "private placement of unregistered securities issued by a member or a control entity." The Proposal, which proposes a new FINRA Rule 5122, goes on to define a "control entity" as "any entity that controls or is under common control with a member, or that is controlled by a member or its associated persons."

FINRA has put forth the Proposal to counter what FINRA sees as a gap in its regulation of the actions of members. FINRA notes in Amendment 2 to SR-FINRA-2008-20 that it has brought

[1] The Investment Program Association, organized in 1985, is a national trade association that represents the interests of sponsors and other industry participants in the promotion of non-traded investment programs, including non-traded real estate investment trusts, real estate programs, equipment leasing programs and oil and gas programs. The members of the IPA include most of the major publicly-offered direct participation program sponsors, most of whom have subsidiary broker-dealers who serve as the dealer-manager for offerings by sponsored investment programs. The views expressed in this letter do not necessarily reflect the views of all members of the IPA. More information about the IPA is available at our website, http://www.theipaonline.org.

numerous enforcement cases concerning abuses in connection with MPOs, including that members failed to provide written offering documents to investors, or provided offering documents that contained misleading, incorrect or selective disclosure, such as omissions and misrepresentations regarding selling compensation and the use of offering proceeds. In addition, as part of its examination program, FINRA conducted a non-public sweep of firms that had engaged in MPOs and reported that it had found widespread problems. According to FINRA, the MPO sweep revealed that in some cases, offering proceeds were used for individual bonuses, sales contest awards, commissions in excess of 20 percent, or other undisclosed compensation.[2] As FINRA states, the provisions of proposed Rule 5122 are intended to provide investor protections for MPOs that are similar to the protections provided by FINRA Rule 2720 for public offerings by FINRA members. While we appreciate FINRA's intent, we believe that the rules go beyond what is necessary to achieve FINRA's objective.

**2. The prohibition in Rule 5122(b) is too broad.**

Rule 5122(b) prohibits any "member or associated person" from offering or selling any securities in an MPO unless the requirements of Rule 5122 are met. In addition, the definition of "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 person." As such, the definition goes beyond normal concepts of a "control entity", and appears to mirror the definition of "affiliate" in the federal securities laws.[3] We understand that the concepts are not completely congruent due to Rule 5122's further definition of "control" as a beneficial interest of more than 50 percent of the outstanding voting securities of a corporation, or the right to more than 50 percent of the distributable profits or losses of a partnership or other non-corporate legal entity.[4] However, because the definition of "control entity" remains so broad, that definition, together with the broad wording of Rule 5122(b), can result in the Proposal reaching private placements that should not be covered by the Proposal.

The abuses that FINRA seeks to address appear to deal with capital raised for member firm working capital or operations. Because of its broad wording, however, the Proposal would go far beyond those situations to pick up private placements by owners of a member firm for businesses that are under common control with the member but otherwise have no connection to the member. Indeed, the member firm (other than through associated persons not acting in such capacity) may have nothing whatsoever to do with the offering, and the proceeds from such private placements would not be a source of working capital or other compensation for a member firm.[5]

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[2] *See* FINRA File No. SR-2008-20, Amendment No. 2 (the "FINRA Proposing Release") at Section 3.(a).

[3] *See, e.g.*, Rule 405 promulgated under the Securities Act of 1933, as amended from time to time ("An affiliate of, or person affiliated with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.").

[4] *See* Proposed FINRA Rule 5122(a)(3).

[5] *See* Letter from Mary Kuan for Securities Industry and Financial Markets Association dated July 27, 2007 ("SIFMA Letter"), which made a similar comment with respect to the NTM.

In addition, to the extent control persons of a member intend to raise capital for businesses that are under common control with, but are otherwise completely unrelated to, the member firm, they arguably would still be covered by the Proposal. Even if those controlling persons are not acting in their capacity as controlling persons of the member firm, or for that matter in any capacity in relation to the member firm, those controlling persons are almost certainly "associated persons" of the member firm. As a result, any such private placement for that unrelated, but affiliated, business would be covered by the Proposal if the owners of the member engage in any offering or selling activities relating to such offering. This type of transaction is clearly not one that would be subject to the abuses that concern FINRA. We suggest that FINRA make clear that Rule 5122 does not apply when an associated person is engaged in offering or selling a security for an affiliate of a member in a capacity other than that person's capacity as an associated person, and the member firm is not otherwise involved in the private placement. [6] Other alternatives to deal with this issue would be to provide that Rule 5122 does not apply when the member firm is not engaging in a distribution of the securities in the MPO (as opposed to unrelated activities by associated persons of the member firm), or that Rule 5122 does not apply when (i) the issuer is not the member firm, and (ii) the purpose of the offering is other than to provide working capital for the member firm.

**3. FINRA should issue no-objection letters, or in the alternative, have a set period of time within which to submit inquiries.**

As currently drafted, the proposed rule provides that FINRA will not provide a "no-objection" letter for filings under proposed Rule 5122, but that FINRA will review the filings and may conduct inquiries regarding the disclosure. We do not believe that this is a practical approach, because of the potential liability concerns from FINRA determining after the fact that a filing did not comply with the disclosure requirements of the Proposal.[7] Consequently, if FINRA is going to impose these requirements, it should undertake to provide "no-objection" letters in a timely fashion.

In the alternative, FINRA could set a certain period of time (for instance, within 10 calendar days of filing), after which FINRA could not make additional inquiries. By setting a specific period of time during which FINRA could make inquiries, the process would allow FINRA an opportunity to review filings, but still provide some certainty to persons conducting MPOs as to when they could proceed without the risk of receiving FINRA comments. [8]

**4. FINRA should not impose a limit on offering expenses.**

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[6] Dual employee status has been recognized by FINRA in various circumstances, and we think it appropriate to make that distinction in this case. *See, e.g.,* FINRA Rule 2810.

[7] *See* SIFMA Letter; Letter from Keith F. Higgins for American Bar Association Committee on Federal Regulation of Securities dated July 20, 2007 ("ABA Letter"). Both of these comment letters raised the same concerns with the proposed rule in the NTM, and those concerns have not been dealt with or responded to in the Proposal.

[8] We note that in the event disclosure issues are discovered more than 10 days after filing of an offering memorandum with FINRA, remedies under state and federal securities laws, including Rule 10b-5 under the Securities Exchange Act of 1934, as amended, would still be available.

Proposed Rule 5122(b)(3) imposes a requirement that at least 85% of the offering proceeds raised must be used for business purposes, which do not include offering costs, discounts, commissions or any other cash or non-cash sales incentives. Several commenters to the NTM mentioned this provision, noting that the provision seems arbitrary, and does not seem necessary to deal with the abuses noted by FINRA.[9] FINRA has responded in the Proposal that it "believes that when a member engages in a private placement of its own securities or those of a control entity, investors should be assured that, at a minimum, 85 percent of the proceeds of the offering are dedicated to business purposes." We would urge reconsideration of this position for several reasons.

First, the abuses that FINRA seems to be concerned about can be resolved through the disclosure requirements in the Proposal. Especially in the private offering context, we also note the comment put forth by IASBA that different member firms have different needs, and that member firms should be able to be flexible with this limit if it is properly disclosed. Indeed, given the fact that most private placements are to accredited investors[10] who should be able to negotiate this term of the offering for themselves, or at least make an informed decision on whether or not to invest, disclosure should be sufficient.

Second, this restriction puts member firms engaging in MPO at a disadvantage to other member firms that are under no such restriction with regard to acting as a placement agent. While we acknowledge that FINRA does not agree that the possibilities of abuse are the same in these two circumstances, subjecting MPOs to additional disclosure and filing requirements strikes a reasonable balance between addressing the potential for abuse while not unreasonably burdening or limiting certain member firms and not others.

**5. The additional disclosure requirements from NASD Notice to Members 07-27 should not be put back in the Proposal.**

The initial proposal set forth in the NTM contained additional disclosure requirements not in the current Proposal, requiring disclosure of risk factors associated with the investment, including company risks, industry risks and market risks, and any other information necessary to ensure that required information is not misleading. FINRA removed those requirements from the current Proposal, but in the Proposal specifically requested comment on its decision to exclude such disclosures.

We applaud FINRA's decision to remove those disclosure requirements from the Proposal, and agree that they should be omitted from any final rule.

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[9] *See* Letter from Dexter M. Johnson for Mallon & Johnson, P.C. dated July 19, 2007; Letter from Peter J. Chepucavage for the International Association of Small Broker-Dealers and Advisors dated July 20, 2007; ABA Letter; SIFMA Letter.

[10] Without repeating a discussion of the applicability of the Commission's rules and regulations to private placements, *see, e.g.*, SIFMA Letter and ABA Letter, we note, for instance, that if a private offering is not to accredited investors, the Commission has imposed extensive disclosure requirements. *See* Rule 502(b) promulgated under the Securites Act of 1933, as amended.

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We appreciate the opportunity to comment on the Proposal. If you have any questions concerning these comments, or would like to discuss these comments further, please feel free to contact me at the number above.

Respectfully submitted,

Jack L. Hollander
Chairman, IPA Executive Committee