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Via email to: rule-comments@sec.gov

July 15, 2016

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

Re: SR-FINRA-2015-054; Notice of Filing of Partial Amendment No. 2 to Proposed Rule Change to Adopt FINRA Capital Acquisition Broker Rules, Release No. 34-78220 (July 1, 2016), 81 Fed. Reg. 44371 (July 7, 2016)

Ladies and Gentlemen:

These comments are provided on behalf of SDR Capital Markets, Inc. (CRD # 170652), a niche investment banking firm that provides mergers and acquisitions advisory (sell-side and buy-side), private capital raising advisory and related services. In these regards, SDR Capital Markets, Inc. provides professional services in respect of securities transactions for which the involvement of a duly registered securities broker dealer and duly securities licensed registered representatives is required by applicable laws, rules and regulations.

Initially, we commend FINRA for proposing a rule set that would apply exclusively to FINRA member firms that meet the definition of "capital acquisition broker" ("**CAB**") and elect to be governed under the proposed FINRA CAB rule set (the "**CAB Rules**"). Because of the potential applicability of the proposed CAB Rules to SDR Capital Markets, Inc., we have been closely following these matters. Overall, we believe that the proposed CAB Rules are thoughtful, appropriate and reflect market realities.

Summary of Comments and Request Regarding the July 1, 2016, Notice:[1]

Respectfully, the proposed revision to CAB Rule 016(c)(1)(F) should be rejected because it fails to expressly allow a CAB to engage in "secondary transactions" that relate directly to the CAB's particular and limited business model.

Instead, CAB Rule 016(c)(1)(F) should be written to expressly permit CABs to engage in secondary market transactions, two specific examples of which are described below.

Moreover in these regards, SDR Capital Markets, Inc. agrees with and respectfully incorporates by reference the views expressed in the January 22, 2016, letter to the SEC from the Securities Regulation Committee of the Business Law Section of the New

[1] Release No. 34-78220 (July 1, 2016), 81 Fed. Reg. 44372 (July 7, 2016).

York State Bar Association ("Definition of CAB – Secondary Transactions") (the "**New York State Bar Association Letter**").

Discussion:

In addition to the "secondary transactions" considerations contained in the New York Bar Association Letter, we believe that FINRA and the SEC should consider and authorize expressly in the CAB Rules the following two materially important and reasonably foreseeable "secondary market" scenarios applicable to potential CABs:

- **First**, the proposed CAB Rules apparently would prohibit a CAB from selling subsequent to a private placement any securities that the CAB receives as compensation for acting as a placement agent in a private placement securities transaction.
  - It is not uncommon for the placement agent of a private placement securities transaction to receive non-cash, securities compensation: e.g., restricted stock, options and/or warrants.
  - The CAB Rules expressly should permit a CAB to sell such securities (as principal[2]) in a private secondary market transaction to an "Institutional Investor" as defined by proposed CAB Rule 016(i), an "accredited investor" as defined by Rule 501 of Regulation D[3] and/or any other non-retail individual or entity investor.
- **Second**, the proposed CAB Rules apparently would prohibit a CAB from acting as an agent to assist the owner of securities purchased in a private placement from selling them subsequent to such private placement.
  - It is not uncommon for the owner of securities purchased in a private placement to desire sometime later to sell those securities in a private secondary market transaction.
  - The CAB Rules expressly should permit the CAB to help sell or purchase such securities (as agent for the seller or buyer) in a private secondary market transaction on behalf of an "Institutional Investor" as defined by

[2] Under the proposed CAB Rules: "CABs would not be permitted to act as a principal in a securities transaction." Exchange Act Release No. 76675, 80 Fed. Reg. 79969, 79971 (December 23, 2015). Accord Release No. 34-77391 (March 17, 2016), pg. 10. This broad proposed prohibition of CABs acting as a principal is not appropriate given the first scenario described above. Moreover, this first scenario would not involve, in any broad or general sense, a CAB "trading" securities on a principal basis. Cf. Release No. 34-77391 (March 17, 2016), pg. 11 ("... CABs may not trade securities on a principal basis.").

[3] FINRA has stated that its regulatory programs "have uncovered significant concerns associated with the ways in which firms sell private placements to accredited investors." Exchange Act Release No. 76675, 80 Fed. Reg. 79969, 79975 (December 23, 2015). On that basis, FINRA concluded that it is not appropriate "to lower the institutional investor threshold for the CAB rules to the accredited investor standard." Id. The circumstances described in the New York Bar Association Letter and the two specific and limited scenarios described in this comment letter would not present these "significant concerns".

proposed CAB Rule 016(i), an "accredited investor" as defined by Rule 501 of Regulation D and/or any other non-retail individual or entity investor.[4]

- The July 1, 2016, notice states in relevant part:[5]
    - "Except as described in proposed CAB Rules 016(c)(1)(F)(ii) and 016(c)(1)(G), a CAB would not otherwise be permitted to engage in qualifying, identifying, soliciting, or acting as a placement agent or finder in connection with secondary securities transactions."
    - Respectfully, such a blanket prohibition makes no sense and should be rejected.
        - Proposed CAB Rule 016(a)(1)(F)(ii) would relate only to "qualifying, identifying, soliciting, or acting as a placement agent or finder ... (ii) on behalf of an issuer or control person in connection with a change of control of a privately-held company."[6]
        - Proposed CAB Rule 016(a)(1)(G) focuses principally on transactions within the scope of the SEC's No-Action Letter regarding "M&A Brokers" dated January 31, 2014 (Revised: February 4, 2014).
        - Both such types of transactions appear to be outside of FINRA's jurisdiction (and therefore perhaps they should not be included in the CAB Rules) because: (a) the SEC makes all legal determinations regarding broker dealer registration under Section 15(b) of the Exchange Act; and (b) FINRA must honor those SEC determinations. See, e.g., FINRA Rule 2040.01 and proposed CAB Rule 016(a)(1)(G) (noting FINRA's acceptance of the SEC's No-Action Letter regarding "M&A Brokers" dated January 31, 2014 (Revised: February 4, 2014)).
- A likely unintended consequence of this proposed blanket prohibition of a CAB participating in "secondary securities transactions" is that it would discourage duly registered FINRA member securities broker dealers conducting a niche investment banking business from electing to change its FINRA membership status to that of a CAB.

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[4] Under the proposed CAB Rules: "CABs would be permitted to act as agent in a securities transaction only in very narrow circumstances." Exchange Act Release No. 76675, 80 Fed. Reg. 79969, 79971 (December 23, 2015). In our view, this notice states specifically the correct principle (emphasis added) that: "CABs would be allowed to act as an agent with respect to institutional investors in connection with purchases or sales of unregistered securities." Id. Accord Release No. 34-77391 (March 17, 2016), pg. 10. This is exactly the second scenario situation described in this comment letter. And the proposed Partial Amendment No. 2 would gut any such permitted CAB activity as an agent for a seller or a buyer.

[5] Release No. 34-78220 (July 1, 2016), 81 Fed. Reg. 44372, 44373 (July 7, 2016) (footnote reference omitted, underlining added).

[6] Proposed CAB Rule 016(a)(1)(F)(i) would relate only to "qualifying, identifying, soliciting, or acting as a placement agent or finder ... (i) on behalf of institutional investors in connection with a sale of newly-issued, unregistered securities to institutional investors...." This scope limitation to such "primary" transactions obviously does not address the "secondary" transactions discussed in this comment letter.

- This is true even if the two scenarios described in this comment letter may be infrequent (or even unlikely) for any potential CAB, because the consequences of the duly registered FINRA member securities broker dealer engaging in "impermissible activities" could be severe. See, e.g., proposed CAB Rule 240.

- Please note and consider the limited and specific nature of the two types of "secondary securities transactions" described above.

  - In each of these two scenarios, the CABs would not be engaged in any "general" securities business (secondary transactions or otherwise) and/or in any "retail" securities business.

  - These two scenarios relate only to the limited activities in which a CAB would be permitted to engage: they would be a logical part of the CAB's permitted activities.

- In both scenarios (and in any other "secondary transactions" involving securities) the CABs would be subject to all applicable securities laws, rules and regulations (including the Exchange Act), and all applicable CAB Rules including for example CAB Rule 201 that incorporates FINRA Rule 2010 ("Standards of Commercial Honor and Principles of Trade").[7]

- Expressly permitting CABs to engage in these limited "secondary securities transactions": (1) would not conflict with purposes of the Exchange Act; (2) would be reasonable, appropriate, and consistent with market realities; (4) likely would not present investor protection and/or sales practices concerns[8]; and (4) would not result in activity "scope creep" inconsistent with the letter and spirit of the proposed CAB Rules.

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[7] "Depending on the facts, other rules, such as 2010, may apply in situations in which a CAB charged a commission or fee that clearly is unreasonable under the circumstances." Exchange Act Release No. 76675, 80 Fed. Reg. 79969, 79972 (December 23, 2015). Accord Release No. 34-77391 (March 17, 2016), pg. 11.

[8] Cf. Exchange Act Release No. 76675, 80 Fed. Reg. 79969, 79976 (December 23, 2015) ("FINRA believes that it is much less likely that a CAB would commit the types of sales practice problems that FINRA has observed in connection with the sale of Regulation D private placements to accredited investors if an investor is required to meet the qualified purchaser standard, since a qualified purchaser likely would have the resources necessary to protect itself from potential sales practice problems."). Although these comments are in the context of an initial sale of securities in a private placement, the rationale applies also to a private secondary market transaction in which the initial purchaser in the private placement desires to sell those securities to a non-retail investor with the assistance of a CAB as agent in the transaction. Moreover: "FINRA believes that a CAB's business model, which is geared toward ... acting as an agent solely in conjunction with purchases and sales of unregistered securities to institutional investors ... does not give rise to the same conflicts of interest and supervisory concerns that paragraph (b)(6) [of FINRA Rule 3110] is intended to address." Id. at 79972-79973. Accord Release No. 34-77391 (March 17, 2016), pg. 14.

Conclusion:

We respectfully request that proposed CAB Rules 016(c) (1) and (2) be revised expressly to make clear that a CAB would be permitted under the CAB Rules to participate in the two limited and specific secondary securities transaction scenarios described above and in the "secondary transactions" discussed in the New York Bar Association Letter.

The New York Bar Association Letter states aptly:

> There are no special or difference [different] compliance risks posed by secondary transactions in unregistered securities. Because of the benefits to be realized by permitting CABs to assist in secondary sales, and the absence of any significant risks, CABs should be expressly permitted to engage in secondary transactions.

Thank you for your consideration of this comment letter. I would be pleased to discuss these matters with you and/or provide additional information related thereto.

Sincerely,

SDR Capital Markets, Inc.
Kent J. Lund
General Counsel and Chief Compliance Officer