

Pursuant to the [Rule 9600](#) Series, FINRA may in exceptional and unusual circumstances, taking into consideration all relevant factors, exempt a member unconditionally or on specified terms from any or all of the provisions of this Rule that it deems appropriate.

(f) Definitions

The definitions in [Rule 5110](#) are incorporated herein by reference. For purposes of this Rule, the following words shall have the stated meanings:

(1) Affiliate

The term "affiliate" means an entity that controls, is controlled by or is under common control with a member.

(2) Beneficial Ownership

The term "beneficial ownership" means the right to the economic benefits of a security.

(3) Bona Fide Public Market

The term "bona fide public market" means a market for a security of an issuer that has been reporting under the Exchange Act for at least 90 days and is current in its reporting requirements, and whose securities are traded on a national securities exchange with an Average Daily Trading Volume (as provided by SEC Regulation M) of at least \$1 million, provided that the issuer's common equity securities have a public float value of at least \$150 million.

(4) Common Equity

The term "common equity" means the total number of shares of common stock outstanding without regard to class, whether voting or non-voting, convertible or non-convertible, exchangeable or non-exchangeable, redeemable or non-redeemable, as reflected on the consolidated financial statements of the company.

(5) Conflict of Interest

The term "conflict of interest" means, if at the time of a member's participation in an entity's public offering, any of the following applies:

(A) the securities are to be issued by the member;

(B) the issuer controls, is controlled by or is under common control with the member or the member's associated persons;

(C) at least five percent of the net offering proceeds, not including underwriting compensation, are intended to be:

(i) used to reduce or retire the balance of a loan or credit facility extended by the member, its affiliates and its associated persons, in the aggregate; or

(ii) otherwise directed to the member, its affiliates and associated persons, in the aggregate; or

(D) as a result of the public offering and any transactions contemplated at the time of the public offering:

(i) the member will be an affiliate of the issuer;

(ii) the member will become publicly owned; or

(iii) the issuer will become a member or form a broker-dealer subsidiary.

(6) Control

(A) The term "control" means:

(i) beneficial ownership of 10 percent or more of the outstanding common equity of an entity, including any right to receive such securities within 60 days of the member's participation in the public offering;

(ii) the right to 10 percent or more of the distributable profits or losses of an entity that is a partnership, including any right to receive an interest in such distributable profits or losses within 60 days of the member's participation in the public offering;

(iii) beneficial ownership of 10 percent or more of the outstanding preferred equity of an entity, including any right to receive such preferred equity within 60 days of the member's participation in the public offering; or

(iv) the power to direct or cause the direction of the management or policies of an entity.

(B) The term "common control" means the same natural person or entity controls two or more entities.

(7) Entity

For purposes of the definitions of affiliate, conflict of interest and control under this Rule, the term "entity":

(A) includes a company, corporation, partnership, trust, sole proprietorship, association or organized group of persons; and

(B) excludes the following:

- (i) an investment company registered under the Investment Company Act;
- (ii) a "separate account" as defined in Section 2(a)(37) of the Investment Company Act;
- (iii) a "real estate investment trust" as defined in Section 856 of the Internal Revenue Code; or
- (iv) a "direct participation program" as defined in [Rule 2310](#).

(8) Investment Grade Rated

The term "investment grade rated" refers to securities that are rated by a nationally recognized statistical rating organization in one of its four highest generic rating categories.

(9) Net Offering Proceeds

The term "net offering proceeds" means offering proceeds less all expenses of issuance and distribution.

(10) Preferred Equity

The term "preferred equity" means the aggregate capital invested by all persons in the preferred securities outstanding without regard to class, whether voting or non-voting, convertible or non-convertible, exchangeable or non-exchangeable, redeemable or non-redeemable, as reflected on the consolidated financial statements of the company.

(11) Prominent Disclosure

A member may make "prominent disclosure" for purposes of paragraphs (a)(1) and (a)(2)(B) by:

(A) providing the notation "(Conflicts of Interest)" following the listing of the Plan of Distribution in the Table of Contents section required in Item 502 of SEC Regulation S-K, and by providing such disclosures in the Plan of Distribution section required in Item 508 of SEC Regulation S-K and any Prospectus Summary section required in Item 503 of SEC Regulation S-K; or

(B) for an offering document not subject to SEC Regulation S-K, by providing disclosure on the front page of the offering document that a conflict exists, with a cross-reference to the discussion within the offering document and in the summary of the offering document if one is included.

(12) Qualified Independent Underwriter

The term "qualified independent underwriter" means a member:

(A) that does not have a conflict of interest and is not an affiliate of any member that has a conflict of interest;

(B) that does not beneficially own as of the date of the member's participation in the public offering, more than 5% of the class of securities that would give rise to a conflict of interest, including any right to receive any such securities exercisable within 60 days;

(C) that has agreed in acting as a qualified independent underwriter to undertake the legal responsibilities and liabilities of an underwriter under the Securities Act, specifically including those inherent in Section 11 thereof; and

(D) that has served as underwriter in at least three public offerings of a similar size and type during the three-year period immediately preceding the filing of the registration statement or the date of first sale in an offering without a registration statement. This requirement will be deemed satisfied if, during the past three years, the member:

(i) with respect to a proposed public offering of debt securities, has acted as sole underwriter or book-running lead or co-manager of at least three public offerings of debt securities each with gross proceeds of not less than 25% of the anticipated gross proceeds of the proposed offering; and

(ii) with respect to a proposed public offering of equity securities, has acted as sole underwriter or book-running lead or co-manager of at least three public offerings of equity securities (or of securities convertible into equity securities), each with gross proceeds of not less than 50% of the anticipated gross proceeds of the proposed offering.

(E) none of whose associated persons who function in a supervisory capacity who is responsible for organizing, structuring or performing due diligence with respect to corporate public offerings of securities:

(i) has been convicted within ten years prior to the filing of the registration statement or the preparation of an offering circular in an offering without a registration statement of a violation of the anti-fraud provisions of the federal or state securities laws, or any rules or regulations promulgated thereunder, in connection with a registered or unregistered offering of securities;

(ii) is subject to any order, judgment, or decree of any court of competent jurisdiction entered within ten years prior to the filing of the registration statement, or the preparation of an offering circular in an offering without a registration statement, permanently enjoining or restraining such person from engaging in or continuing any conduct or practice in violation of the anti-fraud provisions of the federal or state securities laws, or any rules or regulations promulgated thereunder in connection with a registered or unregistered offering of securities; or

(iii) has been suspended or barred from association with any member by an order or decision of the SEC, any state, FINRA or any other self-regulatory organization within ten years prior to the filing of the registration statement, or the preparation of an offering circular in an offering without a registration statement, for any conduct or practice in violation of the anti-fraud provisions of the federal or state securities laws, or any rules, or regulations promulgated thereunder, or the anti-fraud rules of any self-regulatory organization in connection with a registered or unregistered offering of securities.

(13) Registration Statement

The term "registration statement" means a registration statement as defined by Section 2(a)(8) of the Securities Act; notification on Form 1A filed with the SEC pursuant to the provisions of Securities Act Rule 252; or any other document, by whatever name known, initiating a registration or similar process for an issue of securities which is required to be filed by the laws or regulations of any federal or state agency.

(14) Subordinated Debt

The term "subordinated debt" includes (A) debt of an issuer which is expressly subordinate in right of payment to, or with a claim on assets subordinate to, any existing or future debt of such issuer; or (B) all debt that is specified as subordinated at the time of issuance. Subordinated debt shall not include short-term debt with maturity at issuance of less than one year and secured debt and bank debt not specified as subordinated debt at the time of issuance.

Amended by SR-FINRA-2019-012. eff. Sept. 16, 2020.

Amended by SR-FINRA-2014-003 eff. May 28, 2014.

Amended by SR-FINRA-2010-026 eff. Dec. 15, 2010.

Amended by SR-FINRA-2007-009 eff. Sep. 14, 2009.

Amended by SR-NASD-2005-087 eff. Aug. 1, 2006.

Amended by SR-NASD-2000-04 eff. March 22, 2004.

Amended by SR-NASD-2002-97 eff. July 29, 2002.

Amended by SR-NASD-99-02 eff. Dec. 7, 1999.

Amended by SR-NASD-97-95 eff. Aug. 17, 1998.

Amended by SR-NASD-97-38 eff. Dec. 15, 1997.

Amended by SR-NASD-97-45 eff. Sept. 10, 1997.

Amended by SR-NASD-97-28 eff. Aug. 7, 1997.

Amended by SR-NASD-96-17 eff. Aug 15, 1996.

Amended by SR-NASD-92-46 eff. May 10, 1994.

Amended by SR-NASD-94-12 eff. Mar. 7, 1994.

Amended by SR-NASD-88-30 eff. Dec. 1, 1988.

Amended by SR-NASD-87-21 eff. Mar. 29, 1988.

Amended by SR-NASD-76-5 eff. May 19, 1977.

Amended eff. Feb. 8, 1971; Dec. 29, 1971; Sept. 1, 1972; Mar. 21, 1972; Apr. 1, 1974; June 2, 1983; Feb. 22, 1984; Oct. 16, 1992; Jan. 28, 1993.

Selected Notices: [75-14](#), [77-13](#), [80-3](#), [80-39](#), [83-45](#), [86-28](#), [88-33](#), [88-89](#), [88-98](#), [88-100](#), [90-39](#), [92-57](#), [92-58](#), [94-45](#), [95-44](#), [96-53](#), [04-13](#), [09-49](#), [10-49](#), [20-10](#).

VERSIONS

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FINRA IS A REGISTERED TRADEMARK OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.

5122. Private Placements of Securities Issued by Members

The Rule

Notices

(a) Definitions

(1) Member Private Offering

A "member private offering" means a private placement of unregistered securities issued by a member or a control entity.

(2) Control Entity

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.

(3) Control

The term "control" means beneficial interest, as defined in [Rule 5130\(i\)\(1\)](#), 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. Control will be determined immediately after the closing of an offering, and in the case of an offering with multiple intended closings, immediately following each closing.

(4) Private Placement

The term "private placement" means a non-public offering of securities conducted in reliance on an available exemption from registration under the Securities Act.

(b) Requirements

No member or associated person may offer or sell any security in a Member Private Offering unless the following conditions have been met:

(1) Disclosure Requirements

(A) If an offering has a private placement memorandum or term sheet, then such memorandum or term sheet must be provided to each prospective investor and must contain disclosures addressing:

- (i) intended use of the offering proceeds; and
- (ii) offering expenses and the amount of selling compensation that will be paid to the member and its associated persons.

(B) If an offering does not have a private placement memorandum or term sheet, then the member must prepare an offering document that contains the disclosures required in paragraph (b)(1)(A)(i) and (ii) and provide such document to each prospective investor.

(2) Filing Requirements

A member must file the private placement memorandum, term sheet, or other offering document, and any retail communication (as defined under Rule 2210) that promotes or recommends the member private offering with the Corporate Financing Department at or prior to the first time the document or retail communication is provided to any prospective investor. Any amendment(s) or exhibit(s) to the private placement memorandum, term sheet, other offering document or retail communication also must be filed with the Department within ten days of being provided to any investor or prospective investor.

(3) Use of Offering Proceeds

For each Member Private Offering, at least 85% of the offering proceeds raised must be used for business purposes, which shall not include offering costs, discounts, commissions or any other cash or non-cash sales incentives. The use of the offering proceeds also must be consistent with the disclosures required in paragraph (b)(1).

If, in connection with the offer and sale of any security in a Member Private Offering, a member or associated person discovers after the fact that one or more of the conditions listed above have not been met, the member or associated person must promptly conform the offering to comply with this Rule.

(c) Exemptions

The following Member Private Offerings are exempt from the requirements of this Rule:

- (1) offerings sold solely to:
 - (A) institutional accounts, as defined in [Rule 4512\(c\)](#);
 - (B) qualified purchasers, as defined in Section 2(a)(51)(A) of the Investment Company Act;
 - (C) qualified institutional buyers, as defined in Securities Act Rule 144A;
 - (D) investment companies, as defined in Section 3 of the Investment Company Act;
 - (E) an entity composed exclusively of qualified institutional buyers, as defined in Securities Act Rule 144A; and
 - (F) banks, as defined in Section 3(a)(2) of the Securities Act.
- (2) offerings of exempted securities, as defined in Section 3(a)(12) of the Exchange Act;
- (3) offerings made pursuant to Securities Act Rule 144A or SEC Regulation S;
- (4) offerings in which a member acts primarily in a wholesaling capacity (i.e., it intends, as evidenced by a selling agreement, to sell through its affiliate broker-dealers, less than 20% of the securities in the offering);
- (5) offerings of exempt securities with short term maturities under Section 3(a)(3) of the Securities Act;
- (6) offerings of subordinated loans under SEA Rule 15c3-1, Appendix D (see NASD Notice to Members [02-32](#) (June 2002));
- (7) offerings of "variable contracts", as defined in [Rule 2320\(b\)](#);
- (8) offerings of modified guaranteed annuity contracts and modified guaranteed life insurance policies, as referenced in [Rule 5110\(h\)\(2\)](#) (D);
- (9) offerings of unregistered investment grade rated debt and preferred securities;
- (10) offerings to employees and affiliates of the issuer or its control entities;
- (11) offerings of securities issued in conversions, stock splits and restructuring transactions that are executed by an already existing investor without the need for additional consideration or investments on the part of the investor;
- (12) offerings of securities of a commodity pool operated by a commodity pool operator, as defined under Section 1a(5) of the Commodity Exchange Act;
- (13) offerings of equity and credit derivatives, including OTC options; provided that the derivative is not based principally on the member or any of its control entities; and
- (14) offerings filed with the Department under Rules [2310](#), [5110](#) or [Rule 5121](#).

(d) Confidential Treatment

FINRA shall accord confidential treatment to all documents and information filed pursuant to this Rule and shall utilize such documents and information solely for the purpose of review to determine compliance with the provisions of applicable FINRA rules or for other regulatory purposes deemed appropriate by FINRA.

(e) Application for Exemption

Pursuant to the [Rule 9600](#) Series, FINRA may exempt a member or person associated with a member from the provisions of this Rule for good cause shown.

••• Supplementary Material: -----

.01 Private Placement Memorandum. Nothing in this rule shall require a member to prepare a private placement memorandum. A member may satisfy the disclosure and filing requirements in the Rule with an offering document that does not meet the additional requirements of Securities Act Rule 502.

Amended by SR-FINRA-2020-038. eff. Oct. 1, 2021.
Amended by SR-FINRA-2019-012. eff. Sept. 16, 2020.
Amended by SR-FINRA-2011-065 eff. Dec. 5, 2011.
Amended by SR-FINRA-2010-060 eff. Dec. 15, 2010.
Amended by SR-FINRA-2009-078 eff. Dec. 14, 2009.
Amended by SR-FINRA-2009-062 eff. Oct. 19, 2009.
Amended by SR-FINRA-2009-046 eff. Aug. 17, 2009.
Adopted by SR-FINRA-2008-020 eff. June 17, 2009.

Selected Notice: [09-27](#), [17-17](#), [20-10](#), [21-26](#).

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[5123. PRIVATE PLACEMENTS OF SECURITIES ▶](#)

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5123. Private Placements of Securities

The Rule

Notices

(a) Filing Requirements

Each member that sells a security in a non-public offering in reliance on an available exemption from registration under the Securities Act ("private placement") must: (i) submit to FINRA, or have submitted on its behalf by a designated member, a copy of any private placement memorandum, term sheet or other offering document, and any retail communication (as defined in Rule 2210) that promotes or recommends the private placement, including any materially amended versions thereof, used in connection with such sale within 15 calendar days of the date of first sale; or (ii) notify FINRA that no such offering documents or retail communications were used. Members must provide FINRA with the required documents, retail communications, or notification and related information, if known, by filing an electronic form in the manner prescribed by FINRA.

(b) Exemptions

The following private placements are exempt from the requirements of this Rule:

- (1) offerings sold by the member or person associated with the member solely to any one or more of the following:
 - (A) institutional accounts, as defined in [Rule 4512\(c\)](#);
 - (B) qualified purchasers, as defined in Section 2(a)(51)(A) of the Investment Company Act;
 - (C) qualified institutional buyers, as defined in Securities Act Rule 144A;
 - (D) investment companies, as defined in Section 3 of the Investment Company Act;
 - (E) an entity composed exclusively of qualified institutional buyers, as defined in Securities Act Rule 144A;
 - (F) banks, as defined in Section 3(a)(2) of the Securities Act;
 - (G) employees and affiliates, as defined in [Rule 5121](#), of the issuer;
 - (H) knowledgeable employees as defined in Investment Company Act Rule 3c-5;
 - (I) eligible contract participants, as defined in Section 3(a)(65) of the Exchange Act; and
 - (J) accredited investors described in Securities Act Rule 501(a)(1), (2), (3) or (7).
- (2) offerings of exempt securities, as defined in Section 3(a)(12) of the Exchange Act;
- (3) offerings made pursuant to Securities Act Rule 144A or SEC Regulation S;
- (4) offerings of exempt securities with short term maturities under Section 3(a)(3) of the Securities Act and debt securities sold by members pursuant to Section 4(2) of the Securities Act so long as the maturity does not exceed 397 days and the securities are issued in minimum denominations of \$150,000 (or the equivalent thereof in another currency);
- (5) offerings of subordinated loans under SEA Rule 15c3-1, Appendix D (see NASD Notice to Members [02-32](#) (June 2002));
- (6) offerings of "variable contracts," as defined in [Rule 2320\(b\)\(2\)](#);
- (7) offerings of modified guaranteed annuity contracts and modified guaranteed life insurance policies, as referenced in [Rule 5110\(h\)\(2\)](#) (D);
- (8) offerings of non-convertible debt or preferred securities that meet the transaction eligibility criteria for registering primary offerings of non-convertible securities on Forms S-3 and F-3;
- (9) offerings of securities issued in conversions, stock splits and restructuring transactions that are executed by an already existing investor without the need for additional consideration or investments on the part of the investor;

(10) offerings of securities of a commodity pool operated by a commodity pool operator, as defined under Section 1a(11) of the Commodity Exchange Act;

(11) business combination transactions as defined in Securities Act Rule 165(f);

(12) offerings of registered investment companies;

(13) standardized options, as defined in Securities Act Rule 238; and

(14) offerings filed with FINRA under Rules [2310](#), [5110](#), [5121](#) and [5122](#), or exempt from filing thereunder in accordance with [Rule 5110](#)(h)(1).

(c) Confidential Treatment

FINRA shall accord confidential treatment to all documents and information filed pursuant to this Rule and shall utilize such documents and information solely for the purpose of review to determine compliance with the provisions of applicable FINRA rules or for other regulatory purposes deemed appropriate by FINRA.

(d) Application for Exemption

Pursuant to the [Rule 9600](#) Series, FINRA may exempt a member or associated person from the provisions of this Rule for good cause shown.

Amended by SR-FINRA-2020-038. eff Oct. 1, 2021.
Amended by SR-FINRA-2019-012. eff. Sept. 16, 2020.
Amended by SR-FINRA-2013-026 eff. June 20, 2013.
Adopted by SR-FINRA-2011-057 eff. Dec. 3, 2012.

Selected Notices: [12-40](#), [13-26](#), [17-17](#), [20-10](#) [21-26](#).

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[5130. RESTRICTIONS ON THE PURCHASE AND SALE OF INITIAL EQUITY PUBLIC OFFERINGS →](#)

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5130. Restrictions on the Purchase and Sale of Initial Equity Public Offerings

The Rule

Notices

(a) General Prohibitions

(1) A member or a person associated with a member may not sell, or cause to be sold, a new issue to any account in which a restricted person has a beneficial interest, except as otherwise permitted herein.

(2) A member or a person associated with a member may not purchase a new issue in any account in which such member or person associated with a member has a beneficial interest, except as otherwise permitted herein.

(3) A member may not continue to hold new issues acquired by the member as an underwriter, selling group member or otherwise, except as otherwise permitted herein.

(4) Nothing in this paragraph (a) shall prohibit:

(A) sales or purchases from one member of the selling group to another member of the selling group that are incidental to the distribution of a new issue to a non-restricted person at the public offering price;

(B) sales or purchases by a broker-dealer of a new issue at the public offering price as part of an accommodation to a non-restricted person customer of the broker-dealer; or

(C) purchases by a broker-dealer (or owner of a broker-dealer), organized as an investment partnership, of a new issue at the public offering price, provided such purchases are credited to the capital accounts of its partners in accordance with paragraph (c)(4).

(b) Preconditions for Sale

Before selling a new issue to any account, a member must in good faith have obtained within the twelve months prior to such sale, a representation from:

(1) Beneficial Owners

the account holder(s), or a person authorized to represent the beneficial owners of the account, that the account is eligible to purchase new issues in compliance with this Rule; or

(2) Conduits

a bank, foreign bank, broker-dealer, or investment adviser or other conduit that all purchases of new issues are in compliance with this Rule.

A member may not rely upon any representation that it believes, or has reason to believe, is inaccurate. A member shall maintain a copy of all records and information relating to whether an account is eligible to purchase new issues in its files for at least three years following the member's last sale of a new issue to that account.

(c) General Exemptions

The general prohibitions in paragraph (a) of this Rule shall not apply to sales to and purchases by the following accounts or persons, whether directly or through accounts in which such persons have a beneficial interest:

(1) An investment company registered under the Investment Company Act;

(2) A common trust fund or similar fund as described in Section 3(a)(12)(A)(iii) of the Exchange Act, provided that:

(A) the fund has investments from 1,000 or more accounts; and

(B) the fund does not limit beneficial interests in the fund principally to trust accounts of restricted persons;

(3) An insurance company general, separate or investment account, provided that:

(A) the account is funded by premiums from 1,000 or more policyholders, or, if a general account, the insurance company has 1,000 or more policyholders; and

(B) the insurance company does not limit the policyholders whose premiums are used to fund the account principally to restricted persons, or, if a general account, the insurance company does not limit its policyholders principally to restricted persons;

(4) An account if the beneficial interests of restricted persons do not exceed in the aggregate 10% of such account;

(5) A publicly traded entity (other than a broker-dealer or an affiliate of a broker-dealer where such broker-dealer is authorized to engage in the public offering of new issues either as a selling group member or underwriter) that:

(A) is listed on a national securities exchange; or

(B) is a foreign issuer whose securities meet the quantitative designation criteria for listing on a national securities exchange;

(6) An investment company organized under the laws of a foreign jurisdiction, provided that:

(A) the investment company is listed on a foreign exchange for sale to the public or authorized for sale to the public by a foreign regulatory authority;

(B) no person owning more than 5% of the shares of the investment company is a restricted person, the investment company has 100 or more direct investors, or the investment company has 1,000 or more indirect investors; and

(C) the investment company was not formed for the specific purpose of permitting restricted persons to invest in new issues;

(7) An Employee Retirement Income Security Act benefits plan that is qualified under Section 401(a) of the Internal Revenue Code, provided that such plan is not sponsored solely by a broker-dealer;

(8) An employee retirement benefits plan organized under and governed by the laws of the United States or of a foreign jurisdiction, provided that such plan or family of plans:

(A) has, in aggregate, at least 10,000 plan participants and beneficiaries and \$10 billion in assets;

(B) is operated in a non-discriminatory manner insofar as a wide range of employees, regardless of income or position, are eligible to participate without further amendment or action by the plan sponsor;

(C) is administered by trustees or managers that have a fiduciary obligation to administer the funds in the best interests of the participants and beneficiaries; and

(D) is not sponsored solely by a broker-dealer;

(9) A state or municipal government benefits plan that is subject to state and/or municipal regulation;

(10) A tax exempt charitable organization under Section 501(c)(3) of the Internal Revenue Code; or

(11) A church plan under Section 414(e) of the Internal Revenue Code.

(d) Issuer-Directed Securities

The prohibitions on the purchase and sale of new issues in this Rule shall not apply to securities that:

(1) are specifically directed in writing by the issuer, an affiliate of the issuer, or a selling shareholder, to persons that are restricted under the Rule; provided, however, that securities directed by an issuer, an affiliate of the issuer, or a selling shareholder, may not be sold to or purchased by:

(A) a broker-dealer; or

(B) an account in which any restricted person specified in paragraphs (i)(10)(B) or (i)(10)(C) of this Rule has a beneficial interest, unless such person, or a member of his or her immediate family, is an employee or director of the issuer, the issuer's parent, or a subsidiary of the issuer or the issuer's parent, or of a franchisee of any of the foregoing entities. Also, for purposes of this paragraph (d) (1) only, a parent/subsidiary relationship is established if the parent has the right to vote 50% or more of a class of voting security of the subsidiary, or has the power to sell or direct 50% or more of a class of voting security of the subsidiary;

(2) are specifically directed in writing by the issuer, an affiliate of the issuer, or a selling shareholder, and are part of an offering in which no broker-dealer:

(A) underwrites any portion of the offering;

(B) solicits or sells any new issue securities in the offering; and

(C) has any involvement or influence, directly or indirectly, in the issuer's allocation decisions with respect to any of the new issue securities in the offering;

(3) are part of a program sponsored by the issuer or an affiliate of the issuer that meets the following criteria:

(A) the opportunity to purchase a new issue under the program is offered to at least 10,000 participants;

(B) every participant is offered an opportunity to purchase an equivalent number of shares, or will receive a specified number of shares under a predetermined formula applied uniformly across all participants;

(C) if not all participants receive shares under the program, the selection of the participants eligible to purchase shares is based upon a random or other non-discretionary allocation method; and

(D) the class of participants does not contain a disproportionate number of restricted persons as compared to the investing public generally; or

(4) are directed in writing to eligible purchasers who are otherwise restricted under the Rule as part of a conversion offering in accordance with the standards of the governmental agency or instrumentality having authority to regulate such conversion offering.

(e) Anti-Dilution Provisions

The prohibitions on the purchase and sale of new issues in this Rule shall not apply to an account in which a restricted person has a beneficial interest that meets the following conditions:

(1) the account has held an equity ownership interest in the issuer, or a company that has been acquired by the issuer in the past year, for a period of one year prior to the effective date of the offering;

(2) the sale of the new issue to the account shall not increase the account's percentage equity ownership in the issuer above the ownership level as of three months prior to the filing of the registration statement in connection with the offering;

(3) the sale of the new issue to the account shall not include any special terms; and

(4) the new issue purchased pursuant to this paragraph (e) shall not be sold, transferred, assigned, pledged or hypothecated for a period of three months following the effective date of the offering.

(f) Stand-by Purchasers

The prohibitions on the purchase and sale of new issues in this Rule shall not apply to the purchase and sale of securities pursuant to a stand-by agreement that meets the following conditions:

(1) the stand-by agreement is disclosed in the prospectus;

(2) the stand-by agreement is the subject of a formal written agreement;

(3) the managing underwriter(s) represents in writing that it was unable to find any other purchasers for the securities; and

(4) the securities sold pursuant to the stand-by agreement shall not be sold, transferred, assigned, pledged or hypothecated for a period of three months following the effective date of the offering.

(g) Under-Subscribed Offerings

Nothing in this Rule shall prohibit an underwriter, pursuant to an underwriting agreement, from placing a portion of a public offering in its investment account when it is unable to sell that portion to the public.

(h) Exemptive Relief

Pursuant to the Rule 9600 Series, the staff, for good cause shown after taking into consideration all relevant factors, may conditionally or unconditionally exempt any person, security or transaction (or any class or classes of persons, securities or transactions) from this Rule to the extent that such exemption is consistent with the purposes of the Rule, the protection of investors and the public interest.

(i) Definitions

(1) "Beneficial interest" means any economic interest, such as the right to share in gains or losses. The receipt of a management or performance based fee for operating a collective investment account, or other fees for acting in a fiduciary capacity, shall not be considered a

beneficial interest in the account.

(2) "Collective investment account" means any hedge fund, investment partnership, investment corporation or any other collective investment vehicle that is engaged primarily in the purchase and/or sale of securities. A "collective investment account" does not include a "family investment vehicle" or an "investment club."

(3) "Conversion offering" means any offering of securities made as part of a plan by which a savings and loan association, insurance company or other organization converts from a mutual to a stock form of ownership.

(4) "Family investment vehicle" means a legal entity that is beneficially owned solely by one or more of the following persons:

(A) immediate family members;

(B) family members, as defined under Rule 202(a)(11)(G)-1 of the Investment Advisers Act; or

(C) family clients, as defined under Rule 202(a)(11)(G)-1 of the Investment Advisers Act.

(5) "Immediate family member" means a person's parents, mother-in-law or father-in-law, spouse, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, and children, and any other individual to whom the person provides material support.

(6) "Investment club" means a group of friends, neighbors, business associates or others that pool their money to invest in stock or other securities and are collectively responsible for making investment decisions.

(7) "Limited business broker-dealer" means any broker-dealer whose authorization to engage in the securities business is limited solely to the purchase and sale of investment company/variable contracts securities and direct participation program securities.

(8) "Material support" means directly or indirectly providing more than 25% of a person's income in the prior calendar year. Members of the immediate family living in the same household are deemed to be providing each other with material support.

(9) "New issue" means any initial public offering of an equity security as defined in Section 3(a)(11) of the Exchange Act, made pursuant to a registration statement or offering circular. New issue shall not include:

(A) offerings made pursuant to an exemption under Section 4(a)(1), 4(a)(2) or 4(a)(5) of the Securities Act, or Securities Act Rule 504 if the securities are "restricted securities" under Securities Act Rule 144(a)(3), or Rule 144A or Rule 505 or Rule 506 adopted thereunder, or offerings made under Regulation S of the Securities Act or otherwise made outside of the United States or its territories unless the securities offered and sold in the Regulation S offering or other offering made outside of the United States are also registered for sale in the United States under the Securities Act in connection with a concurrent initial public offering of an equity security in the United States;

(B) offerings of exempted securities as defined in Section 3(a)(12) of the Exchange Act, and rules promulgated thereunder;

(C) offerings of securities of a commodity pool operated by a commodity pool operator as defined under Section 1a(5) of the Commodity Exchange Act;

(D) rights offerings, exchange offers, or offerings made pursuant to a merger or acquisition;

(E) offerings of investment grade asset-backed securities;

(F) offerings of convertible securities;

(G) offerings of preferred securities;

(H) offerings of an investment company registered under the Investment Company Act;

(I) offerings of securities (in ordinary share form or ADRs registered on Form F-6) that have a pre-existing market outside of the United States; and

(J) offerings of a special purpose acquisition company subject to Securities and Exchange Commission rules and regulations, a business development company as defined in Section 2(a)(48) of the Investment Company Act, a direct participation program as defined in Rule 2310(a) or a real estate investment trust as defined in Section 856 of the Internal Revenue Code.

(10) "Restricted person" means:

(A) Members or other broker-dealers

(i) Any officer, director, general partner, associated person or employee of a member or any other broker-dealer (other than a limited business broker-dealer);

(ii) Any agent of a member or any other broker-dealer (other than a limited business broker-dealer) that is engaged in the investment banking or securities business; or

(iii) An immediate family member of a person specified in subparagraph (B)(i) or (ii) if the person specified in subparagraph (B)(i) or (ii):

a. materially supports, or receives material support from, the immediate family member;

b. is employed by or associated with the member, or an affiliate of the member, selling the new issue to the immediate family member; or

c. has an ability to control the allocation of the new issue.

(C) Finders and Fiduciaries

(i) With respect to the security being offered, a finder or any person acting in a fiduciary capacity to the managing underwriter, including, but not limited to, attorneys, accountants and financial consultants; and

(ii) An immediate family member of a person specified in subparagraph (C)(i) if the person specified in subparagraph (C)(i) materially supports, or receives material support from, the immediate family member.

(D) Portfolio Managers

(i) Any person who has authority to buy or sell securities for a bank, savings and loan institution, insurance company, investment company, investment advisor or collective investment account.

(ii) An immediate family member of a person specified in subparagraph (D)(i) that materially supports, or receives material support from, such person.

(E) Persons Owning a Broker-Dealer

(i) Any person listed, or required to be listed, in Schedule A of a Form BD (other than with respect to a limited business broker-dealer), except persons identified by an ownership code of less than 10%;

(ii) Any person listed, or required to be listed, in Schedule B of a Form BD (other than with respect to a limited business broker-dealer), except persons whose listing on Schedule B relates to an ownership interest in a person listed on Schedule A identified by an ownership code of less than 10%;

(iii) Any person that directly or indirectly owns 10% or more of a public reporting company listed, or required to be listed, in Schedule A of a Form BD (other than a reporting company that is listed on a national securities exchange or other than with respect to a limited business broker-dealer);

(iv) Any person that directly or indirectly owns 25% or more of a public reporting company listed, or required to be listed, in Schedule B of a Form BD (other than a reporting company that is listed on a national securities exchange or other than with respect to a limited business broker-dealer);

(v) An immediate family member of a person specified in subparagraphs (E)(i) through (iv) unless the person owning the broker-dealer:

a. does not materially support, or receive material support from, the immediate family member;

b. is not an owner of the member, or an affiliate of the member, selling the new issue to the immediate family member; and

c. has no ability to control the allocation of the new issue.

(vi) Subparagraphs (E)(i) through (iv) shall not apply to a sovereign entity.

(11) "Sovereign entity" means a sovereign nation or a pool of capital or an investment fund or other vehicle owned or controlled by a sovereign nation and created for the purpose of making investments on behalf or for the benefit of the sovereign nation.

(12) "Sovereign nation" means a sovereign nation or its political subdivisions, agencies or instrumentalities.

(j) Information Required to be Filed

The book-running managing underwriter of a new issue shall be required to file the following information in the time and manner specified by FINRA with respect to new issues:

(1) the initial list of distribution participants and their underwriting commitment and retention amounts on or before the offering date;
and

(2) the final list of distribution participants and their underwriting commitment and retention amounts no later than three business days after the offering date.

• • • Supplementary Material: -----

.01 Application to Foreign Non-Member Broker-Dealers Participating in an Underwriting Syndicate. The prohibitions on the purchase and sale of new issues in this Rule shall not apply to a foreign non-member broker-dealer that is participating in an underwriting syndicate for the sale of a new issue (which underwriting syndicate may include a member affiliate of the non-member broker-dealer) and allocating new issue securities to a non-U.S. person, provided that such allocation decision is not made at the direction or request of a member or an associated person of a member.

Amended by SR-FINRA-2019-022 eff. Jan. 1, 2020.
Amended by SR-FINRA-2009-046 eff. Aug. 17, 2009.
Amended by SR-FINRA-2009-005 eff. Feb. 17, 2009.
Amended by SR-FINRA-2008-025 eff. Dec. 15, 2008.
Amended by SR-NASD-2006-074 eff. Sept. 5, 2007.
Amended by SR-NASD-2006-068 eff. July 1, 2006.
Amended by SR-NASD-2004-165 eff. Nov. 2, 2005.
Amended by SR-NASD-99-60 eff. March 23, 2004.

Selected Notices: 03-79, 05-65, 07-34, 08-57, 19-37.

VERSIONS

Jan 01, 2020 onwards



5131. New Issue Allocations and Distributions

The Rule

Notices

(a) Quid Pro Quo Allocations

No member or person associated with a member may offer or threaten to withhold shares it allocates of a new issue as consideration or inducement for the receipt of compensation that is excessive in relation to the services provided by the member.

(b) Spinning

(1) No member or person associated with a member may allocate shares of a new issue to any account in which an executive officer or director of a public company or a covered non-public company, or a person materially supported by such executive officer or director, has a beneficial interest:

(A) if the company is currently an investment banking services client of the member or the member has received compensation from the company for investment banking services in the past 12 months;

(B) if the person responsible for making the allocation decision knows or has reason to know that the member intends to provide, or expects to be retained by the company for, investment banking services within the next 3 months; or

(C) on the express or implied condition that such executive officer or director, on behalf of the company, will retain the member for the performance of future investment banking services.

(2) The prohibitions in this paragraph shall not apply to allocations of shares of a new issue to any account described in Rule 5130(c)(1) through (3) and (5) through (11), or to any other account in which the beneficial interests of executive officers and directors of the company and persons materially supported by such executive officers and directors in the aggregate do not exceed 25% of such account.

(c) Policies Concerning Flipping

(1) No member or person associated with a member may directly or indirectly recoup, or attempt to recoup, any portion of a commission or credit paid or awarded to an associated person for selling shares of a new issue that are subsequently flipped by a customer, unless the managing underwriter has assessed a penalty bid on the entire syndicate.

(2) In addition to any obligation to maintain records relating to penalty bids under SEA Rule 17a-2(c)(1), a member shall promptly record and maintain information regarding any penalties or disincentives assessed on its associated persons in connection with a penalty bid.

(d) New Issue Pricing and Trading Practices

In a new issue:

(1) Reports of Indications of Interest and Final Allocations. The book-running lead manager must provide to the issuer's pricing committee (or, if the issuer has no pricing committee, its board of directors):

(A) a regular report of indications of interest, including the names of interested institutional investors and the number of shares indicated by each, as reflected in the book-running lead manager's book of potential institutional orders, and a report of aggregate demand from retail investors;

(B) after the settlement date of the new issue, a report of the final allocation of shares to institutional investors as reflected in the books and records of the book-running lead manager including the names of purchasers and the number of shares purchased by each, and aggregate sales to retail investors;

(2) Lock-Up Agreements. Any lock-up agreement or other restriction on the transfer of the issuer's shares by officers and directors of the issuer entered into in connection with a new issue shall provide that:

(A) Any lock-up agreement or other restriction on the transfer of the issuer's shares by officers and directors of the issuer shall provide that such restrictions will apply to their issuer-directed shares; and

(B) At least two business days before the release or waiver of any lock-up or other restriction on the transfer of the issuer's shares, the book-running lead manager will notify the issuer of the impending release or waiver and announce the impending release or waiver through a major news service, except where the release or waiver is effected solely to permit a transfer of securities that is not for consideration or that is to an immediate family member as defined in Rule 5130(i)(5) and where the transferee has agreed in writing to be bound by the same lock-up agreement terms in place for the transferor;

(3) Agreement Among Underwriters. The agreement between the book-running lead manager and other syndicate members must require, to the extent not inconsistent with SEC Regulation M, that any shares trading at a premium to the public offering price that are returned by a purchaser to a syndicate member after secondary market trading commences:

(A) be used to offset the existing syndicate short position, or

(B) if no syndicate short position exists, the member must either:

(i) offer returned shares at the public offering price to unfilled customers' orders pursuant to a random allocation methodology, or

(ii) sell returned shares on the secondary market and donate profits from the sale to an unaffiliated charitable organization with the condition that the donation be treated as an anonymous donation to avoid any reputational benefit to the member.

(4) Market Orders. No member may accept a market order for the purchase of shares of a new issue in the secondary market prior to the commencement of trading of such shares in the secondary market.

(e) Definitions

For purposes of this Rule, the following terms shall have the meanings stated below.

(1) A "public company" is any company that is registered under Section 12 of the Exchange Act or files periodic reports pursuant to Section 15(d) thereof.

(2) "Beneficial interest" shall have the same meaning as in FINRA Rule 5130(i)(1).

(3) "Covered non-public company" means any non-public company, except for an unaffiliated charitable organization, satisfying the following criteria: (i) income of at least \$1 million in the last fiscal year or in two of the last three fiscal years and shareholders' equity of at least \$15 million; (ii) shareholders' equity of at least \$30 million and a two-year operating history; or (iii) total assets and total revenue of at least \$75 million in the latest fiscal year or in two of the last three fiscal years.

(4) "Flipped" means the initial sale of new issue shares purchased in an offering within 30 days following the offering date of such offering.

(5) "Investment banking services" include, without limitation, acting as an underwriter, participating in a selling group in an offering for the issuer or otherwise acting in furtherance of a public offering of the issuer; acting as a financial adviser in a merger, acquisition or other corporate reorganization; providing venture capital, equity lines of credit, private investment, public equity transactions (PIPEs) or similar investments or otherwise acting in furtherance of a private offering of the issuer; or serving as placement agent for the issuer.

(6) "Material support" means directly or indirectly providing more than 25% of a person's income in the prior calendar year. Persons living in the same household are deemed to be providing each other with material support.

(7) "New issue" shall have the same meaning as in Rule 5130(i)(9).

(8) "Penalty bid" means an arrangement that permits the managing underwriter to reclaim a selling concession from a syndicate member in connection with an offering when the securities originally sold by the syndicate member are purchased in syndicate covering transactions.

(9) "Unaffiliated charitable organization" is a tax-exempt entity organized under Section 501(c)(3) of the Internal Revenue Code that is not affiliated with the member and for which no executive officer or director of the member, or person materially supported by such executive officer or director, is an individual listed or required to be listed on Part VII of Internal Revenue Service Form 990 (i.e., officers, directors, trustees, key employees, highest compensated employees and certain independent contractors).

(f) Exemptive Relief

Pursuant to the Rule 9600 Series, FINRA may in exceptional and unusual circumstances, taking into consideration all relevant factors, exempt a person unconditionally or on specified terms from any or all of the provisions of this Rule that it deems appropriate consistent with the protection of investors and the public interest.

• • • Supplementary Material:

.01 Issuer Directed Allocations. The prohibitions of paragraph (b) above shall not apply to allocations of securities that are directed in writing by the issuer, an affiliate of the issuer, or a selling shareholder, so long as the member has no involvement or influence, directly or indirectly, in the allocation decisions of the issuer, an affiliate, or a selling shareholder with respect to such issuer-directed securities.

.02 Written Representations.

(a) Annual Representation. For the purposes of Rule 5131(b), a member may rely upon a written representation obtained within the prior 12 months from the beneficial owner(s) of the account, or a person authorized to represent the beneficial owner(s) of the account, as to whether such beneficial owner(s) is an executive officer or director or person materially supported by an executive officer or director and if so, the company(ies) on whose behalf such executive officer or director serves.

(b) Indirect Beneficial Owners. For the purposes of Rule 5131(b), a member may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not look through to the beneficial owners of any unaffiliated private fund invested in the account, except for beneficial owners that are control persons of the investment adviser to such private fund, that such unaffiliated private fund:

- (1) is managed by an investment adviser;
- (2) has assets greater than \$50 million;
- (3) owns less than 25% of the account and is not a fund in which a single investor has a beneficial interest of 25% or more; and
- (4) was not formed for the specific purpose of investing in the account.

An unaffiliated private fund is a "private fund," as defined in Section 202(a)(29) of the Investment Advisers Act, whose investment adviser does not have a control person in common with the investment adviser to the account. A control person of an investment adviser is a person with direct or indirect "control" over the investment adviser, as that term is defined in Form ADV.

(c) A member may not rely upon any representation that it believes, or has reason to believe, is inaccurate. A member shall maintain a copy of all records and information relating to whether an account is eligible to receive an allocation of the new issue under Rule 5131(b) in its files for at least three years following the member's allocation to that account.

.03 Lock-up Announcements. For the purposes of this Rule, the requirement that the book-running lead manager announce the impending release or waiver of a lock-up or other restriction on the transfer of the issuer's shares shall be deemed satisfied where such announcement is made by the book-running lead manager, another member or the issuer, so long as such announcement otherwise complies with the requirements of paragraph (d)(2) of this Rule. In addition, the disclosure of a release or waiver in a publicly filed registration statement in connection with a secondary offering satisfies the requirement for an announcement through a major news service.

.04 Anti-Dilution Provisions. The prohibitions of paragraph (b) above shall not apply to an account in which an executive officer or director of a public company or a covered non-public company, or a person materially supported by such executive officer or director, has a beneficial interest that meets the following conditions:

- (a) the account has held an equity ownership interest in the issuer, or a company that has been acquired by the issuer in the past year, for a period of one year prior to the effective date of the offering;
- (b) the allocation of the new issue to the account shall not increase the account's percentage equity ownership in the issuer above the ownership level as of three months prior to the filing of the registration statement in connection with the offering;
- (c) the allocation of the new issue to the account shall not include any special terms; and
- (d) the new issue allocated pursuant to this Supplementary Material .04 shall not be sold, transferred, assigned, pledged or hypothecated for a period of three months following the effective date of the offering.

.05 Application to Foreign Non-Member Broker-Dealers Participating in an Underwriting Syndicate. The prohibitions of paragraph (b) above shall not apply to a foreign non-member broker-dealer that is participating in an underwriting syndicate for the sale of a new issue (which underwriting syndicate may include a member affiliate of the non-member broker-dealer) and allocating new issue securities to a non-U.S. person, provided that such allocation decision is not made at the direction or request of a member or an associated person of a member.

Amended by SR-FINRA-2019-022 eff. Jan. 1, 2020.
Amended by SR-FINRA-2014-009 eff. Feb. 14, 2014.
Amended by SR-FINRA-2013-037 eff. Feb. 3, 2014.
Amended by SR-FINRA-2011-017 eff. Sept. 26, 2011.
Adopted by SR-NASD-2003-140 eff. May 27, 2011.

Selected Notices: 10-60, 11-29, 13-43, 19-37.

[◀ 5130. RESTRICTIONS ON THE PURCHASE AND SALE OF INITIAL EQUITY PUBLIC OFFERINGS](#)

UP

[5140. INTEGRITY OF FIXED PRICE OFFERINGS ▶](#)

VERSIONS

Jan 01, 2020 onwards

5141. Sale of Securities in a Fixed Price Offering

The Rule

Notices

(a) No member or person associated with a member that participates in a selling syndicate or selling group or that acts as the single underwriter in connection with a fixed price offering shall offer or grant, directly or indirectly, to any person or account that is not a member of the selling syndicate or selling group or that is a person or account other than the single underwriter any securities in the offering at a price below the stated public offering price ("reduced price"). Subject to the requirements of Rule 5130, a member of a selling syndicate or selling group, or a member that acts as the single underwriter, is permitted to sell securities in the offering to an affiliated person, provided such member does not sell the securities to the affiliated person at a reduced price under this Rule. The requirements of this Rule shall apply until the termination of the offering or until a member, having made a bona fide public offering of the securities, is unable to continue selling such securities at the stated public offering price. For purposes of this Rule, securities in a fixed price offering shall be presumed salable if the securities immediately trade in the secondary market at a price or prices which are above the stated public offering price.

(b) Nothing in this Rule shall prohibit the purchase and sale of securities in a fixed price offering between members of the selling syndicate or selling group.

• • • Supplementary Material: -----

.01 Reduced Price. For the purposes of this Rule, "reduced price" includes, without limitation, any offer or grant of any selling concession, discount or other allowance, credit, rebate, reduction of any fee (including any advisory or service fee), any sale of products or services at prices below reasonable commercially available rates for similar products and services (except for research subject to Rule 5141.02), or any purchase of or arrangement to purchase securities from the person or account at more than their fair market price in exchange for securities in the offering. For purposes of this Supplementary Material, "fair market price" refers generally to a price or range of prices at which a buyer and a seller, each unrelated to the other, would purchase the securities in the ordinary course of business in transactions that are of similar size and similar characteristics and are independent of any other transaction.

.02 Research. Nothing in this Rule shall prevent a member or person associated with a member that participates in a selling syndicate or selling group, or a member that acts as the single underwriter, from selling securities in the offering to a person or account to which it has provided or will provide research, provided the person or account pays the stated public offering price for the securities and the research is provided pursuant to the requirements of Section 28(e) of the Exchange Act. Investment management or investment discretionary services are not research for purposes of this Supplementary Material. Any product or service provided by a member or person associated with a member that does not qualify as research under this Supplementary Material must not confer a reduced price as set forth in Rule 5141.01.

.03 Affiliated Persons. Transactions between a member of a selling syndicate or selling group, or between a member that acts as the single underwriter, and an affiliated person that are part of the normal and ordinary course of business and are unrelated to the sale or purchase of securities in a fixed price offering shall not be deemed to confer a reduced price under this Rule.

.04 Fixed Price Offering. The term "fixed price offering" means the offering of securities at a stated public offering price or prices, all or part of which securities are publicly offered in the United States or any territory thereof, whether or not registered under the Securities Act, except that the term does not include offerings of "exempted securities" or "municipal securities" as those terms are defined in Sections 3(a)(12) and 3(a)(29), respectively, of the Exchange Act or offerings of redeemable securities of investment companies registered pursuant to the Investment Company Act which are offered at prices determined by the net asset value of the securities.

.05 Asset-Based Fees. A member that is an investment adviser may exempt securities that are purchased as part of a fixed price offering from the calculation of annual or periodic asset-based fees that such member charges to a customer, provided such exemption is part of the member's normal and ordinary course of business with the customer and is not in connection with an offering.

Adopted by SR-FINRA-2010-029 eff. Feb. 8, 2011.

Selected Notice: 10-47

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5150. Fairness Opinions

The Rule

Notices

(a) Disclosures

If at the time a fairness opinion is issued to the board of directors of a company the member issuing the fairness opinion knows or has reason to know that the fairness opinion will be provided or described to the company's public shareholders, the member must disclose in the fairness opinion:

(1) if the member has acted as a financial advisor to any party to the transaction that is the subject of the fairness opinion, and, if applicable, that it will receive compensation that is contingent upon the successful completion of the transaction, for rendering the fairness opinion and/or serving as an advisor;

(2) if the member will receive any other significant payment or compensation contingent upon the successful completion of the transaction;

(3) any material relationships that existed during the past two years or that are mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between the member and any party to the transaction that is the subject of the fairness opinion;

(4) if any information that formed a substantial basis for the fairness opinion that was supplied to the member by the company requesting the opinion concerning the companies that are parties to the transaction has been independently verified by the member, and if so, a description of the information or categories of information that were verified;

(5) whether or not the fairness opinion was approved or issued by a fairness committee; and

(6) whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to any of the company's officers, directors or employees, or class of such persons, relative to the compensation to the public shareholders of the company.

(b) Procedures

Any member issuing a fairness opinion must have written procedures for approval of a fairness opinion by the member, including:

(1) the types of transactions and the circumstances in which the member will use a fairness committee to approve or issue a fairness opinion, and in those transactions in which it uses a fairness committee:

(A) the process for selecting personnel to be on the fairness committee;

(B) the necessary qualifications of persons serving on the fairness committee;

(C) the process to promote a balanced review by the fairness committee, which shall include the review and approval by persons who do not serve on the deal team to the transaction; and

(2) the process to determine whether the valuation analyses used in the fairness opinion are appropriate.

Amended by SR-FINRA-2008-028 eff. Dec. 15, 2008.
Adopted by SR-NASD-2005-080 eff. Dec. 8, 2007.

Selected Notices: 07-54, 08-57.

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