

# Client Alert

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CURRENT ISSUES RELEVANT TO OUR CLIENTS

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## New FINRA Private Placement Rule Effective December 3, 2012

The Financial Industry Regulatory Authority, Inc. ("FINRA") recently announced the new FINRA Rule 5123 (Private Placements of Securities) will be effective December 3, 2012. The new rule requires FINRA member firms to file copies of any offering documents used in non-public offerings of securities. The new rule includes several key exemptions, such as offerings solely to certain institutional investors, very high net worth individuals and employees as well as offerings made pursuant to Rule 144A under the Securities Act of 1933 ("Securities Act").

The FINRA notice announcing the new rule is available at <http://www.finra.org/Industry/Regulation/Notices/2012/P163707>. For information on earlier related rule proposals, please see our November 2011 client alert available at <http://www.chapman.com/media/news/media.1097.pdf> and our January 2011 client alert available at <http://www.chapman.com/media/news/media.931.pdf>.

### New Filing Requirement

New FINRA Rule 5123 requires each FINRA member that sells a security in a non-public offering in reliance on a Securities Act registration exemption to:

- file with FINRA a copy of any private placement memorandum, term sheet or other offering document used in connection with such a sale within 15 calendar days of the date of first sale or
- indicate to FINRA that no such offering documents were used.

The new rule also requires members to file any materially amended versions of offering documents with FINRA. Firms will file these documents through a new filing system accessed through FINRA's Firm Gateway in searchable PDF files. These filings are merely notice filings and FINRA will not respond with comment or clearance letters. Documents and information filed pursuant to the rule will receive confidential treatment by FINRA and will be used solely for FINRA review to determine compliance with FINRA rules and other regulatory purposes deemed appropriate by FINRA.

The new rule is similar in some respects to existing FINRA Rule 5122 which governs private offerings of securities of FINRA member firms or certain affiliates (i.e., securities issued by those firms themselves). The primary difference between the two rules is that, in addition to a filing requirement, FINRA Rule 5122 requires that an offering memorandum or term sheet be given to certain investors and also imposes certain substantive requirements such as distributing disclosure documents. For private offerings of non-member securities, new FINRA Rule 5123 does not require firms to distribute disclosure documents to investors but rather only requires filing of any offering documents that are used.

### Exemptions

Similar to FINRA Rule 5122, the new rule includes a number of significant exemptions. For example, some of the key private placements that are exempt from the new rule include:

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- offerings made solely to:
  - banks, insurance companies, registered investment advisers, registered broker-dealers and registered investment companies;
  - natural persons or entities with total assets of at least \$50 million;
  - qualified purchasers (as defined under the Investment Company Act of 1940);
  - qualified institutional buyers (QIBs) (as defined in Securities Act Rule 144A);
  - certain employee benefit plans (as defined under the Employee Retirement Income Security Act of 1974); and
  - certain employees and affiliates of the issuer (among certain others).
- Rule 144A and Regulation S offerings; and
- offerings of interests in commodity pools operated by a registered commodity pool operator.

If you would like to discuss any of the issues discussed in this Client Alert, please contact any attorney in our Investment Management Group or visit us online at [chapman.com](http://chapman.com).

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