INTEGRATED MANAGEMENT SOLUTIONS USA LLC

39 Broadway, Suite 3300, New York, New York 10006-3019

Via email: pubcom@finra.org

March 14, 2011

RE: Proposed Amendments to FINRA Rule 5122

Integrated Management Solutions USA LLC ("IMS") is pleased to have the opportunity to comment on FINRA's proposed amendments to Rule 5122 (the "Proposed Rule") to regulate the business terms and expand the disclosure requirements in connection with private placements. We believe that the Proposed Rule does not incorporate current business practices of broker-dealers, will needlessly increase costs and harm retail and smaller institutional investors. In addition, it will harm many issuers and negatively impact on our economy by making capital-raising a more difficult process. By way of background, IMS is one of the largest providers of financial accounting and compliance consultants to the securities industry, providing such services to about 100 FINRA members. We believe this perspective enables us to assess the impact of the Proposed Rule on FINRA member firms, specifically, but in our role as business experts we are also conscious of the damage that the proposed changes may cause to the capital intermediation process and the economy.

Current Rule

Current FINRA Rule 5122 (the "Current Rule") was primarily drafted to curb potential abuses and conflicts of interest when a private placement issuer and the broker-dealer, and its associated persons, selling that private placement are "control entities" (i.e., own more than 50% of the voting or profit interest).[1] Under those very limited circumstances, FINRA mandates that at least 85 percent of the offering proceeds be used for the business purposes identified in the offering document, together with disclosures of the offering expenses[2] and the amount of selling compensation to be paid to the associated broker-dealer. Exemptions are provided for certain categories of sophisticated investors and offerings, effectively limiting the reach of Rule 5122 to private placements marketed to retail investors or smaller institutional investors which do not meet the criteria for exemption under the Current Rule. To monitor compliance with these rules, FINRA requires the selling broker-dealer to submit to FINRA each offering document for *ex post* reviews to assess compliance with the rule and identify problematic terms and conditions.

Proposed Amendment

FINRA proposes to expand what started out as a limited rule to root out conflicts of interest into a mandate to regulate the sale of all private placements to non-exempt retail and institutional customers. Those exemptions cover sophisticated offerees and certain narrow categories of offerings. Regrettably, the Proposed Rule does not accommodate the actual business practices that often affect the issuance of private placements and will likely have an unduly harsh impact on smaller private placements, retail customers and smaller, non-exempt institutional customers. Purportedly, FINRA's declared need for the proposed amendment is to

[1]The Current Rule called them "Member Private Offering[s]," a definition eliminated from the Proposed Rule, which also reduced the percentage from 50% to 10% when defining what constitutes "control."
[2] This term needs clarification in both the Current and Proposed Rules.

root out fraud or abuse. We are concerned that the imposition of difficult requirements and the consequences of those additional requirements, even if unintended, are counterproductive, do not protect investors sufficiently anyway and are not in the public interest. Any student of our markets knows quite well how our marketplace has been ruined by Sarbanes-Oxley, and its applicability to even small issuers. We believe that making the capital intermediation process more difficult will actually harm customers, issuers and our economy more than any benefit that would derive from the amendments that FINRA has proposed. In an environment where we need to facilitate more investment in those enterprises that are the growth engine of our economy, we should not be throwing hurdles in the way of legitimate capital-raising, especially when there are other means for regulators to curb abuse or fraud, including anti-fraud and suitability rules. We believe that FINRA and SEC already have plenty of tools at their disposal to deter malfeasance, without introducing more steps to the capital-raising process.

A. Who is Affected?

The Proposed Rule will replace the definitions of "member private offering," "control" and "control entity" with definitions of "affiliate[3]," the FINRA Rule 5121 definition of "control" and the FINRA Rule 5110(a)(5) definition of "participation." "Control" in the Proposed Rule is a 10% interest or the power to direct management, replacing the 50% interest in the Current Rule. "Participation" under the Proposed Rule brings in those who prepare, distribute, or act as

[3] "...[A] company that controls, is controlled by or is under common control with a broker-dealer." This is virtually the same language as in FINRA Rule 5121(f)(1) (using the term "broker-dealer" for "member"), which is the specifically cited source for the definition of "control" in the Proposed Rule.

advisors or consultants in connection with, the offering documents or solicit investors for the offering (including those who provide customer and/or broker lists).[4]

Introducing these definitions broadens the categories of individuals who will now have obligations under the Proposed Rule and will, necessarily, increase the costs of private placements. These include increased record-keeping burdens, and, as a matter of prudent business practice, these individuals are also likely to involve professionals and advisors before making commitments to issuers as well as increase their malpractice coverage, all costs that will be passed on to issuers or investors. Due diligence costs, professional fees and distribution costs (including, without limitation, travel expenses) are rarely dependent proportionately on the size of a transaction. Increased costs are just one of many additional burdens under the Proposed Rule that unfairly impact on smaller offerings and prejudice smaller retail and institutional investors and issuers.

B. Disclosure Requirements

The disclosure requirements remain essentially the same under both versions of Rule 5122. However, FINRA should use this opportunity to clarify whose "offering expenses" have to be disclosed: the issuer's? the selling broker-dealer's? or both. Further, are there categories of offering expenses that should be excluded, particularly third-party, non-negotiable costs that apply to all offerings, e.g., travel or printing? FINRA should also clarify whether there is a substantive difference intended in the use of the term "offering expenses" in the "Disclosure Requirements" of the Proposed Rule and the term "offering costs" in the "Use of Offering Proceeds" section. Again, the burden falls disproportionately on smaller issuers.

[4] Specifically excluded are appraisers for bank offerings and those who issue fairness opinions under SEA Rule 13e-3.

C. Use of Offering Proceeds

The requirement that 85% of the offering proceeds must be used for the business purposes disclosed in the offering remains. Under the Proposed Rule, those offering proceeds can not be used "...to pay for offering costs, discounts, commissions and any other compensation to participating broker-dealers or associated persons,..." This last exclusion broadens the types of compensation excluded from the business purposes of the offering, replacing the more limited "any other cash or non-cash sales incentives..." under the Current Rule. This is yet another change that will make it harder for smaller issuers to attract seasoned broker-dealers to represent their offerings. Less experienced broker-dealers do not have the deep contacts and familiarity with regulatory requirements that a more experienced professional is likely to have. Nor will such inexperienced professionals have the benefit of mentoring by their more experienced co-participants. How does that benefit anyone or enhance investor protection?

D. How would the 85% test be measured?

Many transactions include not only cash but also warrants, options, equity kickers and other incentives that are provided to members. We believe that FINRA should clarify how the rule as currently construed and as proposed would apply to these items, which are quite common.

E. Disclosure specifications for offers or sales by owners, as opposed to issuers

Both the Current Rule and the Proposed Rule call for disclosures that relate mainly to issuers but make little sense with respect to current owners who are offering or selling. For example, the intended use by an owner offeror or seller of the proceeds of sale is not relevant to any prospective offeree or purchaser. Further, it would be illogical to limit the proceeds so that

they are not used to compensate the broker-dealer or its affiliates when those entities or persons are simply selling or offering their assets at what is presumably a fair price.

F. Filing Requirements

Under both versions of Rule 5122, offering documents must be filed with FINRA's Corporate Financing Department at or prior to the time when the offering documents are first provided to a prospective investor. Often, broker-dealers get involved in an offering at the very last minute, making it difficult to submit the offering documents to FINRA in a timely fashion. And then comes the glaring problem. What can (or should) FINRA do with those filed offering documents? Neither version of the Rule provides any guidance or standards, including, without limitation, the amount of time in which FINRA staff has to object to the offering. The comments in Regulatory Notice 11-04 state:

> The offering may proceed while FINRA staff reviews the offering document. Of course, if FINRA staff determines that an offering document presents an apparent investor protection issue, the responsible member should expect FINRA staff to contact the broker-dealer concerning the matter, whether or not the offering has already commenced.

As a practical matter, if FINRA finds something objectionable, what happens to the offering? Is this open-ended review process even enforceable if it is not in the Rule itself? Is "an apparent investor protection issue" broader that the Proposed Rule requirements? How much time must pass before the issuer can declare the offering effective and use the proceeds? When can the selling participants record their respective fees as earned? In other words, when does the transaction close? In many instances, the private placements will have already have closed before FINRA staff has even reviewed the documents that were filed. We fail to understand how that is helpful or even if that is helpful. Or should a member pre-clear the

offering documents because if FINRA does raise an objection, the broker-dealer could then sticker amendments to the offering documents? None of these options is attractive to anyone in the marketplace. Nor are they realistic from a business perspective. This also will make a private placement offering even less attractive to potential offerors, issuers, participants and purchasers.

G. Exemptions

Not surprisingly, the exemptions, which are essentially unchanged in both versions of the Rule[5], favor larger, more established purchasers and more sophisticated types of securities. This places a disproportionate burden on smaller issuers of basic, "plain vanilla" securities. There are also no procedures in the Proposed Rule for an offering that is largely marketed to exempt institutional investors, but then is marketed to a few non-exempt investors who wish to also acquire the securities. Will that cause the entire offering to lose its exempt status? What if that happens after most of the offering has already been sold? Effectively, that would bar the non-exempt purchaser from making the desired purchase because that immediately places the offering in violation of FINRA's filing rules. Perhaps FINRA should only require that 75%, or some other percentage, of the offering be sold to exempt investors, allowing market place rules or practices to govern the placement of the remaining shares? Alternatively, FINRA could only require filing when a non-exempt investor is first provided with the offering documents, not just a blanket rule of prior to or when the offering starts.

Amusingly, warrants or options whose underlying securities (except for those of a member or affiliate) are subject to the Proposed Rule would themselves be exempt from the

[5] The exemption for offerings in which a broker-dealer acts primarily in a wholesaling capacity has been eliminated.

Proposed Rule, as written. We do not believe that this was FINRA's intent. We also recognize that OTC options are typically not registered and FINRA wisely exempted them.

An additional exemption from the Proposed Rule is needed for when there is a change in a broker-dealer's ownership that requires FINRA approval under Rule 1017. Continuing a requirement first imposed in the Current Rule, Proposed Rule 5122(b) states: "[n]o member or associated person may participate in a private placement unless...." Read literally, if a member or an associated person sells the member's securities, there needs to be a Rule 5122 compliant set of disclosures (in addition to meeting, or being exempt from, FINRA 1017 requirements). Why is this burden necessary when there is little likelihood of fraud or abuse?

Proposed Remedies

The Proposed Rule is impractical and unnecessary. There are too many open issues due to insufficient guidance and needless ambiguities. Last year, FINRA issued Regulatory Notice 10-22, which clarified broker-dealer obligations in connection with Regulation D offerings. Much, if not all, of FINRA's articulated concerns and suggested solutions in the Proposed Rule could be more effectively dealt with by updating Regulatory Notice 10-22 and leaving Rule 5122 in its current, more limited form for affiliated offerings[6].

Simply put, if it ain't broke, there's no need to fix it.

* * * * *

[6] We would hope that FINRA would clarify some of the language in Current Rule 5122 based on our comments in this letter.

Thank you for the opportunity to comment on this matter. Should you have any further questions, feel free to call Howard Spindel at 212-897-1688 or Cassondra Joseph at 212-897-1687, or by e-mail at **hspindel@intman.com** **or** **cjoseph@intman.com,** respectively.

Very truly yours,

Howard Spindel
Senior Managing Director

Cassondra E. Joseph
Managing Director