

Regulatory Notice

23-09

Capital Formation

FINRA Requests Comment on FINRA Rules Impacting Capital Formation

Comment Period Expires: August 7, 2023

Summary

An efficient capital raising process fosters business expansion, job creation and economic growth. FINRA members play an important role in facilitating capital formation for businesses of all sizes. FINRA promotes the capital raising process through appropriately tailored rules for its members that are designed to promote transparency and to establish important standards of conduct for the benefit of all market participants, including investors and issuers.

In 2017, in [Regulatory Notice 17-14](#), FINRA requested comment on ways to increase efficiency and reduce unnecessary burdens on the capital raising process.¹ Since that time, FINRA has completed certain actions (including rule changes) and is undertaking additional actions that promote capital formation. While these actions increase efficiency and reduce unnecessary burdens on the capital-raising process, FINRA is requesting comment on whether additional changes to these or other FINRA rules, operations or administrative processes would further enhance the capital-raising process without compromising protections for investors and issuers.

Questions regarding this *Notice* should be directed to:

- ▶ Joseph Price, Senior Vice President and Counsel, Corporate Financing/Advertising Regulation, at joseph.price@finra.org or (240) 386-4642;
- ▶ James S. Wrona, Vice President and Associate General Counsel, Office of General Counsel (OGC), at jim.wrona@finra.org or (202) 728-8270; or
- ▶ Matthew Vitek, Associate General Counsel, OGC, at matthew.vitek@finra.org or (240) 386-6490.

May 9, 2023

Notice Type

- ▶ Request for Comment

Suggested Routing

- ▶ Advertising
- ▶ Compliance
- ▶ Corporate Finance
- ▶ Institutional
- ▶ Investment Banking
- ▶ Legal
- ▶ Research
- ▶ Senior Management
- ▶ Syndicate
- ▶ Underwriting

Key Topics

- ▶ Capital Acquisition Brokers
- ▶ Capital Formation
- ▶ Corporate Financing
- ▶ Investment Banking
- ▶ Private Placements
- ▶ Projections of Performance
- ▶ Public Offerings
- ▶ Research

Referenced Rules & Notices

- ▶ Capital Acquisition Broker Rules
- ▶ FINRA Rules 2111, 2210, 2241, 5110, 5122, 5123, 5130, 5131, and 11880
- ▶ JOBS Act
- ▶ Regulation A, Regulation Best Interest, Regulation D
- ▶ Regulatory Notices 10-22, 15-32, 17-06, 17-14, 20-04, 20-21 and 23-08

Action Requested

FINRA encourages all interested parties to comment. Comments must be received by August 7, 2023.

Comments must be submitted through one of the following methods:

- ▶ Emailing comments to pubcom@finra.org; or
- ▶ Mailing comments in hard copy to:

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

To help FINRA process comments more efficiently, persons should use only one method to comment.

Important Notes: All comments received in response to this *Notice* will be made available to the public on the FINRA website. In general, FINRA will post comments as they are received.²

Before becoming effective, a proposed rule change must be approved by the FINRA Board of Governors and filed with the Securities and Exchange Commission (SEC) pursuant to Section 19(b) of the Securities Exchange Act of 1934 (Exchange Act).³

Background & Discussion

A vital component of economic growth is the ability of businesses of all sizes to efficiently raise capital. This allows businesses to launch, expand, modernize, innovate and create jobs. In turn, well-functioning securities markets that promote issuer and investor confidence are essential to the capital-formation process.

Throughout the lifecycle of this process, FINRA members are central to both public and private markets—underwriting public offerings, advising companies on capital raising and corporate restructuring, acting as placement agents for some sales of unregistered securities, operating funding portals, and publishing research reports to educate and inform investors.⁴ In regulating these members, FINRA promotes market integrity and investor protection in a manner that supports the important role our capital markets play in the U.S. financial system. FINRA is committed to fostering vibrant capital markets in which everyone can participate with confidence.

In 2017, FINRA published *Regulatory Notice 17-14* requesting comment on ways to increase efficiency and reduce unnecessary burdens on the capital raising process without compromising important protections for investors and issuers. Since that time, FINRA has modernized its regulation of members' participation in capital raising activities. As further discussed below, FINRA has amended rules, updated processes and provided guidance to promote the capital-raising process. FINRA continues to undertake additional actions to promote capital formation.

FINRA's actions have made important improvements to the capital raising process. They not only increase efficiency in the process but also increase investor confidence by promoting investor protection and market integrity, key ingredients to ensuring continued participation in capital markets. Consistent with its focus on continuous improvement and regularly updating rules to reflect changes in financial products, markets and services, FINRA is interested in learning whether there are other changes to FINRA rules, operations or administrative processes that would similarly improve capital formation. Therefore, FINRA is requesting general comment on the functioning of its rules, operations and administrative processes that most directly apply to capital raising.

FINRA notes that its rules and programs are only part of a broader framework of securities laws, rules and regulations that govern or affect capital formation—the Sarbanes-Oxley Act of 2002, the Jumpstart Our Business Startups Act of 2012, SEC rules, and rules of other SROs (e.g., securities exchanges). Making changes to this broader regulatory framework is beyond FINRA's control, and in certain cases FINRA rules are governed by specific statutory requirements or SEC rules. Nevertheless, FINRA welcomes comment on how its rules and programs relate to this broader regulatory framework and whether there are opportunities for FINRA to more closely align its rules and programs with the work of other regulators in a manner that promotes capital formation and preserves important investor protections.

Completed FINRA Actions That Promote Capital Formation— Rules Amended, Processes Updated and Guidance Issued

Communications with the Public (FINRA Rule 2210) and Research Analysts and Research Reports (FINRA Rule 2241)

Rule 2210 governs members' communications with the public, while Rule 2241 covers equity research reports. In 2019, FINRA amended Rules 2210 and 2241 to conform those rules to the requirement of the Fair Access to Investment Research Act of 2017.⁵

The amendments created a filing exclusion under Rule 2210 for covered investment fund research reports—including research reports on exchange-traded funds—and eliminated the “quiet period” restrictions in Rule 2241 on publishing a report or making a public appearance concerning such funds. In so doing, the amendments increased timely information flow to investors with respect to some increasingly popular investment fund products that have helped investors to gain broad and diverse market exposure. At the same time, the amendments preserved the important investor protection standards in Rules 2210 and 2241 to ensure such information is fair and balanced and subject to conflict mitigation.

Corporate Financing Rule – Underwriting Terms and Arrangements (FINRA Rule 5110) and FINRA’s Public Offering System

Rule 5110 plays an important role in the capital-raising process by prohibiting unfair underwriting terms and arrangements in connection with the public offering of securities. The rule is important to ensuring investor protection and market integrity in underwritten public offerings. Rule 5110 requires members that participate in public offerings to file documents and information with FINRA.⁶ These documents include registration statements, underwriting agreements, engagement letters and other relevant supporting documentation.⁷

FINRA conducts its review of underwriting activities concurrent with the SEC’s review of issuers’ registration statements and other relevant documents and disclosures. A member must receive a “No Objections Opinion” from FINRA prior to its participation in a public offering.

In 2019, FINRA amended Rule 5110 to better reflect current industry practices.⁸ FINRA engaged in extensive consultation with industry participants and other interested parties to modernize Rule 5110 by significantly improving its administration and simplifying its requirements, without lessening important protections for market participants, including investors and issuers participating in offerings. The amendments also streamlined and clarified rule text and requirements that enable members to understand and apply the rule’s provisions in public offerings more easily.

Specifically, FINRA’s amendments to Rule 5110 address:

- ▶ Filing requirements, including those for shelf offerings—the amendments clarify and reduce the types of documents and information that must be filed.
- ▶ Exemptions from filing and substantive requirements—the amendments reorganize, expand and clarify the scope of these exemptions.

- ▶ Underwriting compensation—the amendments include helpful examples of payments and benefits that are and are not considered underwriting compensation. In addition, the amendments provide a more flexible approach to the review of an issuer’s securities acquired by participating members from third parties, and for securities acquired in directed sales programs (commonly called friends and family programs).
- ▶ Venture capital exceptions—the amendments recognize that bona fide venture capital transactions contribute to capital formation and modify, clarify and expand underwriting compensation exceptions to facilitate members’ participation in such transactions.
- ▶ Treatment of non-convertible or non-exchangeable debt securities and derivatives—the amendments expressly provide that non-convertible or non-exchangeable debt securities and derivative instruments acquired in a transaction unrelated to a public offering are not considered underwriting compensation. In contrast, non-convertible or non-exchangeable debt securities and derivative instruments acquired in a transaction related to a public offering are considered underwriting compensation.
- ▶ Lock-up restrictions—the amendments modify lock-up restrictions and add exceptions where other protections or market forces obviate the need for the restrictions.
- ▶ Prohibited terms and arrangements—the amendments clarify and update the list of prohibited unreasonable terms and arrangements in connection with public offerings, such as simplifying a provision that relates to payments made by an issuer to waive or terminate a right of first refusal (ROFR) to participate in a future capital-raising transaction.

As part of the implementation of the amendments to Rule 5110, FINRA also enhanced its Public Offering System. FINRA’s Public Offering System now facilitates filings required under Rule 5110 by using advanced technologies to extract information from SEC and FINRA databases that lessen reliance on outside counsel to supply publicly available information regarding the issuer and the underwriting terms and arrangements. Technology improvements also facilitated changes that make the Public Offering System’s filing and review procedures more efficient and transparent. In addition, the [Public Offerings page](#) on FINRA’s website provides an implementation guide, updated filing and review guidance, an updated Public Offerings System user guide, and related FAQs.⁹

Private Placement Obligations and Filings

The private placement market is a critical source of capital for American businesses, particularly small and midsize companies. In recent years, the private placement market outpaced the public market.¹⁰ From 2009 to 2019, the amount of capital raised in Regulation D offerings more than doubled.¹¹

The majority of Regulation D offerings are sold directly by issuers without any broker-dealer involvement. Approximately 20 percent of Regulation D offerings involve “intermediaries,” such as broker-dealers.¹² Thus, only a small percentage of investors in private placements are afforded the protections of FINRA rules and other relevant broker-dealer regulations that apply when a Regulation D offering involves a member.

However, member involvement in private placements has kept pace with the growth of the Regulation D market in general. For instance, the number of Regulation D filings submitted by members pursuant to FINRA Rules 5122 and 5123 has increased to over 3,800 unique filings in 2021 in comparison to roughly 2,000 submissions in 2013.¹³

While the growth of the private placement offering market has increased funding opportunities for issuers (in particular, small and midsize businesses) and investment options for investors, private offerings may present certain risks to investors. These risks include, for many private placements, their illiquid nature, the lack of access to comprehensive information with which to value the securities or a transparent market to set the market price, the absence of substantial operating histories and the lack of independently audited financial statements.

Maintaining investor confidence in the private placement market is crucial to the continued success of capital raising efforts of small and midsize companies. In furtherance of that goal, members that participate in private placements are subject to regulatory obligations that help ensure the protection of investors and maintain confidence in the marketplace, thereby ultimately benefiting capital formation. To meet those obligations, it is important that members have a clear understanding of regulatory requirements and that processes be as efficient as possible. In support of these objectives, FINRA has taken the additional steps discussed below.

Guidance on Private Placements

FINRA periodically provides guidance to members active in private placements that assists them with their compliance procedures and regulatory responsibilities. The guidance promotes capital-raising by making compliance requirements more transparent and easier for members to understand. In addition, the guidance benefits smaller and midsize issuers that often raise capital under Regulation D

and need to anticipate information that may be required by members to fulfill their reasonable investigation obligations under SEC and FINRA rules. The guidance also protects investors by informing members of conduct that can result in investor harm and disciplinary actions. This promotes investor and issuer confidence in the marketplace, a critical component of capital raising.

A significant contribution to FINRA's guidance was the publication in 2010 of [Regulatory Notice 10-22](#) that focused on members' obligations to conduct reasonable investigations of issuers and the securities sold in private placements made under the Regulation D exemption. In the years since *Regulatory Notice 10-22* was published, the private placement market and the related regulatory landscape have evolved. FINRA has observed both effective practices and areas of concern in the sales of private placements by members.

In a companion *Regulatory Notice*, FINRA is issuing updated guidance that supplements the prior guidance in light of the developments and observations since *Regulatory Notice 10-22*.¹⁴ The updated, supplemental guidance in [Regulatory Notice 23-08](#) highlights a member's obligation, when recommending a security, to conduct a reasonable investigation of the security under the SEC's Regulation Best Interest (Reg BI), which went into effect in 2020.¹⁵ The *Regulatory Notice* also addresses other key obligations for members when selling private placements, such as FINRA's communications with the public and supervision rules. In addition, the *Regulatory Notice* discusses practices observed since *Regulatory Notice 10-22* that members have adopted to help further address their reasonable investigation and related supervisory obligations when recommending private placements. The guidance is a helpful tool, providing members and issuers with a compliance roadmap to successfully engage in private placement activities.

Filings of Private Placements (FINRA Rules 5122 and 5123)

Rule 5122 (Private Placements of Securities Issued by Members) imposes disclosure and filing requirements for members that sell a private placement of securities issued by a member or a control entity.¹⁶ Its companion rule, Rule 5123 (Private Placements of Securities), requires members that sell any other type of private placement to file a copy of any offering documents with FINRA within 15 calendar days of the first sale, subject to various exemptions.¹⁷

The requirement for members to file information on the private placements they sell is essential to FINRA's oversight of broker-sold private placements. As part of these filings, members are required to complete a Filer Form to provide known information about the issuer, the offering terms, and the filer itself. This information assists FINRA in assessing the risks of the offerings. In 2021, FINRA updated the Filer Form to clarify some current questions and include new questions associated with areas of concern that FINRA believes may help determine which filings are

potentially problematic.¹⁸ The updated Filer Form also reduces the need for FINRA to routinely request additional information that the Filer Form had previously omitted, thereby streamlining the process and alleviating the burdens to members of having to provide additional responses.

Restrictions on the Purchase and Sale of Initial Equity Public Offerings (FINRA Rule 5130) and New Issue Allocations and Distributions (FINRA Rule 5131)

Rule 5130 protects the integrity of the initial public offering (IPO) process by placing certain restrictions on the purchase and sale of new issue shares.¹⁹ Specifically, the rule provides that, except as otherwise permitted under the rule, a member may not: (1) sell new issue shares to an account in which a restricted person has a beneficial interest;²⁰ (2) purchase new issue shares in any account in which such member firm or associated person has a beneficial interest; and (3) continue to hold new issue shares acquired as an underwriter, selling group member or otherwise. Rule 5131 addresses abuses in the allocation and distribution of new issue shares. Among other practices, the rule prohibits the practice of “spinning,” which is the allocation of new issue shares by a member to an account in which an executive officer or a director of a public company or covered non-public company (as defined in the rule) that is the member’s current, former or prospective investment banking client has a beneficial interest. These rules include several exemptions.

In 2019, FINRA amended the exemptions under the rules to enhance regulatory consistency, address unintended operational impediments and promote capital formation.²¹ Among other changes, FINRA:

- ▶ Amended the exemption available to foreign investment companies to provide an alternative investor test to satisfy the exemption (*i.e.*, whether the investment company has 100 or more direct investors or 1,000 or more indirect investors). Foreign public investment companies were generally unable to satisfy the prior investor test, which required that they determine whether any person owning more than five percent of their shares was a restricted person.²² As FINRA explained in its rule filing with the SEC, it is operationally impractical for a foreign investment company to determine whether an investor owns more than five percent of its shares where the investor acquires the interest through an intermediary that holds the shares for multiple investors in an omnibus or nominee account. Further, an investor may acquire shares of a foreign investment company through multiple intermediaries or through multiple omnibus or nominee accounts at the same intermediary. In such cases, the foreign investment company is unable to satisfy the five percent investor test. As a result of the amendment, foreign investment companies have greater flexibility to participate in the U.S. IPO market and to invest in U.S. issuers.

- ▶ Adopted an exemption for U.S. and foreign employee retirement benefits plans (or family of plans) that meet specified conditions, including having, in aggregate, at least 10,000 plan participants and beneficiaries and \$10 billion in assets. Prior to this change, only Employee Retirement Income Security Act (ERISA) benefits plans and state and municipal government benefits plans qualified for a general exemption to participate in IPOs under the rules. Other benefits plans had to: (1) assess whether they could participate in IPOs by determining the status of each person that had a beneficial interest in the plans, which would have required a review of potentially hundreds of thousands of participants and beneficiaries; or (2) obtain exemptive relief from FINRA, which was reviewed on a case-by-case basis. This could have significantly impeded their ability to invest in IPOs. As a result of this change, these plans have greater flexibility to participate in the U.S. IPO market and to invest in U.S. issuers.
- ▶ Expanded the definition of “family investment vehicle” under Rule 5130 to include legal entities that are beneficially owned by “family members” and “family clients.” The definition now aligns with the definitions relating to “family offices” under the Investment Advisers Act of 1940 (Advisers Act).²³ Prior to this change, investment professionals that provided investment advice to family offices were not considered exempt from the definition of portfolio manager (a category of restricted persons) and, thus, were generally unable to purchase IPO shares. The amendment allows for greater participation in the U.S. IPO market by these investment professionals and by the family offices to which they provide advice.

Settlement of Syndicate Accounts (FINRA Rule 11880)

Rule 11880 addresses the maximum time for the final settlement of syndicate accounts by the syndicate manager in a public offering of corporate securities.²⁴ The rule had required, in public offerings of corporate equity and debt securities, that final settlement of syndicate accounts had to be effected within 90 days following the syndicate settlement date. In November 2022, FINRA amended Rule 11880 to adopt, as of January 1, 2023, a two-stage syndicate account settlement approach for public offerings of corporate debt securities in which the syndicate manager must remit to each syndicate member at least 70 percent of the gross amount due to such syndicate member within 30 days following the syndicate settlement date, with any final balance due remitted within 90 days following the syndicate settlement date.²⁵ As a result of this change, syndicate members in public offerings of corporate debt offerings now receive most of their earnings within 30 days instead of waiting 90 days, freeing up capital that can be used in other areas, including underwritings and other activity in support of capital formation.

Additional Actions FINRA Is Undertaking to Promote Capital Formation

CAB Rules

Capital Acquisition Brokers (CABs) are broker-dealers that engage in a limited range of activities, essentially acting as placement agents or finders for sales of unregistered securities to institutional investors, serving as intermediaries in connection with the change of control of privately held companies, and advising companies and private equity funds on capital raising and corporate restructuring. Firms that meet the CAB criteria may elect to be governed by the CAB Rules.

The benefit of electing CAB status is that CABs are subject to fewer restrictions on specified activities (such as advertising) and have less burdensome supervisory requirements. On the other hand, CABs are not permitted to engage in other broker-dealer activities, such as accepting customers' trading orders, carrying customer accounts, handling customers' funds or securities, or engaging in proprietary trading or market making.

In 2020, FINRA issued [Regulatory Notice 20-04](#) soliciting comment on proposed amendments to the CAB Rules.²⁶ The proposed changes would: (1) allow CABs to register as investment advisers provided that the firm's advisory clients are solely institutional investors; (2) broaden the definition of institutional investor to include "knowledgeable employees"; (3) permit CABs to act as intermediaries in connection with a secondary transaction involving unregistered securities, provided the transaction is not considered a distribution of securities under the Securities Act of 1933 (Securities Act), and both the seller and the purchaser are institutional investors as defined by the CAB rules; (4) codify a staff interpretation that CABs may be compensated in the form of securities issued by a privately held CAB client under certain conditions; and (5) confirm that associated persons of CABs may invest in unregistered securities, provided that the associated person reports such investments to his or her employer CAB firm.

FINRA is preparing to file proposed amendments based, in part, on comments received in response to [Regulatory Notice 20-04](#). The purpose of these proposed changes is to make the CAB Rules more useful to CABs without reducing investor protection.

Projections of Performance under FINRA Rule 2210 (Communications with the Public)

FINRA Rule 2210 generally prohibits member communications from predicting or projecting performance, implying that past performance will recur, or making any exaggerated or unwarranted claim, opinion, or forecast.²⁷ The rule has three

exceptions to these prohibitions: (1) hypothetical illustrations of mathematical principles; (2) investment analysis tools and the reports that such tools produce; and (3) price targets in research reports, subject to specified conditions.²⁸ The FINRA rules governing options²⁹ and securities futures³⁰ communications also permit projected performance, provided the communication meets specified requirements.

In 2017, FINRA published [Regulatory Notice 17-06](#) soliciting comments on a proposed exception to the prohibition on projecting performance for customized hypothetical investment planning illustrations that include projected performance of an asset allocation or other investment strategy, but not individual securities.³¹ FINRA received numerous comments on the proposal, including many that urged FINRA to permit projections of performance of individual securities, particularly with respect to institutional communications. FINRA is preparing to file proposed amendments with the SEC based, in part, on comments received in response to [Regulatory Notice 17-06](#). The contemplated amendments would improve the flow of information, which would help enhance capital formation.

Regulation A and FINRA Rule 5110

Regulation A is an exemption from registration for public offerings. Rule 5110—which, as noted above, prohibits unfair underwriting terms and arrangements in connection with the public offering of securities—requires the filing of specified information in connection with public offerings, including Regulation A offerings.³² SEC amendments to Regulation A in 2015 and 2020 resulted in considerably more issuers using its provision to conduct public offerings.³³ Regulation A can provide a more cost-effective means of raising capital than a traditional IPO, but it imposes limits on the amount of capital issuers are allowed to raise.³⁴

To help facilitate members' growing participation in Regulation A offerings, FINRA published [Regulatory Notice 15-32](#) to provide guidance on the FINRA filing requirements and review procedures that apply to such offerings.³⁵ FINRA also routinely publishes updates of [Regulation A FAQs](#) on FINRA's Public Offerings page that provide additional guidance on the application of the Corporate Financing Rules to Regulation A offerings. Members have found this guidance helpful in navigating Regulation A filings.

To understand whether there are other forms of guidance or changes that can further enhance the Regulation A filing process, FINRA has begun a series of roundtable discussions with industry participants. FINRA will consider feedback from those discussions and this *Notice* to determine whether responsive guidance or changes are appropriate.

Fixed Income Roundtables

FINRA's engagement with members regarding capital formation also has included targeted outreach efforts in the fixed income area. In this regard, FINRA, in partnership with the Municipal Securities Rulemaking Board (MSRB), held a series of roundtables, known as the MSRB/FINRA Partnership Roundtables, to explore the challenges facing minority, women, disabled, and veteran-owned firms in the securities industry. The roundtables provided an opportunity to discuss the concerns raised by these firms regarding economic barriers and regulatory challenges, as well as possible solutions. FINRA is currently considering the feedback received from the roundtables.

Request for Comment

FINRA believes the changes discussed above have improved and will further improve the capital raising process. However, FINRA recognizes that many other rules and processes, separately or in the aggregate, may impact capital formation. FINRA therefore requests comment on any of its rules or processes that affect the capital raising process and how they might be modified to further promote capital formation while maintaining investor protection. In particular, FINRA requests comment on the following questions:

- ▶ Are there any FINRA rules, operations or administrative processes that should be updated or amended to better facilitate capital raising in a manner that preserves investor protection?
- ▶ Have FINRA's rules covering the capital raising process effectively responded to the problem(s) they were intended to address?
- ▶ What have been the economic impacts, including costs and benefits, arising from FINRA's rules on the capital raising process? To what extent do these economic impacts differ by business attributes, such as size of the member or differences in business models? Can you provide quantitative information regarding any of these impacts?
- ▶ Where have FINRA rules related to the capital raising process been particularly effective? Are there other rules or applications where a similar approach might enhance capital formation while maintaining investor protections?
- ▶ What, if any, unintended consequences have arisen from FINRA's rules related to the capital raising process? Have members changed their business models and practices in ways unintended by FINRA with a consequence to capital formation or investor protection in response to FINRA's rules in these areas?

- ▶ Are there other FINRA rules or practices not identified above that impact the capital raising process, such as rules related to the fixed income market (other than the amendments to FINRA Rule 11880)? If so, what has been your experience with these rules or practices?
- ▶ Are there any ambiguities in the rules that FINRA should address to aid members' compliance and enhance the capital raising process while ensuring investor protection concerns are addressed? Are there any other types of modifications to FINRA rules that should be considered? For example, can FINRA rules be modified to encourage the frequency of quotes, quoted prices or number of shares quoted for securities, particularly illiquid ones?
- ▶ What changes have occurred in the market for capital formation since *Regulatory Notice 17-14* that should prompt FINRA to consider amending its rules to better facilitate capital raising?
- ▶ Can FINRA make any of its administrative processes or interpretations related to the capital raising process more efficient and effective? If so, which ones and how? Are there any such processes or interpretations that should be added?
- ▶ Is there any additional data FINRA could provide to facilitate capital formation or to facilitate analysis of the regulatory framework?

Endnotes

1. See *Regulatory Notice 17-14* (April 2017).
2. Parties should submit in their comments only personally identifiable information, such as phone numbers and addresses, that they wish to make available publicly. FINRA, however, reserves the right to redact or edit personally identifiable information from comment submissions. FINRA also reserves the right to redact, remove or decline to post comments that are inappropriate for publication, such as vulgar, abusive or potentially fraudulent comment letters.
3. See Section 19 of the Exchange Act and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the Federal Register. Certain limited types of proposed rule changes take effect upon filing with the SEC. See Section 19(b)(3) of the Exchange Act and Exchange Act Rule 19b-4.
4. See *Regulatory Notice 17-14* (April 2017).
5. See Exchange Act Release No. 86700 (August 16, 2019), 84 FR 43833 (August 22, 2019) (SR-FINRA-2019-017) (Order Approving a Proposed Rule Change to Amend FINRA Rules 2210 (Communications with the Public) and 2241 (Research Analysts and Research Reports)). See also Exchange Act Release No. 86700A (September 4, 2019), 84 FR 47688 (September 10, 2019) (correction).
6. See FINRA Rule 5110(a)(4).
7. See FINRA Rule 5110(a)(4)(A).
8. See Exchange Act Release No. 87855 (December 23, 2019), 84 FR 72396 (December 31, 2019) (Order Approving File No. SR-FINRA-2019-012).
9. See FINRA's [Public Offerings](#) page.
10. See *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, Securities Act Release No. 10884 (November 2, 2020), 86 FR 3496 (January 14, 2021) (Facilitating Capital Formation); [Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009-2017](#), Division of Economic and Risk Analysis (DERA), U.S. Securities and Exchange Commission (Aug. 2018) (Capital Raising in the U.S.).
11. In 2019, approximately \$1.5 trillion was raised under Regulation D, in comparison to approximately \$0.7 trillion in 2009. See *Facilitating Capital Formation*, *supra* note 10; see also *Capital Raising in the U.S.*, *supra* note 10.
12. See *Capital Raising in the U.S.*, *supra* note 10. The SEC's analysis of private offerings that involve "intermediaries" did not distinguish between those that involved broker-dealers versus those that involved other types of intermediaries, such as unregistered "finders." *Id.*
13. FINRA Rule 5122 requires members to make a filing when they offer or sell any security in a private placement of unregistered securities by a member or control entity. FINRA Rule 5123 requires members to make a filing when they sell a security in any other private placement. Both rules provide exemptions from filing for certain types of offerings, and for offerings sold solely to certain types of investors such as qualified purchasers, institutional purchasers, and other sophisticated investors.
14. See *Regulatory Notice 23-08* (May 2023).

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15. See Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 86031 (June 5, 2019), 84 FR 33318, 33375 (July 12, 2019). Members and their associated persons must comply with Reg BI when recommending private placements to retail customers. Reg BI requires a member or associated person, when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, to act in the best interest of the retail customer without placing the financial or other interest of the member or associated person ahead of the interest of the retail customer. This general obligation is satisfied only by complying with four specified component obligations: the Care Obligation, the Disclosure Obligation, the Conflict of Interest Obligation and the Compliance Obligation. Reg BI's Care Obligation incorporates and builds on broker-dealers' longstanding suitability obligations, and like FINRA Rule 2111 (Suitability), it includes reasonable basis, customer specific and quantitative components. The reasonable basis obligation requires that the member or associated person undertake reasonable diligence, care and skill to understand the nature of the recommended security or investment strategy involving a security—as well as the potential risks, rewards and costs of the recommended security or investment strategy—and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers based on that understanding. As discussed further in *Regulatory Notice 23-08*, to fulfill the reasonable basis obligation, a member or associated person must conduct a reasonable investigation of any security (including a private placement) it recommends.
16. FINRA Rule 5122 requires a member to file the private placement memorandum, term sheet or other offering document with FINRA at or prior to the first time the document is provided to any prospective investor, subject to certain exemptions.
17. The date of first sale is defined as the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor's subscription agreement or check. This is the same definition applied by the SEC in the context of the Form D filing requirement. See Securities Act Release No. 8891 (February 6, 2008) and the [Form D filing instructions](#), 73 FR 10592 (February 27, 2008).
18. See Exchange Act Release No. 91047 (February 3, 2021); 86 FR 8819 (February 9, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2021-002).
19. "New issue" means any IPO of an equity security as defined in Section 3(a)(11) of the Exchange Act, made pursuant to a registration statement or offering circular, subject to certain exceptions. See FINRA Rules 5130(i)(9) and 5131(e)(7).
20. The term "restricted person" includes the following categories of persons: (1) broker-dealers; (2) broker-dealer personnel; (3) finders and fiduciaries; (4) portfolio managers; and (5) persons owning a broker-dealer. See Rule 5130(i)(10). The term "beneficial interest" means any economic interest, such as the right to share in gains or losses, excluding the receipt of a management or performance-based fee for operating a collective investment account or other fees for acting in a fiduciary capacity. See Rule 5130(i)(1).

21. See Exchange Act Release No. 87470 (November 5, 2019), 84 FR 61102 (November 12, 2019) (Order Granting Accelerated Approval of File No. SR-FINRA-2019-022).
22. See Exchange Act Release No. 86558 (August 2, 2019), 84 FR 39029 (August 8, 2019) (Notice of Filing of File No. SR-FINRA-2019-022).
23. See Advisers Act Rule 202(a)(11)(G)-1.
24. Underwriting groups ordinarily form syndicate accounts to process the income and expenses of the syndicate. The syndicate manager is responsible for maintaining syndicate account records and must provide each selling syndicate member an itemized statement of syndicate expenses no later than the date of the final settlement of the syndicate account.
25. See Exchange Act Release No. 96279 (November 9, 2022), 87 FR 68783 (November 16, 2022) (Order Approving File No. SR-FINRA-2022-025).
26. See *Regulatory Notice 20-04* (January 30, 2020).
27. See FINRA Rule 2210(d)(1)(F). With respect to forecasts, FINRA issued guidance in 2020 regarding the use of reasonable forecasts of issuer operating metrics in retail communications concerning private placements. See *Regulatory Notice 20-21* (July 2020).
28. See FINRA Rule 2210(d)(1)(F)(i)-(iii).
29. See FINRA Rule 2220(d)(3).
30. See FINRA Rule 2215(b)(3).
31. See *Regulatory Notice 17-06* (February 2017).
32. See FINRA Rule 5110(a)(2).
33. See Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A), Securities Act Release No. 9741 (March 25, 2015), 80 FR 21806 (April 20, 2015). See also *Facilitating Capital Formation, supra* note 10.
34. Subject to specific eligibility requirements, Regulation A allows companies to raise money under two different tiers. Under Tier 1, a company can raise up to \$20 million in any 12-month period. Under Tier 2, a company can offer up to \$75 million in any 12-month period. See 17 CFR § 230.251.
35. See *Regulatory Notice 15-32* (September 2015).