consistent with federal requirements for market makers.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–NYSE–2012–10) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14337 Filed 6–12–12; 8:45 am]

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[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67157; File No. SR–FINRA–2011–057]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendments No. 2 and No. 3 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendments No. 1, No. 2, and No. 3 to Adopt FINRA Rule 5123 (Private Placements of Securities) in the Consolidated FINRA Rulebook

June 7, 2012.

I. Introduction

On October 5, 2011, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt FINRA Rule 5123 (''Private Placements of Securities'').[3] The proposed rule change was published for comment in the **Federal Register** on October 24, 2011.[4] The Commission received sixteen (16) comment letters in response to the original proposed rule change (''Original Proposal'').[5] On January 19, 2012, FINRA filed Amendment No. 1 to the proposed rule change and a letter responding to comments.[6] In order to solicit additional input from interested parties on the issues presented in FINRA's proposed rule change, on January 20, 2012, the Commission published notice of Amendment No. 1 for comment and an order instituting proceedings pursuant to Section 19(b)(2)(B) of the Act, to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[7] The Commission received eleven (11) comment letters in response to the Notice and Proceedings Order.[8] On March 12, 2012, FINRA filed Amendment No. 2 to the proposed rule change and a letter responding to comments.[9] On March 22, 2012, FINRA filed Amendment No. 3 to the proposed rule change.[10] In Amendment No. 2, as further clarified by Amendment No. 3, FINRA proposed eliminating the Original Proposal's requirement for members to disclose to investors the anticipated use of offering proceeds, and the amount and type of offering expenses and offering compensation. Instead, FINRA proposed to limit members' obligations under proposed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Prior to filing the rule change with the Commission, in January 2011, FINRA published Regulatory Notice 11–04 requesting comment on proposed amendments to Rule 5122 (''Private Placement of Securities Issued by Members''). FINRA Rule 5122 established disclosure and filing requirements for members and associated persons offering or selling any security issued by a member or a member's control entity in a non-public offering of securities conducted in reliance on certain available exemptions from registration under the Securities Act of 1933 (''Securities Act''). As originally proposed, the proposed rule change would have amended Rule 5122 to include similar disclosure and filing requirements for members and associated persons offering or selling any security issued by a non-member in a non-public offering of securities conducted in reliance on certain available exemptions from registration under the Securities Act. A copy of the regulatory notice is available on FINRA's Web site at *http://www.finra.org.* The comment period expired on March 14, 2011. FINRA received 35 comments in response to the regulatory notice.

[4] *See* Exchange Act Release No. 65585 (Oct. 18, 2011), 76 FR 65758 (Oct. 24, 2011) (Notice of Filing of Proposed Rule Change to Adopt New FINRA Rule 5123 (Private Placements of Securities)) (''Notice of Filing''). The comment period closed on November 18, 2011.

[5] *See* Letters from Ryan Adams, Christine Lazaro, Esq., and Lisa Catalano, Esq., St. John's School of Law Securities Arbitration Clinic, dated November 10, 2011 (''St. John's Letter''); Ryan K. Bakhtiari, President, Public Investors Arbitration Bar Association, dated November 14, 2011 (''PIABA Letter''); David T. Bellaire, Esq., Financial Services Institute, Inc., dated November 14, 2011 (''FSI Letter''); Robert E. Buckholz, Chair, Committee on Securities Regulation, New York City Bar Association, dated November 9, 2011 (''NYC Bar-November Letter''); Richard B. Chess, President, Real Estate Investment Securities Association, dated November 14, 2011 (''REISA–November Letter''); Alicia M. Cooney, Managing Director, Monument Group, dated January 12, 2012 (''Monument Group-January Letter''); Martel Day, Chairman, Investment Program Association, dated November 14, 2011 (''IPA Letter''); Jack E. Herstein, President, North American Securities Administrators Association, Inc., dated November 17, 2011 (''NASAA–November Letter''); Joan Hinchman, Executive Director, National Society of Compliance Professionals, dated November 14, 2011 (''NSCP Letter''); William A. Jacobson, Associate Clinical Professor, and Carolyn L. Nguyen, Cornell Law School, dated November 14, 2011 (''Cornell-November Letter''); Stuart J. Kaswell, Executive Vice President, Managed Funds Association, dated November 14, 2011 (''MFA Letter''); William H. Navin, Senior Vice President, The Options Clearing Corporation, dated November 9, 2011 (''OCC Letter''); Jeffrey W. Rubin, Chair, Federal Regulation of Securities Committee, American Bar Association, dated November 14, 2011 (''ABA Letter''); Sullivan & Cromwell LLP, dated November 10, 2011 (''S&C–November Letter''); Osamu Watanabe, Deputy General Counsel, Moelis & Co., dated November 28, 2011 (''Moelis Letter''); and Donald S. Weiss, K&L Gates LLP, dated November 14, 2011 (''K&L Gates Letter''). Comment letters are available at *www.sec.gov.*

[6] *See* Letter from Stan Macel, Assistant General Counsel, FINRA, dated January 19, 2012 (''Response Letter''). The text of proposed Amendment No. 1 and FINRA's Response Letter are available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, and at the Commission's Public Reference Room. FINRA's Response Letter is also available on the Commission's Web site at *www.sec.gov.*

[7] *See* Exchange Act Release No. 66203 (Jan. 20, 2012); 77 FR 4065 (Jan. 26, 2012) (Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as modified by Partial Amendment No. 1, to Adopt FINRA Rule 5123 (Private Placements of Securities) in the Consolidated FINRA Rulebook)) (''Notice and Proceedings Order''). The comment period closed on February 27, 2012 and FINRA's rebuttal period closed on March 12, 2012.

[8] *See* Letters from Wesley A. Brown, Managing Director and Chief Compliance Officer, St. Charles Capital, LLC, dated February 26, 2012 (''St. Charles Letter''); Robert E. Buckholtz, Chair, Committee on Securities Regulation, New York City Bar Association, dated February 24, 2012 (''NYC Bar-February Letter''); Alicia M. Cooney, Managing Director, Monument Group, Inc., dated February 27, 2012 (''Monument Group-February Letter''); Jack E. Herstein, NASAA President and Assistant Director, Nebraska Department of Banking and Finance Bureau of Securities, dated April 23, 2012 (''NASAA–April Letter''); William A. Jacobson, Associate Clinical Professor of Law, Cornell Law School, and Director, Cornell Securities Law Clinic, dated February 27, 2012 (''Cornell-February Letter''); Stuart J. Kaswell, Executive Vice President, Managed Funds Association, dated February 27, 2012 (''MFA–February Letter''); Douglas Martin, dated February 1, 2012 (''Martin Letter''); National Investment Banking Association, dated February 27, 2012 (''NIBA Letter''); Daniel Oschin, President, Real Estate Investment Securities Association, dated February 27, 2012 (''REISA–February Letter''); G. Philip Rutledge, attorney, dated April 27, 2012 (''Rutledge Letter''); and Sullivan & Cromwell LLP, dated February 23, 2012; (''S&C–February Letter'').

[9] *See* Letter from Stan Macel, FINRA, dated March 12, 2012 (''Rebuttal Letter''). *On May 18, 2012, FINRA filed a supplementary response to additional comments* (''Supplementary Rebuttal Letter''). *See Letter from Stan Macel, FINRA, dated May 18, 2012.* The text of proposed Amendment No. 2, the Rebuttal Letter, and the Supplementary Rebuttal Letter are available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, and at the Commission's Public Reference Room. FINRA's Rebuttal Letter and Supplementary Rebuttal Letter are also available on the Commission's Web site at *www.sec.gov.*

[10] In Amendment No. 3, FINRA made clear that proposed Rule 5123 would require members to file with FINRA within 15 calendar days of the date of first sale the original offering documents as well as any ''materially amended versions'' of offering documents used in connection with a sale. The text of proposed Amendment No. 3 is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, and at the Commission's Public Reference Room.

Rule 5123 to filing any existing offering document (including any material amendment thereto) used in connection with a sale of the subject securities within 15 calendar days of the date of first sale, or to identify that no such document was used. The Commission is publishing this notice and order (''Notice and Order'') to solicit comment on Amendments No. 2 and No. 3 and to approve the proposed rule change, as modified by Amendments No. 1, No. 2, and No. 3, on an accelerated basis.

II. Description of Original Proposal, Comments, and Amendment No. 1

A. Description of Original Proposal

The Original Proposal would have required that members and associated persons that offer or sell any applicable private placement (''Covered Offering''), or participate in the preparation of a private placement memorandum (''PPM''), term sheet, or other disclosure document in connection with any Covered Offering, disclose to each investor prior to sale the anticipated use of offering proceeds, and the amount and type of offering expenses and offering compensation. If any issuer's disclosure documents did not contain the requisite information, the Original Proposal would have required the member to create and provide to any potential investor a separate disclosure document containing this information.

The Original Proposal also would have required that each participating member file the PPM, term sheet, or other disclosure document, and any exhibits thereto, with FINRA no later than 15 calendar days after the date of the first sale. In addition, the Original Proposal would have required any material amendments to such disclosure document, or any amendments to any mandated disclosures described in the Original Proposal, to be filed with FINRA no later than 15 calendar days after the date such document was provided to any prospective investor.

B. Comments on the Original Proposal

As stated above, the Commission received sixteen comment letters on the Original Proposal. Some commenters expressed support for the goals of the Original Proposal.[11] Other commenters, including some who supported the proposal, expressed concerns about the Original Proposal.[12]

The commenters' concerns generally fell into broad categories: Several commenters advocated for additional exemptions to the proposed rule (*e.g.,* offerings made by a private fund,[13] secondary market transactions exempt from registration under the Securities Act,[14] and offerings sold to ''knowledgeable employees'' of a private fund or of the investment adviser that sponsors or manages a private fund [15]). At least one commenter viewed the Original Proposal as exceeding the scope of FINRA's regulatory authority.[16] Several commenters expressed concern about the costs and burdens related to the Original Proposal (*e.g.,* increased risk of liability for FINRA members required to create an offering document,[17] additional monetary costs associated with requiring each FINRA selling group member to provide to each prospective investor a copy of the offering document,[18] and the potential negative impact on the availability of capital to certain hedge funds [19]).

In response to commenters, FINRA submitted its Response Letter and filed Amendment No. 1 to the Original Proposal.[20]

C. Description of Amendment No. 1

Amendment No. 1 made the following changes to the Original Proposal:

First, FINRA amended the Original Proposal by clarifying that the term ''private placement'' would have the same meaning as it does in Rule 5122. That is, the term private placement would mean ''a non-public offering of securities conducted in reliance on an available exemption from registration under the Securities Act.''

Second, FINRA amended the Original Proposal by eliminating a member's obligation to create a disclosure document. In particular, FINRA eliminated the proposed requirement to create and provide to any potential investor a separate disclosure document containing the anticipated use of offering proceeds, the amount and type of offering expenses, and the amount and type of compensation provided or to be provided to sponsors, finders, consultants, and members and their associated persons in connection with the offering, if a disclosure document containing this information, drafted by or on behalf of the issuer, did not already exist.

Third, FINRA amended the Original Proposal by revising a member's obligation to make a notice filing with FINRA with respect to a Covered Offering. In particular, a member would still be obligated to file with FINRA any disclosure document used in the Covered Offering containing the requisite information about proceeds, expenses, and compensation; however, if no such disclosure document existed, the member would not be required to generate a notice document containing the requisite information. Instead, the participating member would have to prepare a notice filing identifying the private placement, the participating members, and stating that no disclosure document was used, and file it with FINRA no later than 15 calendar days after the date of first sale.

Amendment No. 1 also affirmed that proposed Rule 5123 would not preclude sales of Covered Offerings in which no disclosure documents were used and would not require the member to make any additional disclosure to investors in such offerings. In addition, Amendment No. 1 clarified that each member participating in an offering (or a member's designee) would be required to file the disclosure document of notice filing with FINRA no later than 15 calendar days after the date of first sale.

Fourth, Amendment No. 1 amended the Original Proposal by clarifying certain proposed exemptions from and adding new proposed exemptions to the Original Proposal.[21] The Amendment

[11] The Cornell-November Letter viewed the Original Proposal as an important step in protecting investors by informing them of the risks associated with private placements; the FSI Letter generally supported the Original Proposal because it would provide an enhanced level of disclosure to investors participating in private placements of securities; the NASAA–November Letter generally supported FINRA's efforts to increase the disclosure of information pertinent to the offer and sale of private placements; the PIABA Letter stated its support for the Original Proposal; the St. John's Letter supported the Original Proposal in the interest of investor protection, increased transparency, and awareness.

[12] The NASAA Letter recommended that the Original Proposal require members to provide additional risk disclosures to investors; the Cornell-November Letter urged FINRA to amend the Original Proposal to require a member to disclose any affiliation between the issuer and the member; the PIABA Letter sought clarification that the Original Proposal would not create a safe harbor for broker-dealers; the FSI Letter recommended that FINRA adopt an amendment to allow one member to make the notice filing on behalf of all members of a selling group.

[13] *See, e.g.,* MFA–February Letter.

[14] *See, e.g.,* ABA Letter.

[15] *See, e.g.,* K&L Gates Letter.

[16] *See, e.g.,* ABA Letter.

[17] *See, e.g.,* REISA–February Letter.

[18] *See, e.g.,* NYC Bar November Letter.

[19] *See, e.g.,* NSCP Letter.

[20] FINRA subsequently submitted a second letter (*i.e.,* the Rebuttal Letter, supra note 9) and amended the Original Proposal three times (*i.e.,* Amendments No. 1, No. 2 and No. 3 (discussed in Part III, below)). The changes proposed in Amendment No. 1 (along with the explanations found in the Response Letter, *supra* note 6 and in the Notice and Proceedings Order, *supra* note 7) addressed the concerns commenters raised in response to the Original Proposal. The Commission is therefore not fully discussing the comments to the Original Proposal in this Order.

[21] Amendment No. 1 amended the Original Proposal to exclude offerings pursuant to the following provisions: Securities Act Sections 4(1), 4(3), and 4(4) (which generally exempt secondary

clarified that a member qualifies for an exemption based upon the sales it makes rather than those of all members participating in the offering. Thus, the actions of one member would not affect the availability of an exemption for another member.

Fifth, Amendment No. 1 made two additional clarifications. Amendment No. 1 clarified that the term ''affiliate'' for purposes of Rule 5123 would have the same meaning as in FINRA Rule 5121. Specifically, the term ''affiliate'' would mean ''an entity that controls, is controlled by or is under common control with a member.'' Finally, Amendment No.1 clarified that a member would only be required to deliver a disclosure document to persons to whom it sells shares in the private placement.

III. Description of Comments on Amendment No. 1, FINRA's Rebuttal, and Amendments No. 2 and No. 3

A. Comments on Amendment No. 1

In its Notice and Proceedings Order, the Commission asked that commenters address, among other things, the changes that FINRA proposed in Amendment No. 1, the comments received on the Notice of Filing, and FINRA's Response Letter. In addition, the Commission expressly requested comment on the following aspects of the proposed rule change: (1) The categories of offerings that would be subject to the proposed rule change under the proposed definition of ''private placement;'' (2) the potential impact on investors purchasing private placement securities through a broker-dealer subject to the proposed rule change; (3) the potential impact on members of having to comply with the proposed rule change; and (4) the potential impact of competition and capital formation, including: (a) Whether members would continue to participate in private placements subject to the proposed rule change; (b) whether the proposed rule change would encourage issuers to utilize unregistered firms to effect their covered offerings; and (c) whether the proposed rule change would affect access to capital, the costs of capital raising, or the cost of capital for issuers.[22]

The Commission received eleven (11) comment letters in response to the Notice and Proceedings Order,[23] including four (4) letters supporting the proposed rule [24] and seven (7) letters requesting requested significant changes.[25]

1. Favorable Comments

The S&C-February Letter commended FINRA for the amendment and stated its belief that members would be able to comply with the narrowly tailored disclosure requirements. The NYC Bar-February Letter stated that FINRA substantially responded to its comments and it therefore supported the rule. The Cornell-February Letter stated that it supported the proposed rule as amended and that the costs of compliance would be minimal. The Cornell-February Letter and the NYC Bar-February Letter stated that the proposed rule change would have a beneficial impact on investors and investor protection. Although the NASAA-April Letter stated that NASAA continued to support the rule, NASAA expressed opposition to the amendment, saying that the amendment weakened the protection of investors as compared to the Original Proposal.[26]

2. General Compliance and Other Concerns

The Rutledge Letter recommended that FINRA adopt a uniform template for its notice filing. Specifically, the Rutledge Letter recommended that the proposed rule change specify that a member would be required to file an issuer's Form D to satisfy its filing obligation.[27] FINRA did not adopt this approach, stating that the information contained in an issuer's Form D does not fully address the informational needs of FINRA with respect to oversight of its members' activities regarding private placements, and thus is not a viable alternative to the proposed rule change.

The Martin Letter stated that proposed Rule 5123 should clarify how a member would comply if the member does not sign a selling agreement until more than 15 days have passed after the first sale. FINRA noted in its Rebuttal Letter that the proposed filing requirement referred to the first sale by the member making the filing (or on whose behalf a designated member is filing), rather than the first sale by another member.

The NIBA Letter and REISA—February Letter suggested that members be provided access to summary information collected by FINRA regarding private placements as a result of the proposed rule change. FINRA responded in its Response Letter and repeated in its Rebuttal Letter that, by the express terms of the proposed rule change, this information would be collected solely for regulatory purposes and FINRA intends to provide confidential treatment to all documents and information filed pursuant to it. In fact, the proposed rule would contain a provision addressing confidential treatment of any information filed with FINRA pursuant to the proposed rule. Specifically, pursuant to proposed paragraph 5123(c), FINRA would accord confidential treatment to all documents and information filed pursuant to the Rule, and would use such documents and information solely for the purpose of determining compliance with FINRA rules or other applicable regulatory purposes.

These two commenters also sought clarification about the liability of members for violations of the proposed rule.[28] FINRA stated in its Response Letter that a wide range of regulatory responses is available for violations of the proposed rule, as there is for violations of any FINRA rule. FINRA stated that its regulatory response would depend on the facts and circumstances of the violation in question. FINRA also noted that any sanction it imposes in any matter is also subject to oversight and review by the Commission.[29]

3. Exemptions

Several commenters requested additional exemptions from coverage under Rule 5123. The S&C—February Letter, for example, requested an exemption for all accredited investors. FINRA stated that it does not believe that the exemption should extend to offers to accredited investors under Rule 501(a)(4), (5), or (6) of Regulation D. In particular, FINRA stated that it believes

transactions); Securities Act Sections 3(a)(2) (offerings by banks), 3(a)(9) (exchange transactions with an existing holder, where no one is paid to solicit the exchange), 3(a)(10) (securities subject to a fairness hearing), 3(a)(12) (securities issued by a bank or bank holding company pursuant to reorganization or similar transactions); and Section 1145 of the Bankruptcy Code (securities issued in a court-approved reorganization plan that are not otherwise entitled to the exemption from registration afforded by Securities Act Section 3(a)(10)).

[22] *Supra* note 7.

[23] *Supra* note 8.

[24] S&C—February Letter; NYC Bar—February Letter; Cornell—February Letter; NASAA—April Letter.

[25] St. Charles Letter; Monument Group—February Letter; MFA—February Letter; Martin Letter; NIBA Letter; REISA—February Letter.

[26] NASAA—April Letter.

[27] ''Form D'' is a notice filing an issuer makes to the Commission and any requisite states after the issuer first sells its securities in reliance on an exemption under Regulation D or Section 4(5) of the Securities Act. Form D generally includes the names and addresses of the company's executive officers and stock promoters, but contains little other information about the company.

[28] NIBA Letter; REISA-February Letter.

[29] *See, e.g.,* FINRA Rule 9370 (Application to SEC for Review).

that the criteria used to measure whether a person meets the accredited investor standard do not necessary reflect a sufficiently high level of sophistication to justify exemption from the proposed rule.

The NIBA Letter and REISA-February Letter expressed concern about the exemption for institutional accounts as amended by Amendment No. 1. Specifically, Amendment No. 1 proposed exempting from coverage, offerings sold by a member or person associated with the member solely to institutional accounts as defined by new FINRA Rule 4512(c). Those commenters stated that the proposed exemption is confusing because the definition used in FINRA Rule 4512(c)(1)(A) uses a different set of monetary thresholds than those used for the definitions of Qualified Institutional Buyers (''QIBs'') in Section 144A of the Securities Act and Qualified Purchasers (''QPs'') in Section 2(a)(51)(A) of the Investment Company Act. FINRA noted in its Rebuttal Letter that proposed Rule 5123 would exempt offerings sold to all three of these categories of purchasers—institutional accounts as defined in FINRA Rule 4512(c), QIBs, and QPs. Because the categories provide cumulative relief to members, FINRA stated that it did not believe that offering more exemptions, including an additional, stand-alone exemption with different criteria would be confusing.

The St. Charles Letter requested that FINRA include an exemption for firms engaged solely in advisory services, *e.g.,* firms that assist with the preparation of the PPM. In its Rebuttal Letter, FINRA stated that Amendment No. 1 eliminated from the Original Proposal the application of the proposed rule to firms that assist with the preparation of offering documents.

In addition, the proposed rule would contain a catchall provision that would give FINRA discretion to allow for additional exemptions. Specifically, pursuant to proposed paragraph 5123(d), FINRA would have authority to exempt a member or associated person from the provisions of the proposed Rule upon a showing of good cause.

4. Legislative and Regulatory Concerns

The Rutledge Letter requested that FINRA reevaluate the proposed rule change in light of the enactment of the Jumpstart Our Business Startups Act of 2012 (''JOBS Act''). In particular, the Rutledge Letter suggested that the proposed rule change is inconsistent with the intent of the JOBS Act to reduce regulation applicable to small business capital formation.[30] In the Supplementary Rebuttal Letter, FINRA stated that it believes that the proposed rule change is consistent with the JOBS Act.[31] In particular, FINRA stated that it believes that requiring a member to make a notice filing subsequent to a sale of a private placement would not unnecessarily burden members or capital formation in light of the intended regulatory benefits to investors of the resulting enhanced oversight. FINRA suggested that investor confidence would be fostered by the enhanced oversight resulting from the proposed rule change and that it would thereby facilitate capital formation. FINRA further reiterated its view that that the proposed rule change, as amended, would enhance its regulatory oversight of broker-dealers that sell securities in the private placement market.[32]

The Rutledge Letter also stated that the proposed rule is unnecessary and suggested FINRA instead enforce existing rules and increase sanctions for private placement fraud. FINRA stated that the proposed rule change, as amended, would enhance its regulatory oversight of broker-dealers that sell securities in the private placement market by providing FINRA with more timely and complete information about its members' private placement activities.

The Rutledge Letter suggested an alternative approach to improve investor protection in the private placement market. Specifically, the Rutledge Letter proposed that the SEC and FINRA adopt additional regulations governing finders and business brokers with respect to, among other things, licensing, qualifications, recordkeeping, and continuing education. FINRA stated that it will examine the need for additional rules governing finders and business brokers and work with the Commission, as appropriate. FINRA, however, stated that it views additional regulation of finders and business brokers as a complement to the proposed rule and the enhanced information it would make available to FINRA.

The MFA-February Letter opposed the amended rule stating that it believed the rule would be inconsistent with the federal securities laws. Although the letter acknowledged that FINRA's proposed rule would no longer require the creation and delivery of a disclosure document in connection with sales in which no offering document was used, it stated that the proposed rule's ongoing requirement to provide any existing disclosure document to a prospective investor would substitute FINRA's judgment for Congress's, which has enacted and repeatedly reaffirmed a statutory framework for private funds that leave matters of disclosure to issuers. FINRA responded to these concerns by filing Amendments No. 2 and No. 3, which eliminated any disclosure requirement and left only a filing requirement or a requirement to indicate to FINRA that no offering documents were used.

The Rutledge Letter also asserted that the proposed rule would disrupt the established federal securities regulatory scheme because it would expand FINRA's jurisdiction to cover issuers of private placements. Similarly, the Rutledge Letter claimed that the proposed rule change would subject private placements subject to the proposed rule change to an implicit approval process. The Rutledge Letter stated that inserting an additional layer of regulatory review would impede capital formation. FINRA responded that it believes the proposed rule change is consistent with its jurisdiction over members and persons associated with members. Moreover, FINRA represented in the Original Proposal and in the Supplementary Rebuttal Letter that the proposed notice filing requirement does not establish any review and approval process by FINRA for private placements.[33]

The NIBA Letter stated that the additional burden that would be imposed on FINRA members by the proposed rule would cause issuers to rely on unregistered entities or themselves to conduct the types of offerings covered by the rule. Thus, NIBA argued that FINRA can only partially address the problems in this area unless the Commission also adopts rules applicable to issuers and unregulated persons, who provide essentially the same services as FINRA members.

In the Rebuttal Letter, FINRA stated that it generally supports broader oversight of private placements and stated that improvement in the protection of broker-dealer customers should not depend upon whether the Commission adopts rules for issuers and entities not subject to FINRA's oversight. Moreover, by amending the filing in Amendments No. 2 and No. 3 to require only either a notice filing of the offering documents that were used or a statement that no such documents

[30] *Supra* note 8.

[31] *Supra* note 9.

[32] *Supra* note 9.

[33] *See* Original Proposal, *supra,* note 4 and Supplementary Rebuttal Letter, *supra,* note 9.

were used, as FINRA stated in the Original Proposal and in the Supplementary Rebuttal Letter, there should be no implication that the FINRA staff would comment on a filing; that a filing need occur prior to making an offering; or that members should expect FINRA staff input before proceeding with an offering.

5. Costs and Burdens

The Cornell-February Letter and NYC Bar-February Letter both stated that the proposed rule change would not impose unnecessary burdens on capital formation or have unequal competitive impact. Other commenters, however, raised concerns regarding burdens on capital formation and effect on competition. For example, the REISA–February Letter and the NIBA Letter stated that the proposed rule would unduly burden independent broker-dealers participating in offerings of $50 million or less. The NIBA Letter asserted that the amended proposed rule would adversely affect small firms, small issuers, and small businesses more directly than large and medium sized firms, because those larger firms do not participate in offerings of under $50 million in retail private placements for small or newer issuers. The Monument Group-February Letter opposed the amended rule stating that it believed it would impede capital formation by placing ''anticompetitive'' burdens on small private placement agents. The MFA–February Letter opposed the amended rule stating, among other things, that it believed the rule would be burdensome and costly, would impede capital formation, and would reduce efficiency.

In its Rebuttal Letter, FINRA stated that it has responded to these concerns by filing Amendment No. 2 which amended the proposed rule to minimize the potential burden: by (1) Eliminating any disclosure requirement; and (2) narrowly tailoring the remaining notice filing requirement (See Section III.B. below). FINRA asserted in its Response Letter and Rebuttal Letter that a requirement to make a notice filing after the offering has commenced and sales have occurred would not impose an unnecessary burden on members or capital formation and would be appropriate in light of the intended regulatory benefits for investors that would flow from enhanced oversight of, among other things, members' compliance obligations, such as their suitability obligations.[34]

FINRA further stated that it believes the filing requirement of proposed Rule 5123 would provide FINRA with timely and detailed information about the private placement activities of its member firms that would enhance its oversight functions. Specifically, FINRA stated that it believes that information obtained through compliance with the proposed rule would assist its efforts to identify problematic terms and conditions in private placements, thereby helping to detect and prevent fraud in connection with private placements.

In sum, FINRA stated that it does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. And FINRA stated that it believes that the ''relatively modest burden'' of the proposed rule change is both necessary and appropriate in helping to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

B. Description of Amendments No. 2 and No. 3

In response to comments, FINRA filed two subsequent Amendments to the proposed rule, discussed below.

In Amendment No. 2, FINRA eliminated the requirement in proposed Rule 5123 that firms provide specified disclosures to investors. As a result, proposed Rule 5123(a) would contain only a filing requirement. Specifically, paragraph (a) would require each member that sells a security in a Covered Offering to: (i) Submit to FINRA, or have submitted on its behalf by a designated member, a copy of any PPM, term sheet, or other offering document used in connection with such sale within 15 calendar days of the date of first sale, as well as any material amendments to a previously-filed document within 15 calendar days of the date such document is provided to any investor; or (ii) indicate to FINRA that no such offering documents were used.

In Amendment No. 2, FINRA, responding to comments on the exemption for employees and affiliates, also proposed adding a cross-reference to the definition of ''affiliate'' in proposed Rule 5121(b)(1)(G). And FINRA proposed deleting the supplementary material that was proposed in Amendment No. 1.[35]

In Amendment No. 3, FINRA proposed a further clarifying technical amendment to paragraph (a) of proposed Rule 5123. Specifically, FINRA proposed to clarify that a FINRA member must file with FINRA not only the original offering documents but also any ''materially amended versions'' of offering documents used in connection with a sale within 15 calendar days of the date of first sale.

As noted above, FINRA stated its belief that these changes to the proposed rule would address concerns raised by the industry in the comment process, would provide important investor protections in connection with private placements of securities, and are in the public interest.[36] FINRA stated that it generally supports broader oversight of private placements and stated that improvement in the protection of broker-dealer customers should not depend upon whether the Commission, itself, adopts rules for issuers and entities not subject to FINRA's oversight. FINRA further stated that it believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[37] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

IV. General Commission Findings

After carefully reviewing the proposed rule change, as amended, the comments received, and FINRA's response to comments, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association. In particular, the

[34] FINRA noted that members have an obligation under NASD Rule 2310 to conduct a robust and thorough suitability analysis before recommending securities in a private placement. FINRA stated that this analysis requires a reasonable investigation into the offering and understanding of its features, including fees and expenses and use of proceeds. Specifically, FINRA stated that *Regulatory Notice* 10–22, dated April 2010, provides that a member's reasonable investigation must be tailored to each Regulation D offering in a manner that best ensures that it meets its regulatory responsibilities. The Regulatory Notice sets out lists of best practices in investigations focusing on the issuer and its management, the issuer's business prospects and the issuer's assets.

[35] The Proposed Supplementary Material .01 contained a definition of ''affiliate'' that would have noted that the term had the same meaning as in FINRA Rule 5121. This concept was moved to the body of the rule, which now incorporates the definition affiliates from Rule 5121 by reference. Proposed Supplementary Material .02 expanded on the compliance obligations for the disclosure requirement but is no longer necessary because the disclosure obligation that was contained in Rule 5123 was deleted.

[36] *See* Rebuttal Letter.

[37] 15 U.S.C. 78*o*–3(b)(6).

Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[38] which, among other things, requires that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. In approving the proposed rule change, the Commission has also considered the rule change's impact on efficiency, competition, and capital formation.[39]

As discussed above, the Commission believes that FINRA has addressed capital formation, competition, and efficiency concerns. In Amendments No. 2 and No. 3, FINRA minimized any potential inefficiency to, or burden on, members by: (1) Eliminating any disclosure requirements; and (2) narrowly tailoring the rule to require either a notice filing of the offering documents that were used within 15 calendar days of the date of first sale or provide a statement that no such documents were used. Furthermore, in response to comments, FINRA created additional exemptions to coverage under Rule 5123. In addition, FINRA noted in its Rebuttal Letter and its Supplementary Rebuttal Letter that it believes that a requirement to make a notice filing after the offering has commenced and sales have occurred would not impose any unnecessary burdens on capital formation. FINRA stated that it would use the information it receives pursuant to the proposed new rule, to further its detection and prevention of fraudulent and manipulative acts and practices, and to promote just and equitable principles of trade, all in the interest of enhancing the protection of investors. The Commission believes that FINRA narrowly tailored a broker-dealer's obligations under Rule 5123, while enhancing its ability to carry out its statutory obligations to oversee member firms. The Commission points to the discussion above which highlights the many revisions FINRA made to the proposal to address comments and concerns raised through three separate opportunities for comment.

V. Accelerated Approval

The Commission finds goods cause, pursuant to Section 19(b)(2) of the Exchange Act,[40] for approving the proposed rule change, as modified by Amendments No. 1, No. 2, and No. 3, and prior to the 30th day after publication of notice of the filing of Amendments No. 2 and No. 3 in the **Federal Register.** The proposed rule change was informed by FINRA's consideration of, and the incorporation of many suggestions made in comments on a 2011 proposal to members to expand Rule 5122,[41] the Notice of Filing,[42] and the Notice and Proceedings Order.[43] Amendments No. 1, No. 2, and No. 3 reflect FINRA's efforts to further address commenter concerns and minimize burdens resulting from the proposed rule's requirements.

Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendments No. 1, No. 2, and No. 3, on an accelerated basis.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rules change as amended by Amendments No. 2 and No. 3 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2011–057 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2011–057. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2011–057 and should be submitted on or before July 5, 2012.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[44] that the proposed rule change (SR–FINRA–2011–057), as amended by Amendments No. 1, No. 2, and No. 3, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[45]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–14340 Filed 6–12–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67156; File No. SR–ICC–2012–09]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Schedule 502 of the ICE Clear Credit LLC Rules To Amend the Reference Entity Name for Three Credit Default Swap Contracts and the Reference Obligation International Securities Identification Number Associated With One Credit Default Swap Contract

June 7, 2012

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder[2] notice is hereby given that on May 19, 2012, ICE Clear Credit LLC ("ICC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by ICC. ICC filed the proposal pursuant to

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[38] 15 U.S.C. 78*o*–3(b)(6).

[39] 15 U.S.C. 78c(f).

[40] 15 U.S.C. 78s(b)(2).

[41] *Supra* note 3.

[42] *Supra* note 4.

[43] *Supra* note 7.

[44] 15 U.S.C. 78s(b)(2).

[45] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.