3PM
THIRD PARTY MARKETERS ASSOCIATION

March 10, 2011

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 11-04: Proposed Amendments to FINRA Rule 5122 to Address Member Firm Participation in Private Placements

Dear Ms. Asquith,

I am writing to you today on behalf of the Third Party Marketers Association ("3PM") to express the concerns of members of our association regarding aspects of the rule proposed in Regulatory Notice 11-04. Many of our members engage in third party marketing or placement agent services, and will be dramatically impacted by the proposed rule.

The current rule 5122 regards the offer or sale of any security in a Member Private Offering which we believe is appropriate and necessary. Our members also generally agree that since the vast majority of sales of private placements occur beyond the scope of the current rule that some action must be taken to curb abuses in such offerings. We however do not agree with FINRA's proposal to make its Members who are merely "participating" in an unaffiliated private placement responsible for matters, including disclosures, that are not within their control.

- **Disclosure Requirements**

We object to the scope of disclosure required by FINRA under amended rule 5122 as proposed as it relates to unaffiliated private offerings. We agree investors are entitled to complete disclosures and accurate information so that they can make an informed investment decision. We also concur that a full description of broker-dealer's compensation is an appropriate point of sale disclosure when offering a private placement, including one offered by an unaffiliated issuer. We do not believe, however, that it is appropriate or feasible for a broker-dealer to be responsible for any disclosures that involve information out of the broker-dealer's control. In instances where a broker-dealer receives notice from FINRA regarding required clarification, information or amendments to the submitted offering materials, which would be provided on behalf of an unaffiliated entity, the broker-dealer would not have the authority to make the requisite changes. Rather, such authority resides with the issuer and its legal counsel.

Accordingly, we believe that any changes regarding these documents should also be the responsibility of the issuer.

As for disclosure of fees, placement agent's fees vary by a number of factors including length of time in business, past experience, success in raising assets, ancillary services offered to the issuer such as assistance with marketing materials, due diligence questionnaires and fact sheets, as well as the make-up and composition of the placement agent's firm. As such, each placement agent that participates in an offering may negotiate different terms with the issuer. We concur that it is appropriate to have a placement agent disclose the fees they have negotiated and earn on successful placements, but that it is wholly unreasonable to think that one placement agent is privy to the compensation of all of the placement agents participating in the transaction. We suggest that the amended rule clarify the extent to which each broker-dealer's responsibility extends, and that the mandated scope be limited to the broker-dealer's own participation.

- **Filing with FINRA**

The proposed amendments would require offering documents for non-exempt private placement to be filed with FINRA at or prior to the first time it is provided to any prospective investor. First, we refer you back to earlier comments regarding the proposed disclosure requirements. I reassert our belief that the issuer and its legal counsel should be the parties responsible for compliance with this requirement.

Second, this requirement would likely cause confusion and inconsistencies in the offering materials for certain private placements, particularly offerings with multiple traunches or those employing a master feeder structure. In such cases, multiple offering documents may exist for funds that are extremely similar but which naturally differ to accommodate varied types of investors or their domiciles. FINRA will receive documents timed to particular solicitations, but which differ based on the natural evolution of the offering. Comments from a FINRA examiner on one version may or may not be relevant to then-current versions and/or may differ from comments rendered by another FINRA examiner, resulting in complicated broker-dealer compliance, overlapping or inconsistent demands on the issuer, and, surely, investor confusion.

Based on these comments, we propose that FINRA consider exempting all parties other than the issuer from the submission requirement. Further we suggest that FINRA base the timing of the submission on relevance to the offering itself (such as the effective date and upon material updates), rather than on presentation of an offering document provided to a potential investor.

- **Use of Offering Proceeds**

Under the proposed amendments, at least 85% of the offering proceeds of a private placement subject to the rule may not be used to pay for offering costs and compensation and must be used for business purposes disclosed in the offering document. While we accept that this mandate could be a condition of

firm approval of the product, consistently with previous comments, we believe it to be infeasible for a broker-dealer unaffiliated with the issuer to be responsible for compliance with this condition.

- **Removal of the Wholesaler Exemption**

For the reasons stated throughout this letter, members of 3PM strongly urge FINRA to reconsider the elimination of the wholesaler exemption. Our members firmly believe that compliance with the rule is not possible for broker-dealers acting in the capacity of a wholesaler with no control relationship or affiliation with the issuer, and that implementation of the rule without some relevant carve-out will render it impossible to implement.

Conclusion

While 3PM members understand and support the need for disclosure, we also believe that broker-dealers can reasonably only be responsible for disclosing such information that is relevant to the firm's own participation or that is under its direct control. In fact, when the rule addressed broker-dealers as issuers, offering their own securities, it was an effective rule. As proposed however, the rule addresses parties who are not in a control position with respect to the offering, and therefore presents an obstacle to compliance.

Regards,

<<Lisa Roth>>

Lisa Roth
Board Director, Third Party Marketers Association

About The Third Party Marketers Association (3PM)

3PM began in 1998. Today, the Association is comprised of more than 75 member firms. 3PM was formed to maintain a standard of excellence in the industry and to share information and ideas among independent sales and marketing firms. The Association helps to cultivate relationships and business opportunities among its members, and works to provide them with information and ongoing education about the investment management industry. 3PM's goal is to enhance our profession's standards, integrity and business practices. This is accomplished by advancing ongoing agendas in the areas of regulation and compliance as well as adherence to the highest standards and best practices utilized throughout the financial services industry.

A typical 3PM member firm consists of two to five highly experienced investment management marketing executives with, on average, 10+ years of experience of selling success in the institutional and/or retail distribution channels. The Association's members run the gamut in terms of the products they represent. Approximately 50% of the Association's members work with traditional separate account managers covering strategies such as domestic and international equity, as well as fixed income. In the alternative arena, Members represent fund products such as mutual funds, hedge funds, private equity, fund of funds and real estate. More than two thirds of 3PM's members offer both types of product offerings.

3PM member firms that work with traditional separate account managers are typically registered under the investment adviser rules with the States in which they solicit business. Since the Association's members do not manage money they generally are not eligible to register directly with the SEC. For the Association's members that work with Fund products, these firms are either registered with FINRA as broker/dealers or work as Registered Representatives of an established broker/dealer to offer securities. Regardless of the structure within which 3PM members operate, they do fall under the scrutiny of some regulatory authority.

For more information on 3PM or its members, please visit www.3pm.org