

## Attachment A

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

### 5110. Corporate Financing Rule — Underwriting Terms and Arrangements

#### (a) Requirements for Public Offerings

(1) through (3) No Change.

#### (4) Documents and Information Required to be Filed

(A) No Change.

(B) Any member filing documents with FINRA pursuant to paragraph

(a)(4)(A) must file the following information with respect to the offering in FINRA's

Public Offering System:

(i) through (iii) No Change.

(iv) a description of any securities of the issuer acquired and beneficially owned by any participating member during the review period, provided that:

a. non-convertible<sub>1</sub> [or] non-exchangeable debt or preferred securities and derivative instruments acquired in a transaction related to the public offering must be filed and also accompanied by a representation that a registered principal or senior manager of the participating member has determined if the transaction was or will be entered into at a fair price;

b. non-convertible<sub>1</sub> [or] non-exchangeable debt or preferred securities and derivative instruments need not be filed if acquired in a transaction that is unrelated to the public offering;  
and

c. securities if acquired in accordance with Supplementary Material .01(b) need not be filed.

(v) through (vi) No Change.

(C) through (E) No Change.

(b) No Change.

**(c) Valuation of Underwriting Compensation**

**(1) Limitation on Securities Received Upon Exercise or Conversion of Another Security**

A participating member may not receive a security (including securities in a unit), a warrant for a security, or a security convertible into another security as underwriting compensation in connection with a public offering unless:

(A) the security received or the security underlying the warrant or convertible security received is identical to the security offered to the public [or to a security with a bona fide public market]; or

(B) No Change.

**(2) Valuation of Non-Convertible Securities**

Non-convertible securities received as underwriting compensation will have a compensation value based on:

(A) the difference between:

(i) either the closing market price [per]of the security traded on a U.S. registered national securities exchange or a designated offshore securities market as defined under Securities Act Rule 902(b) on the date of acquisition, or[, if no bona fide public market exists for the security,] the public offering price per security; and

(ii) the per security cost;

(B) through (D) No Change.

**(3) Valuation of Convertible Securities**

Options, warrants or convertible securities (“warrants”) shall have a compensation value based on the following formula:

(A) No Change.

(B) minus the resultant of the exercise or conversion price per warrant

less either:

(i) the closing market price [per]of the convertible security, or the common stock or other security underlying the convertible security traded on a U.S. registered national securities exchange or a designated offshore securities market as defined under Securities Act Rule 902(b) on the date of acquisition[, where a bona fide public market exists for the security]; or

(ii) the public offering price per security;

(C) through (H) No Change.

(4) No Change.

**(5) Valuation of Securities Acquired in Connection with a Fair Price Non-Convertible [or] Non-Exchangeable Debt or Preferred Securities and Derivative Instruments**

Any non-convertible, [or] non-exchangeable debt or preferred securities and derivative instruments acquired or entered into at a "fair price" as defined in Supplementary Material .0[6]Z(b) and underwriting compensation received in or receivable in the settlement, exercise or other terms of such non-convertible [or] non-exchangeable debt or preferred securities and derivative instruments shall not have a compensation value for purposes of determining underwriting compensation. If the actual price for the non-convertible, [or] non-exchangeable debt or preferred securities and derivative instruments [is] are not at a fair price, compensation will be calculated

pursuant to this paragraph (c) or based on the difference between the fair price and the actual price.

(d) No change.

**(e) Lock-Up Restriction on Securities**

(1) No Change.

**(2) Exceptions to Lock-Up Restriction**

Notwithstanding paragraph (e)(1):

(A) the lock-up restriction will not apply:

(i) through (iii) No Change.

(iv) to a non-convertible or non-exchangeable debt, or preferred security acquired in a transaction related to the public offering;

(v) through (ix) No Change.

(B) No Change.

(f) No Change.

**(g) Unreasonable Terms and Arrangements**

Without limiting the requirements of paragraph (a)(1)(A) of this Rule, the following terms and arrangements are prohibited:

(1) through (4) No Change.

(5) any underwriting compensation in connection with a public offering that is not completed according to the terms of an agreement entered into by an issuer and a participating member, except

(A) No Change.

(B) a termination fee, a tail fee or a right of first refusal, as set forth in a written agreement entered into by an issuer and a participating member, provided that:

(i) No Change.

(ii) an issuer's exercise of its right of "termination for cause" eliminates any obligations with respect to the payment of any termination fee, tail fee or provision of any right of first refusal;

(iii) the amount of any termination fee or tail fee must be reasonable in relation to the underwriting services contemplated in the agreement and any fees arising from underwriting services provided under a right of first refusal must be customary for those types of services; and

(iv) the issuer shall not be responsible for paying the termination fee or tail fee unless an offering or other type of transaction (as set forth in the agreement) is consummated within two years of the date the engagement is terminated by the issuer;

(6) through (11) No Change.

## **(h) Exemptions**

### **(1) Offerings Exempt from Filing**

Documents and information related to the following public offerings need not be filed with FINRA for review, unless subject to the provisions of Rule 5121(a)(1[2])(A)(i), provided that the following public offerings must comply with this Rule and, if applicable, Rules 2310 and 5121:

(A) securities offered by a bank, foreign bank, corporate issuer, foreign government or foreign government agency that has outstanding unsecured non-convertible debt with a term of issue of at least four years or unsecured non-convertible preferred securities that are investment grade rated, as defined in Rule 5121(f)([8]), or are outstanding securities in the same series that have equal rights and obligations as investment grade rated securities, provided that an initial public offering of equity is required to be filed;

(B) through (G) No Change.

(2) No Change.

(i) No Change.

**(j) Definitions**

The definitions in Rule 5121 are incorporated herein by reference. For purposes of this Rule, the following terms have the meanings stated below:

(1) through (7) No Change.

**(8) Immediate Family**

The term “immediate family” means:

(A) the spouse or children of an associated person of a member; and

(B) No Change.

(9) through (22) No change.

**••• Supplementary Material: -----**

**.01 Underwriting Compensation**

(a) No Change.

(b) Participating members may receive payments from an issuer or another source during the review period that may be unrelated to a particular offering. Such payments generally would not be deemed to be underwriting compensation. The following list, while not comprehensive, provides examples of payments that are not deemed to be underwriting compensation:

(1) through (18) No Change.

(19) non-convertible or non-exchangeable debt, or preferred securities and derivative instruments acquired in a transaction that is unrelated to the public offering;

(20) through (22) No Change.

(23) securities acquired by a lender affiliated with a participating member through a debt-for-equity exchange that is sold by its affiliated member, if:

(A) the debt-for-equity exchange was structured to provide economic and tax benefits to the issuer and not the lender or affiliated member, except for the compensation in subparagraph (D) of this Supplementary Material .01(b)(23);

(B) the affiliated member subsequently offered all of the equity securities acquired by the lender in an offering following the debt exchange;

(C) the terms negotiated in connection with the debt exchange and the subsequent equity offering were determined through arms' length negotiations based on the market price of the equity exchanged, subject to the compensation in subparagraph (D) of this Supplementary Material .01(b)(23);

(D) the affiliated member negotiated customary compensation for an equity public offering; and

(E) the equity public offering was structured as a firm commitment offering.

(c) No Change.

**.02 Venture Capital Transactions and Significantly Delayed Offerings.** Notwithstanding paragraph (d) of this Rule, in the event that an offering is significantly delayed and the issuer needs funding pending consummation of the public offering, FINRA may exclude from underwriting compensation any securities acquired in a transaction that otherwise meets the requirements in paragraph (d), but occurs after the required filing date. To determine whether an acquisition of securities that occurs after the required filing date may be excluded from underwriting compensation, FINRA will consider the following factors, as well as any other relevant factors and circumstances:

(a) through (c) No Change.

**.03 Underwriting Compensation Securities Acquired Other than from the Issuer.**

Notwithstanding paragraph (j)(22) of this Rule, FINRA may exclude securities acquired from a third-party entity from underwriting compensation. To determine whether an acquisition of

securities from a third-party entity may be excluded from underwriting compensation, FINRA will consider the following factors, as well as any other relevant factors and circumstances:

(a) through (c) No Change.

**.04 Underwriting Compensation Resulting from Issuer Directed Sales Programs.**

Notwithstanding paragraph (j)(15) and (22) of this Rule, FINRA may exclude from underwriting compensation securities acquired by a participating member's associated persons or their immediate family pursuant to an issuer directed sales program. To determine whether an acquisition of securities by a participating member's associated persons or their immediate family pursuant to an issuer directed sales program may be excluded from underwriting compensation, FINRA will consider the following factors, as well as any other relevant factors and circumstances:

(a) through (c) No Change.

**.05 Seed Capital Investments.** Notwithstanding paragraph (j)(22) of this Rule, FINRA may exclude securities acquired by a participating member in the issuer or an affiliated entity, in connection with the investment of cash to capitalize a direct participation program or a real estate investment trust, as defined Rule 2231(d), provided that:

(a) the acquisition of securities is disclosed in the issuer's prospectus as a seed capital investment or a comparable form of capitalization;

(b) the securities offered to the public and the securities acquired in the capitalization transaction are valued and priced on a net asset value or NAV basis;

(c) the offering for which the participating member is engaged is an offering subject to the requirements of Rule 2310; and

(d) the securities acquired and excluded are not sold, transferred, assigned, pledged or hypothecated, or be the subject of any hedging, short sale, derivative, put or call transaction that would result in the effective economic disposition of the securities for a period of 180 days beginning on the date of commencement of sales of the public equity offering.



**.06 Disclosure of Underwriting Compensation.** A description of each item of underwriting compensation received or to be received by a participating member must be disclosed in the section on distribution arrangements in the prospectus (or other similar offering document). The description shall include the dollar amount ascribed to each individual item of compensation. When securities are acquired by a participating member, material terms and arrangements of the acquisition must also be disclosed in the section on distribution arrangements in the prospectus (or other similar offering document) when applicable, such as exercise terms, demand and piggyback registration rights and lock-up periods that may apply. Similarly, if underwriting compensation consists of a right of first refusal to participate in the distribution of a future public offering, private placement or other financing, the description should reference the existence of such right and its duration.

**.06]07 Non-Convertible [or], Non-Exchangeable Debt or Preferred Securities and Derivative[s] Instruments**

(a) Non-convertible [or], non-exchangeable debt or preferred securities and derivative instruments acquired in a transaction related to the public offering and at a fair price, will be considered underwriting compensation but will have no compensation value. Non-convertible, [or] non-exchangeable debt or preferred securities and derivative instruments acquired in a transaction related to the public offering but not at a fair price, will be considered underwriting compensation and subject to the normal valuation requirements of this Rule.

(b) The term “derivative instrument” means any “eligible OTC derivative instrument” as defined in SEA Rule 3b-13(a)(1), (2) and (3). The term “fair price” means the participating members have priced a derivative instrument or non-convertible [or], non-exchangeable debt or preferred security in good faith; on an arm’s length, commercially reasonable basis, and in accordance with pricing methods and models and procedures used in the ordinary course of their business for pricing similar transactions. A derivative instrument or other security received as compensation for providing services for the issuer, for providing or arranging a loan, credit

facility, merger, acquisition or any other service, including underwriting services will not be deemed to be entered into or acquired at a fair price.

**.[07]08 Venture Capital Transactions.** The determination of whether a securities acquisition may be excluded from underwriting compensation pursuant to paragraph (d) of this Rule is to be made at the time of the securities acquisition.

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<sup>1</sup> The current annual amount fixed by the Board of Governors is \$100.

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## **5121. Public Offerings of Securities [W]with Conflicts of Interest**

### **(a) Requirements for Participation in [Certain] Public Offerings with a Conflict of Interest**

#### **(1) General**

(A) No member that has a conflict of interest may participate in a public offering unless the offering complies with subparagraph (i) or (ii)[(1) or (2)].

(i)[(1) There must be prominent disclosure of the nature of the conflict of interest in the prospectus, offering circular or similar document for the public offering, and one of the following conditions must be met:]  
A qualified independent underwriter has participated in the offering and meets the requirements of paragraph (a)(3) of this Rule; or

(ii) The offering can meet one of the following conditions:

a.[(A) the] each member[(s)] that is primarily responsible for managing the public offering does not have a conflict of interest, is not an affiliate of any member that does have a conflict of interest, and meets the requirements of paragraph  
(a)(3)(A)(vi)[(f)(12)(E)];

[(B) the securities offered have a bona fide public market; or]

b.[(C)] as of the required filing date, the securities offered are investment grade rated or are securities in the same series that have equal rights and obligations as investment grade rated securities; or[.]

c. as of the required filing date, the securities are offered by an issuer that has (i) been reporting under the Exchange Act for at least one year, (ii) is current in its reporting requirements, and (iii) its common equity securities have an aggregate market value of at least \$300 million.

**(2) Duties and Obligations of a Conflicted Member(s)**

(A) A member(s) that has a conflict(s) of interest must: [A qualified independent underwriter has participated in the preparation of the registration statement and the prospectus, offering circular, or similar document and has exercised the usual standards of "due diligence" in respect thereto; and

(B) there must be prominent disclosure in the prospectus, offering circular or similar document for the offering of:]

(i) [the nature of the] ensure its conflict(s) of interest is prominently disclosed in the registration statement that must include:[:]

a. a description of the conflict(s) of interest including identification of the conflicted member(s);

b. [(ii)]if applicable, the name of the member acting as the qualified independent underwriter; and

c. [(iii)]if applicable, a brief statement regarding the role and responsibilities of the qualified independent underwriter[.]; and (ii) make prominent disclosure in the registration statement by:

a. providing the notation "(Conflicts of Interest)" following the listing of the Plan of Distribution in the Table of Contents section required in Item 502 of SEC Regulation S-K, and by providing such disclosures in the Plan of Distribution section required in Item 508 of SEC Regulation S-K and any Prospectus Summary section required in Item 503 of SEC Regulation S-K; or

b. for an offering document not subject to SEC Regulation S-K, by providing disclosure on the front page of the offering document that a conflict of interest exists, with a cross-reference to the discussion within the offering document and in the summary of the offering document if one is included.

(B) if required by paragraph (a)(1)(A)(i), a conflicted member must:

(i) engage or ensure a qualified independent underwriter is engaged, once it determines any conflict of interest exists and before the commencement of sales;

(ii) retain the confirmation provided by the qualified independent underwriter as required in paragraph (a)(3)(B) in its records; and

(iii) ensure there is a written agreement that details the services to be provided by the qualified independent underwriter and reflects the amount, if any, of all qualified independent underwriter compensation.

### **(3) Duties and Obligations of a Qualified Independent Underwriter**

(A) A qualified independent underwriter must:

(i) not have a conflict of interest and must not be an affiliate of any member that has a conflict of interest;

(ii) not beneficially own, as of the date of the member's participation in the public offering, more than 5% of the class of securities

that would give rise to a conflict of interest, including any right to receive any such securities exercisable within 60 days following the later of the effective date or the final closing of the offering;

(iii) have entered into a written agreement required in paragraph (a)(2)(B)(iii) of this Rule that provides the member is participating as a qualified independent underwriter within the meaning of this Rule and discloses the services to be provided by the qualified independent underwriter and any compensation for such services as applicable;

(iv) undertake the responsibilities and liabilities of an underwriter under the Securities Act, specifically including those inherent in Section 11, and agree to exercise the usual standards of due diligence in respect thereto;

(v) have served as an underwriter for at least three years prior to its engagement as a qualified independent underwriter and participated in at least three public offerings of a similar size and type. This requirement will be deemed satisfied if, during the past three years, the member:

a. with respect to a proposed public offering of debt securities, has acted as sole underwriter or book-running lead or co-manager of at least three public offerings of debt securities each with offering proceeds of not less than 25% of the anticipated offering proceeds of the proposed offering; or

b. with respect to a proposed public offering of equity securities, has acted as sole underwriter or book-running lead or co-manager of at least three public offerings of equity securities (or of securities convertible into equity securities), each with

offering proceeds of not less than 50% of the anticipated offering proceeds of the proposed offering; and

(vi) not have any associated person who functions in a supervisory capacity who is responsible for organizing, structuring, or performing due diligence with respect to public offerings of securities that:

a. has been convicted within 10 years prior to the preparation and filing of the registration statement or the preparation of an offering circular in an offering without a registration statement of a violation of the anti-fraud provisions of the federal or state securities laws, or any rules or regulations promulgated thereunder, in connection with a registered or unregistered offering of securities;

b. is subject to any order, judgment, or decree of any court of competent jurisdiction entered within 10 years prior to the preparation and filing of the registration statement, or the preparation of an offering circular in an offering without a registration statement, permanently enjoining or restraining such person from engaging in or continuing any conduct or practice in violation of the anti-fraud provisions of the federal or state securities laws, or any rules or regulations promulgated thereunder in connection with a registered or unregistered offering of securities; or

c. has been suspended or barred from association with any member by an order or decision of the SEC, any state, FINRA or any other self-regulatory organization within 10 years prior to the preparation and filing of the registration statement, or the

preparation of an offering circular in an offering without a registration statement, for any conduct or practice in violation of the anti-fraud provisions of the federal or state securities laws, or any rules, or regulations promulgated thereunder, or the anti-fraud rules of any self-regulatory organization in connection with a registered or unregistered offering of securities.

(B) A qualified independent underwriter must provide confirmation to the member(s) that has a conflict of interest that it participated in the preparation of the registration statement and exercised the usual standards of due diligence in respect thereto.

**(b) Escrow of Proceeds, [;] Net Capital Computation**

(1) through (2) No Change.

(3) Any member offering its securities pursuant to this Rule shall disclose in the registration statement[, offering circular or similar document] a date by which the offering is reasonably expected to be completed and the terms upon which the proceeds will be released from the escrow account described in paragraph (b)(1).

**(c) Discretionary Accounts**

Notwithstanding Rule 3260 [NASD Rule 2510], no member that has a conflict of interest may sell to a discretionary account any security with respect to which the conflict exists, unless the member has received specific written approval of the transaction from the account holder and retains documentation of the approval in its records.

**(d) Application of Rule 5110**

Any public offering subject to paragraph (a)[(2)](1)(A)(i) is subject to [Rule 5110, whether or not the offering would be otherwise exempted from] the filing and[or] other requirements of Rule 5110[that rule].

**(e) Requests for Exemption from Rule 5121**

Pursuant to the Rule 9600 Series, FINRA, for good cause shown after [may in exceptional and unusual circumstances,] taking into consideration all relevant factors, [exempt a member] may conditionally or unconditionally grant an exemption [or on specified terms] from any [or all of the] provision[s] of this Rule to the extent that such exemption is consistent with the purposes of the Rule, the protection of investors, and the public interest[it deems appropriate].

**(f) Definitions**

The definitions in Rule 5110 are incorporated herein by reference. For purposes of this Rule, the following words shall have the stated meanings:

(1) through (2) No Change.

**(3) [Bona Fide Public Market]**

[The term "bona fide public market" means a market for a security of an issuer that has been reporting under the Exchange Act for at least 90 days and is current in its reporting requirements, and whose securities are traded on a national securities exchange with an Average Daily Trading Volume (as provided by SEC Regulation M) of at least \$1 million, provided that the issuer's common equity securities have a public float value of at least \$150 million.]

**[(4)]Common Equity**

The term "common equity" means the total number of shares of common stock outstanding without regard to class, whether voting or non-voting, convertible or non-convertible, exchangeable or non-exchangeable, redeemable or non-redeemable, as reflected on the consolidated financial statements of the company.

**(4[5]) Conflict of Interest**

The term "conflict of interest" means, if at the time of a member's participation in an entity's public offering, any of the following applies:

(A) the securities are to be issued by the member;



(B) the issuer controls, is controlled by or is under common control with the member or the member's affiliate or associated persons;

(C) through (D) No Change.

Subparagraph (6) through subparagraph (10) renumbered as subparagraph (5) through subparagraph (9).

**(11) [Prominent Disclosure]**

[A member may make "prominent disclosure" for purposes of paragraphs (a)(1) and (a)(2)(B) by:]

[(A) providing the notation "(Conflicts of Interest)" following the listing of the Plan of Distribution in the Table of Contents section required in Item 502 of SEC Regulation S-K, and by providing such disclosures in the Plan of Distribution section required in Item 508 of SEC Regulation S-K and any Prospectus Summary section required in Item 503 of SEC Regulation S-K; or]

[(B) for an offering document not subject to SEC Regulation S-K, by providing disclosure on the front page of the offering document that a conflict exists, with a cross-reference to the discussion within the offering document and in the summary of the offering document if one is included.]

**[(12) Qualified Independent Underwriter]**

[The term "qualified independent underwriter" means a member:]

[(A) that does not have a conflict of interest and is not an affiliate of any member that has a conflict of interest;]

[(B) that does not beneficially own as of the date of the member's participation in the public offering, more than 5% of the class of securities that would give rise to a conflict of interest, including any right to receive any such securities exercisable within 60 days;]

[(C) that has agreed in acting as a qualified independent underwriter to undertake the legal responsibilities and liabilities of an underwriter under the Securities Act, specifically including those inherent in Section 11 thereof; and]

[(D) that has served as underwriter in at least three public offerings of a similar size and type during the three-year period immediately preceding the filing of the registration statement or the date of first sale in an offering without a registration statement. This requirement will be deemed satisfied if, during the past three years, the member:]

[(i) with respect to a proposed public offering of debt securities, has acted as sole underwriter or book-running lead or co-manager of at least three public offerings of debt securities each with gross proceeds of not less than 25% of the anticipated gross proceeds of the proposed offering; and]

[(ii) with respect to a proposed public offering of equity securities, has acted as sole underwriter or book-running lead or co-manager of at least three public offerings of equity securities (or of securities convertible into equity securities), each with gross proceeds of not less than 50% of the anticipated gross proceeds of the proposed offering.]

[(E) none of whose associated persons who function in a supervisory capacity who is responsible for organizing, structuring or performing due diligence with respect to corporate public offerings of securities:]

[(i) has been convicted within ten years prior to the filing of the registration statement or the preparation of an offering circular in an offering without a registration statement of a violation of the anti-fraud provisions of the federal or state securities laws, or any rules or

regulations promulgated thereunder, in connection with a registered or unregistered offering of securities;]

[(ii) is subject to any order, judgment, or decree of any court of competent jurisdiction entered within ten years prior to the filing of the registration statement, or the preparation of an offering circular in an offering without a registration statement, permanently enjoining or restraining such person from engaging in or continuing any conduct or practice in violation of the anti-fraud provisions of the federal or state securities laws, or any rules or regulations promulgated thereunder in connection with a registered or unregistered offering of securities; or]

[(iii) has been suspended or barred from association with any member by an order or decision of the SEC, any state, FINRA or any other self-regulatory organization within ten years prior to the filing of the registration statement, or the preparation of an offering circular in an offering without a registration statement, for any conduct or practice in violation of the anti-fraud provisions of the federal or state securities laws, or any rules, or regulations promulgated thereunder, or the anti-fraud rules of any self-regulatory organization in connection with a registered or unregistered offering of securities.]

**(10[3]) Registration Statement**

The term "registration statement" means a registration statement as defined by Section 2(a)(8) of the Securities Act; notification on Form 1A filed with the SEC pursuant to the provisions of Securities Act Rule 252; or any other document, by whatever name known, initiating a registration or similar process for an issue of securities which is required to be filed by the laws or regulations of any federal or state agency.

**[(14) Subordinated Debt]**

[The term "subordinated debt" includes (A) debt of an issuer which is expressly subordinate in right of payment to, or with a claim on assets subordinate to, any existing or future debt of such issuer; or (B) all debt that is specified as subordinated at the time of issuance. Subordinated debt shall not include short-term debt with maturity at issuance of less than one year and secured debt and bank debt not specified as subordinated debt at the time of issuance.]

**••• Supplementary Material: -----**

**.01 Lead Members**

**(a) Role of Primarily Responsible Member(s).** One condition of paragraph (a)(1)(A)(ii) of this Rule is that the member primarily responsible for managing the public offering (i.e., the book-running lead manager(s) or lead placement agent(s)) must not have a conflict of interest and is not an affiliate of a member that has a conflict of interest. If the member primarily responsible for managing the public offering cannot meet these requirements, one of the conditions in paragraphs (a)(1)(A)(i), (a)(1)(A)(ii)b. or (a)(1)(A)(ii)c. must be met in order for the conflicted member(s) to participate in the offering.

If two or more members that are primarily responsible for managing the public offering share responsibilities with regard to due diligence, each must be free of conflicts of interest, otherwise one of the conditions in paragraph (a)(1)(A)(i), (a)(1)(A)(ii)b. or (a)(1)(A)(ii)c. must be met in order for the conflicted member(s) to participate in the offering.

In some best efforts offerings, there is not a member that is primarily responsible for managing the offering. Under such circumstances, a conflicted member(s) must meet one of the conditions in paragraph (a)(1)(A)(i), (a)(1)(A)(ii)b. or (a)(1)(A)(ii)c. to participate in the offering.

**(b) Engagement of a Qualified Independent Underwriter.** If a qualified independent underwriter is required to comply with paragraph (a)(1)(A) of this Rule, one of the members primarily responsible for managing the public offering, or any other member participating in the

offering, may act as the qualified independent underwriter if it meets the requirements of paragraph (a)(3) of this Rule.

**.02 Services and Compensation of a Qualified Independent Underwriter.** A qualified independent underwriter's responsibility to perform reasonable due diligence applies to all public offerings that require a qualified independent underwriter. A qualified independent underwriter is expected to participate in the preparation of the registration statement and perform due diligence if engaged prior to the initial filing of the registration statement. While a qualified independent underwriter that is retained after the registration statement has been filed cannot participate in the "preparation" of the registration statement as originally filed, it can conduct due diligence and require the issuer to amend the registration statement disclosures if necessary. If a member has not been afforded appropriate time in which to complete its due diligence prior to commencement of sales, it is not qualified to act as a qualified independent underwriter. To the extent any compensation is paid to a member, from any source, for acting as the qualified independent underwriter in a public offering, it should be commensurate with the level of services performed and does not exceed the customary costs for related services. Qualified independent underwriter compensation must be disclosed in the section on distribution arrangements in the registration statement as required by Rule 5110(b) and Rule 5110.05.

**.03 Economic Interest in Offering Proceeds.** Rule 5121(f)(4)(C) provides that a conflict of interest arises when at least five percent of the net offering proceeds, excluding underwriting compensation, are directed to a member, its affiliates and associated persons. This type of conflict of interest only applies if the participating member and its related affiliates and associated persons have an economic interest in the proceeds and does not include proceeds held in brokerage accounts on behalf of a member's customer.

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## **5123. Private Placements of Securities**

(a) No Change.

**(b) Exemptions**

The following private placements are exempt from the requirements of this Rule:

(1) offerings sold by the member or person associated with the member solely to any one or more of the following:

(A) through (I) No Change.

(J) accredited investors described in Securities Act Rule 501(a)(1), (2),

(3), [or] (7), (9) or (12).

(2) through (14) No Change.

(c) through (d) No Change.