AMERICAN BAR ASSOCIATION
Business Law Section

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

August 7, 2023

Submitted via email to: pubcom@finra.org

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1506

Re: <u>Request for Comment on FINRA Rules Impacting Capital Formation</u>

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA") in response to the request for comments by the Financial Industry Regulatory Authority, Inc. ("FINRA") pursuant to FINRA Regulatory Notice 23-09 (the "Notice"), as more fully set forth below.

This letter was prepared by members of the Committee's Subcommittee on FINRA Corporate Financing Rules. The comments expressed in this letter represent the views of the Committee only and have not been reviewed or approved by the ABA's House of Delegates or Board of Governors and, therefore, do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

I. Description of the Notice

The Committee commends the significant steps already taken by FINRA to promote and reduce unnecessary burdens on capital formation. The Notice requests comment on whether there are additional changes to FINRA rules, operations or administrative processes that would further improve capital formation while preserving protections for issuers and investors.

The Committee supports FINRA's efforts to continue to modernize its rules and processes and welcomes the opportunity to suggest further improvements that would be consistent with FINRA's goals set forth in the Notice, as discussed below.

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

II. Comments

A. Rule 5110

1. Rule 5110(c)(1), (2) and (3) – Use of Term "Bona Fide Public Market" in Valuation of Securities Under Rule 5110

Change From "Bona Fide Independent Market" to "Bona Fide Public Market" in the 2020 Amendments to Rule 5110

In the amendments to FINRA Rule 5110 (at times referred to as the "Corporate Financing Rule") implemented in 2020 (the "2020 Amendments"), the term "bona fide public market," as defined in Rule 5121(f)(3), was included to replace the term "bona fide independent market" in Rule 5110(c)(1), (2) and (3) with respect to the valuation of securities with a public market. The Committee believes the substitution of "bona fide public market" for "bona fide independent market" in Rule 5110(c)(1), (c)(2) and (c)(3) may have been made in an attempt to make terms consistent across Rule 5110 and Rule 5121. Unfortunately, the implications of the changes from "bona fide independent market" to "bona fide public market" do not seem to have been noticed by any practitioner or industry organization commenting on the proposed 2020 Amendments, at least in part because of the absence of discussion of these material changes in the Federal Register notices relating to the 2020 Amendments and commentary from FINRA on such amendments.

Commenters on the proposed 2020 Amendments requested that the Rule 5121 term "bona fide public market" be added to Rule 5110 in order to provide exemptions from filing of an offering and from compliance with the lock-up requirement. Although these proposals were not incorporated, an exception to the lock-up requirement was added for "actively-traded" securities (as defined under Regulation M). This apparently was the only issue addressed by FINRA with respect to the term "bona fide public market" in connection with the 2020 Amendments.

The change from the undefined term "bona fide independent market" to the term "bona fide public market," as defined in Rule 5121(f)(3), in Rule 5110(c)(1), (2) and (3) means that there are situations where publicly traded securities that are deemed to be underwriting compensation do not meet the "bona fide public market" definition and, therefore, either:

i. are not be able to be valued when there is no public offering price,[1] with the result that exemptive relief must be sought in order to value the

---

1 For example, in the context of a resale registration statement for a committed equity facility where there is no "bona fide public market" as defined in Rule 5121(f)(3) for the security and no public offering price, there is no Rule 5110 valuation method for the securities that may be received and counted as underwriting

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

securities or the acquisition of such securities will be considered an unreasonable arrangement under Rule 5110(g)(1); or

ii. may be unfairly ascribed a higher valuation based on the public offering price, which may result in excessive total underwriting compensation.

As discussed below, we do not believe that this is what was intended by the change in terms in the 2020 Amendments.

Historical Use of "Bona Fide Independent Market" Prior to 2020 Amendments

Since 1970, beginning with Article III, Section 1, "Interpretation of the Board of Governors --- Review of Corporate Financing" (the "Interpretation"), FINRA (previously the National Association of Securities Dealers or NASD) has always permitted securities deemed to be underwriting compensation that are publicly traded securities to be valued based on the difference between the purchase price and the "market price." This term has always also been further clarified to allow reliance on the "market price" so long as there was a "bona fide *independent* market" for the security.[2]

The Interpretation was replaced in 1992 by a new free-standing rule, which has been subsequently amended as needed and is now FINRA Rule 5110. In all iterations of the Corporate Financing Rule prior to the 2020 Amendments, NASD and FINRA retained the original valuation method for non-convertible securities, which was "(a) the difference between: (i) either the market price per security on the date of acquisition, or, if no bona fide independent market exists for the security, the public offering price per security; and (ii) the per security cost; …."

Until June 2009, both Rule 2710 (now 5110) and Rule 2720 (now Rule 5121) included the same term – "bona fide independent market." "Bona fide independent

---

compensation. Companies enter into committed equity facilities because they are not yet eligible to use SEC Forms S-3 or F-3 and cannot yet institute a traditional at-the-market program. Payment of underwriting compensation in securities in connection with such facilities often benefits the companies, which are then able to use their limited cash for other purposes. Some companies may be prevented from conserving cash and issuing securities as underwriting compensation in connection with such facilities or other transactions. This could result in an anti-competitive and disparate impact on companies who shares are listed on a U.S. national securities exchange but which do not meet the definition of "bona fide public market".

[2] Article III, Section 1, "Interpretation of the Board of Governors --- Review of Corporate Financing" stated: "Stock acquired or to be acquired by an underwriter and related persons, any other broker/dealer participating in the financing, and persons associated with such broker/dealer, which has been acquired in connection with or related to or in relation to the proposed offering (hence, part of the compensation paid in connection therewith) shall be valued for compensation purposes by taking into consideration the differences between the cost of such stock and the proposed public offering price or, in the case of securities with a bona fide independent market, the cost of such stock and the price of the stock on the market on the date of purchase, and other relevant factors."

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

market" was defined in Rule 2720 as a market in a security that is listed on a national securities exchange or Nasdaq with a market price of $5 per share, aggregate trading volume of 500,000 shares over 90 days and a public float of 5 million shares.[3] The definitions in Rule 2720 were incorporated by reference in Rule 2710. However, the Committee's understanding is that this definition was only applied with respect to the conflicts rule (Rule 2720, now Rule 5121) and not the corporate financing rule (Rule 2710, now Rule 5110).

In June 2009, "bona fide public market" replaced "bona fide independent market" in the conflicts rule (Rule 2720, now Rule 5121). The Committee believes the new term "bona fide public market" was specifically added to the conflicts rule to distinguish new criteria for the qualified independent underwriter ("QIU") exception from the historical use of the term "bona fide independent market" in Rule 2710 (now Rule 5110) to value any securities with a public market.

From June 2009 until the 2020 Amendments, there were two different terms used: (i) defined term "bona fide public market" in Rule 2720/Rule 5121 and (ii) undefined term "bona fide independent market" in Rule 2710/Rule 5110. Historically, FINRA has deemed the last sale price of a security listed on a U.S. national securities exchange to be a reliable basis for the valuation of traded securities because the market price is independently determined. Such exchanges require each security to meet market maker, financial and securities liquidity standards on an on-going basis and disseminate detailed trading information. In addition, the Committee understands that historically FINRA has deemed the last sale price of a security traded in the over-the-counter market with a sufficient trading volume to be a reliable number for the valuation of traded securities because the market price is independently determined.[4]

Request for Rule Change

The Committee requests that Rule 5110(c)(1), (2) and (3) be amended to revert to the undefined term "bona fide independent market" and its historical application, instead of "bona fide public market" as defined in Rule 5121(f)(3). The Committee believes such amendment would be consistent with FINRA's goal of further improving capital formation while preserving protections for issuers and investors. To the extent FINRA would prefer to

---

3 SEC Release No. 34-60113 (June 15, 2009); 74 Fed. Reg. 29255 (June 19, 2009), at 29256.

4 For example, to qualify for the OTCQX market of the OTC Market Group, companies must meet high financial standards, follow best practice corporate governance, demonstrate compliance with U.S. securities laws, meet frequently-traded and disclosure standards of SEC Rule 15c2-11, be current in their disclosure, and have a professional third-party sponsor (broker/dealer) introduction. The companies found on OTCQX are distinguished by the integrity of their operations and diligence with which they convey their qualifications. They must have continuing priced quotes by a market maker. Penny stocks, shell companies and companies in bankruptcy cannot qualify for OTCQX.

2022 - 2023 ASSOCIATION YEAR

CHAIR
James C. Schulwolf
jschulwolf@goodwin.com

CHAIR-ELECT
Nicole F. Munro
nmunro@hudco.com

VICE-CHAIR
Mac Richard McCoy
mac_mccoy@flmd.uscourts.gov

SECRETARY
Norman M. Powell
npowell@ycst.com

BUDGET OFFICER
Thomas J. Walsh
twalsh@brodywilk.com

CONTENT OFFICER
Lisa R. Lifshitz
llifshitz@torkinmanes.com

DIVERSITY OFFICER
Sylvia Fung Chin
schin@whitecase.com

MEMBERSHIP OFFICERS
Michael F. Fleming
michael_fleming@uhc.com
Jonathan Rubens
rubens@mosconelaw.com

IMMEDIATE PAST CHAIR
Penelope L. Christophorou
pchristophorou@cgsh.com

SECTION DELEGATES TO THE ABA HOUSE OF DELEGATES
Lynne B. Barr
Paul "Chip" L. Lion III
Barbara M. Mayden
Christopher J. Rockers

COUNCIL
Brenda E. Barrett
Brigida Benitez
Anna-Katrina Christakis
Wilson Chu
Jonice Gray Tucker
Monique D. Hayes
Christina Houston
Garth B. Jacobson
E. Christopher Johnson
Kevin Johnson
Donald R. Kirk
Kay S. Kress
Alison Manzer
Marlon Quintanilla Paz
Richard W. Pound
Grace P. Powers
Stuart M. Riback
Ankur D. Shah
Heidi McNeil Staudenmaier
Christopher P. Yates

BOARD OF GOVERNORS LIAISON
Aurora Abella-Austriaco

SECTION DIRECTOR
Susan Daly Tobias
susan.tobias@americanbar.org

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

adopt a definition of this term, the Committee believes that the definition should include any security listed on a registered national securities exchange or traded in the OTCQX market for at least 30 days. Due to the criteria for inclusion in and oversight of the securities exchange listed and OTCQX markets, further criteria such as the trading price and volume are unnecessary.

2. Rule 5110(j)(12) and (15) – Clarification of the "Issuer" Carve-Out From the Definition of "Participating Member"

Rule 5110(j)(15) makes clear that the term "participating member" does not include those within the definition of "issuer".[5] Commenters on the proposed 2020 Amendments to Rule 5110 requested clarification as to the extent of the "issuer" carve-out from the defined term "participating member." In its response to comments, FINRA stated that the phrase "but does not include the issuer" at the end of the definition of "participating member" was "intended to make clear that the 'issuer' ***as defined in proposed Rule 5110(j) is entirely*** excluded from the proposed 'participating member' definition" (emphasis added).[6] Nevertheless, in practice, it is not clear when the "issuer" carve-out from the definition of "participating member" will apply, particularly where securities are acquired during the Rule 5110 review period by someone within both the definitions of "issuer" and "participating member" unless this carve-out is applied as written. We would greatly appreciate fact-specific guidance in this area, which would benefit both FINRA members and FINRA staff by eliminating the current extensive submissions and discussions of whether situations with different facts can rely on the "issuer" carve-out.

3. Rule 5110 Supplementary Material .01(b)(14) and .01(b)(16) – Clarification of the Exceptions to Underwriting Compensation for Securities Acquired as a Result of a Conversion, Stock Split, Pro-Rata Rights or Similar Offering

In the 2020 Amendments, the exception from underwriting compensation for the conversion of securities in Rule 5110 Supplementary Material .01(b)(14) was simplified by

---

5 As defined in amended Rule 5110, (i) "issuer" means "a registrant or other person that is offering its securities to the public, any selling security holder offering securities to the public, any affiliate of the registrant or such other person or selling security holder, and the officers or general partners, and directors thereof, but does not include a participating member unless the participating member is itself the registrant or a selling security holder offering its own beneficially held securities to the public"; and (ii) "participating member" means "any FINRA member that is participating in a public offering, any affiliate or associated person of the member, and any immediate family, but does not include the issuer".

6 See SEC Approval Order, Release No. 34-87855 and File No. SR-FINRA-2019-012 (December 23, 2019), at p. 72406, available at https://www.finra.org/sites/default/files/2019-12/SR-FINRA-2019-012_Approval_order.pdf; Letter from FINRA to SEC, dated July 11, 2019, at p. 18 ("Response to Comments"), available at https://www.finra.org/sites/default/files/2019-07/sr-finra-2019-012-response-to-comments.pdf.

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

eliminating most conditions, which was helpful. However, the simplified exception only applies to "securities acquired as the result of a conversion of ***securities that were originally acquired prior to the review period***" (emphasis added). Before such simplifying amendments, this exception applied to "the conversion of ***securities that have not been deemed by FINRA to be underwriting compensation***" (emphasis added), so long as certain other conditions were met (See prior Rule 5110(d)(5)(D)(i)(c)).

In addition, the exception from underwriting compensation for securities acquired as a result of a stock split, pro-rata rights offering or similar offering in Rule 5110 Supplementary Material .01(b)(16) was simplified in the 2020 Amendments by eliminating most conditions, which was helpful. However, like the exception prior to the 2020 Amendments, the simplified exception only applies where the securities upon which the acquisition is based were acquired prior to the Rule 5110 review period.

These exceptions cannot be relied on for certain conversions of securities, stock splits or similar transactions where the securities on which the transactions are based were originally acquired during the Rule 5110 review period, even where those original acquisitions were not deemed underwriting compensation because they met one of the venture capital or another exception from underwriting compensation. In these situations, FINRA members have had to seek exemptive relief which adds to transaction expenses and can cause delays for an offering.

Often issuers must conduct conversions of securities, stock splits or similar transactions as part of reorganizations in preparation for an initial public offering and to meet stock exchange listing standards. The participating FINRA members have no control over such transactions. If the original acquisition of securities is not deemed underwriting compensation, a subsequent acquisition of securities that fits the exceptions in Rule 5110 Supplementary Material .01(b)(14) and .01(b)(16) except for the timing of such original acquisition, should likewise not be deemed underwriting compensation. The Committee requests that Rule 5110 be revised to permit reliance on the exceptions in Rule 5110 Supplementary Material .01(b)(14) and .01(b)(16) when the original acquisition of securities on which the conversion, stock split pro-rata rights offering or similar transaction is based is not deemed underwriting compensation, even when such original acquisition occurs during the Rule 5110 review period.

4. Rule 5110(d) – Venture Capital Exceptions

In its comment letters on the proposed 2020 Amendments (the "Prior Comment Letters"), the Committee encouraged FINRA to expand the timing requirement of the so-called "Venture Capital Exceptions" in Rule 5110(d) to allow for application to situations in which the participating member or its affiliate has made its investment in the issuer after

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

the required filing date. Although the timing was not expanded in amended Rule 5110, the Committee continues to believe that the fact that these exceptions only apply if an acquisition occurs prior to the required filing date is a significant detriment to capital formation and is particularly an issue in public offerings that have been substantially delayed and where the issuer is most in need of an infusion of capital. It may also unfairly impact a member firm if it or an affiliate participates in a private offering by the issuer without knowing that the issuer had previously confidentially submitted a registration statement to the SEC and is later invited to join the underwriting syndicate.

The Committee believes that this revision is particularly consistent with investor protection because, where all other criteria for any one of the Venture Capital Exceptions is met, the participating member or its affiliate receives no special benefit compared to the other investors by virtue of the fact that the subject transaction occurs subsequent to the initial filing date for the offering.

5. FINRA Rule 5110(j)(22)-Definition of "Underwriting Compensation"

The Committee requests that FINRA clarify that certain "seed capital" investments ("Seed Investment") made by sponsors or affiliates ("Sponsor") of a non-traded business development companies ("BDC") or a non-traded real estate investment trusts ("REIT" and collectively with BDC referred to as "Program") at the issuer's net asset value per share ("NAV") should be excluded from the definition of "underwriting compensation." Sponsors often provide a Seed Investment to BDCs and REITs in exchange for their shares ("Seed Shares"). Such investments are made in order to permit initial acquisition of assets and to align the Sponsor's interests with those of the investors. Seed Investments are often made after the required filing date, and therefore, do not satisfy the venture capital exemptions.

FINRA Rule 5110(j)(22) defines "underwriting compensation" as "any payment, right, interest, or benefit received or to be received by a participating member from any source for underwriting, allocation, distribution, advisory and other investment banking services in connection with a public offering." The Seed Investment is not a payment or benefit received related to the performance of any services, including underwriting, allocation, distribution, advisory and other investment banking services. Seed Investment is not the same as early investment in a third party issuer with a hope of profit, rather, Seed Investments by Sponsors of BDCs or REITs are made solely to enable the BDCs or REITs to commence investing activities prior to the initial public offering.

The Seed Investment is not intended to benefit or result in an economic gain to an affiliated broker-dealer. Sponsors provide seed capital to BDCs and REITs regardless of whether an affiliated broker-dealer participates in a public offering. In other words, if a Program would engage a non-affiliated broker-dealer to participate in a public offering, a Seed Investment made by the Sponsor would not be considered underwriting compensation under

AMERICAN BAR ASSOCIATION
Business Law Section

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

FINRA Rule 5110. The purpose of the Seed Investment is to enable BDCs and REITs to commence business activities and to demonstrate an alignment of interest between the Sponsor and shareholders. Therefore, it should not be deemed underwriting compensation.

Generally, broker-dealers affiliated with BDCs and REITs act as dealer-managers in the offerings. The role of dealer-managers is, among other things, to manage issuer's relationships with third-party brokers engaged by a dealer-manager to participate in the distribution of securities in the offering. A dealer-manager also coordinates issuer's marketing and distribution efforts with participating brokers and their registered representatives with respect to communications related to the terms of the offering, investment strategies, material aspects of operations and subscription procedures. Any commissions or fees paid to a dealer-manager are passed through to participating brokers. This arrangement differs from corporate public offering where the underwriters are actively engaged in distribution of securities and establishing an initial public offering price. In a Program IPO, the price per share is always equal to NAV over which a dealer-manager has no control.

Because the Program's shares are not publically traded, the only way for a Sponsor to sell its Seed Shares is through the issuer's stock repurchase program. As a general practice, a Sponsor's liquidity terms related to Seed Shares are more restrictive than the liquidity provided to retail shareholders in a public offering. A Sponsor will not be able to take advantage of NAV increase because often it is not permitted to sell its Seed Shares for years after the initial offering.

Because the purpose of Seed Investment is to provide capital to the issuer and the purchase price is always equal to NAV, we ask that FINRA agree that Seed Shares should be excluded from definition of underwriting compensation.

B. Rule 5121

1. FINRA Rule 5121(a)(2) – Issuers Required to File with FINRA due to the Required Participation of a QIU

In its Prior Comment Letters, the Committee requested that FINRA reconsider its requirement that follow-on offerings by public companies that would otherwise meet an exemption from filing requirements pursuant to Rule 5110(h)(1) (such as the experienced issuer and investment grade debt exemptions) nonetheless must be filed with FINRA solely because an offering requires the engagement of a QIU pursuant to FINRA Rule 5121(a)(2). Although FINRA declined to reflect this comment in amended Rule 5110, the Committee continues to believe that this requirement is outdated and unnecessary due to changes to Rule 5121 and FINRA review procedures.

In particular, a QIU is no longer required to deliver a pricing opinion and FINRA Rule 5121 requires prominent disclosure of all conflicts of interest as well as QIU arrangements

AMERICAN BAR ASSOCIATION
Business Law Section

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

in the prospectus supplement for the related offering. In addition, F1NRA no longer finds it necessary to require member firms to obtain pre-filing advance approval from FINRA staff to participate as a QIU for future offerings by submitting information demonstrating that the firm meets each of the QIU definition criteria. Instead, FINRA relies on each member firm to confirm that it meets the QIU requirements in connection with a particular offering.

Finally, we note that this filing requirement related to follow-on offerings by publicly traded issuers otherwise exempt from Rule 5110 filing requirements has an unnecessarily burdensome financial impact on such issuers. Under Rule 5110, such issuers are regularly required to file and pay a filing fee for the aggregate dollar amount of securities originally registered on a shelf registration statement in connection with a single take-down requiring QIU participation, even if only a limited number of securities registered on the registration statement remain unsold or the registration statement is nearing its three-year expiration at the time of the offering. Accordingly, the Committee believes that this filing requirement is unduly burdensome on capital formation, serves no investor protection purpose and should be eliminated.

If FINRA determines to retain this filing requirement, the Committee urges FINRA to revise Section 7 of Schedule A to the FINRA Corporation By-Laws to reduce the FINRA filing fee for such offerings, which is borne by the issuer, to only be calculated based on those securities subject to the particular shelf take-down for which QIU participation is required.

2. FINRA Rule 5121(a)(1)(A) – "Primarily Responsible for Managing the Public Offering"

The Committee requests that FINRA provide additional guidance on the meaning of "primarily responsible for managing the public offering" with respect to the conflicts of interest requirements under Rule 5121, as this reference continues to raise interpretive questions for member firms. We note that appointing a QIU increases the time and expense of a transaction because the issuer must be educated on the topic; a QIU must be identified and, in some cases, added to the transaction at a late stage in the transaction; and additional provisions to the underwriting agreement must be negotiated. The Committee believes that a QIU should be necessary only when all the lead managers or bookrunners have a conflict of interest and the offering does not meet the requirements of FINRA Rule 5121(a)(1)(B) or (C).

FINRA has said that, in cases where two or more book-running lead managers have equal responsibilities with regard to due diligence, each must be free of conflicts of

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

interest, otherwise the QIU provisions apply.[7] Interpretive questions have arisen with respect to this statement in connection with different offering fact patterns. For example, some underwriters may actively manage the due diligence process, while others may be more passive in that regard. A passive bookrunning underwriter is generally labeled a "bookrunner" and included in the list of underwriters on the top line on the cover of a prospectus but is not generally leading the due diligence process. Specific guidance as to whether or not a QIU would be required if that passive bookrunner had a conflict of interest under Rule 5121, as well as specific guidance in other potential similar fact patterns, would be helpful.

3. FINRA Rule 5121(f)(3) – Definition of "Bona Fide Public Market"

The Committee requests that FINRA clarify the definition of "bona fide public market" in Rule 5121(f)(3) solely for the purpose of compliance with that rule. As currently drafted, the definition states that a bona fide public market exists if the issuer of the offered securities has at least one series of securities "traded on a national securities exchange with an Average Daily Trading Volume (as provided by SEC Regulation M) of at least $1 million." However, as discussed in the Prior Comment Letters, we understand that the quoted language is intended to be applied consistent with FINRA Rule 5121(a)(1)(B) -- i.e., that the securities being offered in the public offering have a bona fide public market. If this is the correct interpretation, we urge FINRA to take this opportunity to eliminate the continuing confusion as to the proper application of this provision and make appropriate changes to the definition to make the intention clear.

Furthermore, the Committee requests that FINRA consider including an exception for offerings of securities convertible into securities meeting the bona fide public market definition for the purposes of FINRA Rule 5121(a)(1)(B). The value of convertible securities is generally derived from the value of the underlying securities. If the underlying securities have a bona fide public market, the Committee believes that this exception should not raise investor protection issues, which would be consistent with the position taken by the SEC's exemption for actively-traded reference securities in Rule 102(d)(1) of Regulation M.

* * *

7 FINRA Regulatory Notice 09-49 (published on August 14, 2009).

AMERICAN BAR ASSOCIATION
Business Law Section

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

The Committee greatly appreciates the opportunity to provide its comments with respect the Notice and thanks the FINRA staff for its efforts to further increase efficiency and reduce unnecessary burdens on capital formation. Members of the Drafting Committee are available to meet and discuss these matters with the FINRA staff and to respond to any questions.

Very truly yours,

/s/ Jay Knight

Jay Knight
Federal Regulation of Securities Committee
ABA Business Law Section

Drafting Committee:

Gail S. Neely
Chair, FINRA Corporate Finance Subcommittee
Pallas A. Comnenos,
Vice Chair, FINRA Corporate Finance Subcommittee
Jennie Getsin
Tracey E. Russell