MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

December 3, 2013

VIA EMAIL

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: FINRA Rule 5123 (Private Placements of Securities); File Number SR-FINRA-2013-026

Dear Ms. Murphy:

Managed Funds Association ("MFA")[1] appreciates the opportunity to provide additional comments to the Securities and Exchange Commission's (the "SEC") notice of the Financial Industry Regulatory Authority's ("FINRA") proposed immediately effective amendments to Rule 5123.[2] The amendments would require FINRA members, in connection with the electronic filing of private placement materials pursuant to Rule 5123, to provide additional information to FINRA about the nature of the offering, the issuer, and affiliates of the issuer.[3]

We are writing following our previous submission of comments to the SEC in response to its notice of the amendments to FINRA Rule 5123.[4] In our prior comments, we raised questions

[1] The Managed Funds Association ("MFA") represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and all other regions where MFA members are market participants.

[2] Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Members' Filing Obligations under FINRA Rule 5123 (Private Placements of Securities), Securities Exchange Act Release No. 69843 (June 25, 2013); 78 F.R. 39367 (July 1, 2013) (the "Release").

[3] The Form would include questions regarding: whether the offering is a contingency offering; whether independently audited financial statements are available; the use of offering proceeds; the issuer's board of directors or general partner; general solicitation activity; and disciplinary history of the issuer and affiliates.

[4] Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to Elizabeth Murphy, Secretary, Securities and Exchange Commission (July 22, 2013), available at:

about the scope of the amendments and Rule 5123, the authority of FINRA in implementing the Rule, and the expedited approval process, which lacked a formal notice and comment period prior to adoption of the amendments. We continue to believe these issues merit careful consideration by both FINRA and the SEC, and we ask that FINRA provide a response to these comments and other similar concerns that market participants have raised.

In particular, we believe that Rule 5123 conflicts with the long-standing regulatory framework for private fund offerings.[5] The filing requirement is inconsistent with both Section 4(a)(2) of the Securities Act of 1933 (the "Securities Act"), which exempts private offerings from the registration requirement of the Securities Act, and Regulation D, which provides a safe harbor for issuers to comply with Section 4(a)(2). Rule 5123 undermines these provisions by requiring private fund managers to file documents that are similar in form and substance to a registration statement. In addition, the amendments would impose a new obligation on an issuer to complete the information requested in FINRA's Private Placement Form, irrespective of whether the issuer has prepared such information in the ordinary course of conducting the offering. Accordingly, and for the reasons described more fully in our previous comments, we believe that Rule 5123 and the amendments conflict with Section 15A(b)(6), Section 15A(b)(9) and Section 3(f) of the Securities Exchange Act of 1934.[6]

FINRA staff has discussed this issue with us and expressed the view that these filings reduce the likelihood that broker-dealers will unknowingly sell fraudulent offerings. We appreciate FINRA's willingness to discuss its concerns with us. Moreover, MFA strongly opposes any fraudulent activity in the securities markets in general, and in the private placement market in particular. Nonetheless, MFA believes that FINRA could instead enhance oversight of its members through other more effective and less burdensome methods, such as by utilizing its examination authority to ensure that members fulfill their obligations when participating in a private offering. Under FINRA's rules, members report to FINRA detailed information about

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https://www.managedfunds.org/wp-content/uploads/2013/07/MFA-Comments-on-FINRA-Rule-5123-July-2013.pdf.

[5] *See* Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to Elizabeth Murphy, Secretary, Securities and Exchange Commission (June 29, 2012), available at: https://www.managedfunds.org/wp-content/uploads/2012/06/MFA-Comments-on-FINRA-Rule-5123-6-29-12.pdf; Letter from Stuart J. Kaswell, MFA, to Elizabeth Murphy, SEC (Feb. 27, 2012), available at: https://www.managedfunds.org/wp-content/uploads/2012/02/MFA_Comments_on_FINRA_Rule5123_2-27-2012.pdf; Letter from Stuart J. Kaswell, MFA, to Elizabeth Murphy, SEC (Nov. 14, 2011), available at: https://www.managedfunds.org/wp-content/uploads/2011/11/MFA_Comments_on_FINRA_Rule5123.pdf. We incorporate those comments by reference to this letter.

[6] Section 15A(b)(6) of the Exchange Act 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, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Section 15A(b)(9) provides that FINRA's rules must not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title. Section 3(f) of the Exchange Act requires the Commission as part of its review of a rule of a self-regulatory organization to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

their business practices, including the types of securities to be offered and sold, and the types of customers to be solicited.[7] FINRA should use the information already reported by its members in conducting its member oversight, rather than indirectly impose burdensome disclosure obligations on issuers seeking to raise capital in a manner inconsistent with the fundamental statutory framework of the federal securities laws. MFA also believes that FINRA could review broker-dealers' policies and procedures to ensure that they use adequate due diligence in evaluating offerings.[8]

We also disagree with FINRA's request of, and the SEC's grant of, the waiver of the standard 30-day operative delay after the date of filing for a proposed rule change filed under Rule 19b-4(f)(6), and the lack of an opportunity for notice and comment prior to the effectiveness of the amendments. The Commission asserts that the burden on members imposed by the amendments is minimal because FINRA already has required that members file an abbreviated version of the Private Placement Form. The amendments, however, will impose an additional obligation on FINRA members and issuers to obtain and provide information about a private offering, and it is appropriate that the proposal should be subject to a period of notice and comment.

For these reasons, we respectfully request that FINRA respond to the comments that MFA and others have submitted, and address the significant policy concerns that have been identified. Neither Congress nor the SEC has granted FINRA authority to conduct general oversight of issuers raising capital through private offerings, and Rule 5123 and the amendments would for the first time insert FINRA into this process through its oversight of broker-dealers. We recommend that the Commission disapprove of the proposed amendments to Rule 5123, pursuant to Section 19(b)(2) of the Exchange Act.[9] At a minimum, pursuant to its authority, the Commission should suspend the Rule amendments and institute proceedings to determine whether the proposed rule should be approved or disapproved.

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[7] FINRA Rule 1013 (a)(1)(E)(v). FINRA members also must indicate on Form BD whether they are engaged in the business of private placements of securities. Question 12.

[8] *Cf.* FINRA Rules 2010 and 3130.

[9] Section 19(b)(2) requires that the Commission approve a proposed rule change if it is consistent with the requirements of the Exchange Act and the rules thereunder that are applicable to such organization, and directs the Commission to disapprove a proposed rule change if it does not satisfy such standard.

If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact Matthew Newell, Associate General Counsel, or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President & Managing Director,
General Counsel

Cc: John Ramsay, Acting Director, Division of Trading and Markets, SEC
Norman Champ, Director, Division of Investment Management, SEC
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