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March 11, 2011

VIA ELECTRONIC MAIL

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

Re: Comments Regarding Regulatory Notice 11-04: Proposed Amendments to FINRA Rule 5122 (the "Proposed Rule")

Dear Ms. Asquith:

We are submitting this letter on behalf of our client, a broker-dealer that sells passive ownership interests (the "Offered Interests") in partnerships and/or limited liability companies ("Offering Entities"). This comment letter is in response to Regulatory Notice 11-04: "Proposed Amendments to FINRA Rule 5122 to Address Member Firm Participation in Private Placements" (the "Regulatory Notice").

Background of Regulatory Notice

In the Regulatory Notice, FINRA proposes that member firms participating in a private placement of securities issued by an affiliate notify investors to potential conflicts of interest. To ensure that the disclosure requirements reach the amount and type of any compensation that will be paid directly or indirectly to a participating member firm or its associated persons in connection with a private placement subject to the Proposed Rule, the Proposed Rule replaces the phrase "selling compensation," which is in the existing version of the rule, with the term "compensation."

In addition, in order to conform to the proposed changes in disclosure noted in the Regulatory Notice, FINRA proposes replacing the phrase "any other cash or non-cash sales incentives" with the phrase "any other compensation to participating broker-dealers or associated persons." The

Regulatory Notice also states that at least 85 percent of the offering proceeds raised may not be used to pay for offering costs, discounts, commissions and any other compensation to participating broker-dealers or associated persons, and must be used for the business purposes disclosed in the offering document.

Background of Facts To Be Applied to Proposed Amendments to Rule 5122

As noted above, we are submitting this comment letter on behalf of our client, a broker-dealer that sells Offered Interests in Offering Entities and would like clarification of certain aspects of the proposed rule. An affiliate of the broker-dealer is the general partner/managing member of the Offering Entities. After paying sales commissions, reimbursing offering costs and other costs/compensation associated with the offering, the Offering Entities plan to use the balance of the proceeds raised in the offerings (which will always be at least 85% of the offering proceeds raised) to acquire interests (the "Purchased Interests") in partnerships or limited liability companies from an entity (the "Purchased Interests Seller") under common control with the broker-dealer.

The stated business purpose of the Offering Entities, as described in the private placement memorandum ("PPM") or term sheet for the offering, is to acquire the Purchased Interests, and the relationship between and among the various parties and the use of the net proceeds from the offering to acquire the Purchased Interests is described in the PPM and/or term sheet. The return to owners of Offered Interests is anticipated to come exclusively from allocations to owners of the Offered Interests of tax credits that can be offset against the owners' tax liability and that are allocated with respect to properties in which the Purchased Interests directly or indirectly own an interest.

The purchase price paid to the Purchased Interest Seller by the Offering Entities in part reimburses the Purchased Interest Seller for amounts it invested/spent in acquiring and holding the Purchased Interests, with the balance providing profit/gain to the Purchased Interest Seller.

Application, Clarification and Interpretation of Regulatory Notice

We would like clarification from FINRA on the scope and application of the proposed amendments to FINRA Rule 5122. Specifically, we would like clarification that it is not FINRA's intent that any portion of the purchase price paid by the Offering Entities for the Purchased Interests would be included as "other compensation to participating broker-dealers or associated persons" that must be taken into consideration and subject to the requirements/limitations on compensation in Proposed Rule 5122(b)(3). We believe that the purpose of the Proposed Rule is not to prohibit uses of proceeds of the Offering for other business purposes disclosed to prospective investors in the offering materials, but that the currently proposed language of the Proposed Rule is unclear on this point. To provide such clarification, a parenthetical could be added in paragraph (b)(3) of the Proposed Rule after the term "associated persons" as follows: "(which shall not include offering proceeds used for other business purposes disclosed as required by paragraph (b)(1)(A)(i))." As stated in the Regulatory

Notice, FINRA Rule 5122 was developed in response to abuses in the sale of private placements issued by broker-dealers and their control entities.[1] We do not believe that the purposes of Rule 5122 would be served by extending the "other compensation to participating broker-dealers or associated persons" to the aforementioned facts. We believe that extending the Proposed Rule to such situations would not address the abuses in the sales of private placements Rule 5122 is designed to combat, but, rather, would primarily curtail legitimate and genuine business conduct. We recommend the Proposed Rule be tailored to reflect this intent. If, however, FINRA does anticipate treating situations similar to the foregoing facts as "other compensation," we believe FINRA should precisely clarify how members should determine what portion is to be treated as "compensation," keeping in mind the burden this can place on legitimate and genuine business conduct in private placements.

We appreciate the opportunity to comment on the Proposed Rule. Please do not hesitate to e-mail or call me at the number or email listed above if you have any questions or would like any additional or more specific input regarding the issues raised in this comment letter.

[1] *See*, e.g., SEC v. Provident Royalties, LLC., SEC Complaint No. 3-09-cv-1238-L (filed July 1, 2009), Litigation Release No. 21118 (July 7, 2009), and related FINRA case Dep't of Enforcement v. Provident Asset Management, LLC, AWC No. 2009017497201 (March 17, 2010) (private placements sold to thousands of investors using offering documents that contained material omissions regarding the use of offering proceeds). In re David V. Siegel, Rel. 34-62803 (August 31, 2010) and In re Axiom Capital Management, Exchange Act Release No.61563 (February 22, 2010) (SEC found Siegel and Axiom failed to supervise unsuitable sales of private placements made by registered representatives to customers who were elderly, retired with limited income and risk averse); In re Mark Tuminello, Exchange Act Release No. 59739 (April 9, 2009) (SEC found that Tuminello failed to disclose material information and concealed facts that made models incorporated into the private placement offering documents misleading).

Respectfully submitted,

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