

# Investment Management Alert

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## January 1 Effective Date for FINRA IPO Allocation Rules Changes

December 31, 2019

On December 19, 2019, the Financial Industry Regulatory Authority, Inc. (FINRA) adopted amendments to Rules 5130 and 5131 (the “New Issues Rules”) to permit allocations of initial public offering (IPO) profits to certain investors, including “family office” investors, sovereign investors that own interests in FINRA members, foreign public investment companies and certain large pension funds, effective January 1, 2020. The amendments also carve out certain offerings from application of the New Issues Rules, including clarifications regarding the treatment of sales to non-U.S. persons in registered and unregistered offerings.

### Amendments to General Exemptions

The amendments expand the exemptions from being a “restricted person” or “covered person” under FINRA Rules 5130 and 5131 in two ways:

- **Foreign Public Investment Companies.** The New Issues Rules currently exempt an investment company organized under foreign law, provided that the investment company is listed on a foreign exchange for sale to the public or authorized for sale to the public by a foreign regulatory authority, and no person owning more than 5 percent is a “restricted person.” The amendments to the New Issues Rules will add two alternative methods to establishing that the foreign investment company is widely held: (i) the foreign investment company has 100 or more direct investors or (ii) the foreign investment company has 1,000 or more indirect investors. The amendments also add a requirement to this exemption that the entity was not formed for the purpose of investing in new issues.
- **Employee Benefit Plans.** The amendments to the New Issues Rules add a new exemption for employee retirement benefit plans, provided that the plan (i) has at least 10,000 participants and \$10 billion in assets, (ii) is operated in a non-discriminatory manner, (iii) is administered by a fiduciary and (iv) is not sponsored solely by a broker-dealer.

### Contact Information

**If you have any questions regarding this alert, please contact the Akin Gump lawyer with whom you usually work or:**

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## Amendments to Certain Defined Terms

### *Changes to Definition of Restricted Person*

FINRA Rule 5130 is being amended to make certain changes to the definition of a “restricted person”:

- **Family Office Investment Vehicles.** FINRA Rule 5130 includes in the definition of “restricted person,” any “person who has authority to buy or sell securities for a bank, savings and loan institution, insurance company, investment advisor or collective investment account.” “Collective investment account” includes hedge funds and many other private funds, but there is an exclusion for “family investment vehicles.” In the current version of Rule 5130, this carve out is limited to a legal entity that is “solely beneficially owned by immediate family members.” The definition of “collective investment account” is being amended to expand it to include “family members” and “family clients” as defined under Rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940 (the “Family Office Rule”). This will align the definitions in FINRA Rule 5130 with those in the Family Office Rule.
- **Sovereign Entities.** FINRA Rule 5130 is being amended to exclude a “sovereign entity” from being a “restricted person” due solely to its ownership of (and not operation as) a broker-dealer.

### *Changes to Definition of Covered Person*

FINRA Rule 5131 is being amended to change the definition of “covered person” to exclude “unaffiliated charitable organizations” from the definition of “covered non-public companies,” so that their executive officers and directors are not captured within the New Issues Rules unless the charitable organization is affiliated with the member firm allocating the IPO shares.

### *Changes to Definition of New Issues*

The definition of “new issues” in both of the New Issue Rules is being amended to carve out from their scope (i) foreign offerings under Regulation S and not registered in the United States, (ii) allocations of foreign offerings to non-U.S. persons by non-FINRA members, even if registered in the United States, so long as the allocations were not directed by a member broker-dealer, (iii) special purpose acquisition companies and (iv) acquisitions in public offerings for anti-dilution purposes by a current holder who has held an equity ownership for at least a year, so long as the acquisitions are not sold for three months thereafter.

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