April 29, 2019

Via Electronic Mail (rule-comments@sec.gov)

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Attention: Ms. Vanessa A. Countryman, Acting Secretary

Re: Solicitations of Interest Prior to a Registered Public Offering (File Number S7-01-19)

Dear Acting Secretary Countryman:

The Securities Industry and Financial Markets Association ("SIFMA") is writing to respond to the invitation of the Securities and Exchange Commission ("Commission") for public comment on the new rule and related amendments to expand the permitted use of communications between issuers and potential investors to assess investor interest in a contemplated registered public offering ("test-the-waters communications") to all issuers as set forth in the Commission's Proposed Rule Release No. 33-10607 (the "Release"). We appreciate the opportunity to provide comments to the Commission on the Release.

We commend the Commission's efforts to further streamline the public offering process as a means to encourage additional participation in the public markets and thereby facilitate capital formation in a manner that does not compromise investor protection. As referenced in the Commission's Release, SIFMA was party to a 2018 report[1] encouraging the expansion of test-the-waters communications to all issuers as an enhancement to the JOBS Act, and, in line with our position in such report, we support the proposals in the Release.

In this letter, we first respond to several of the specific requests for comment posed by the Commission in the Release and thereafter provide additional comments relating to the Release.

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[1] *Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public*, Sec. Industry and Fin. Markets Association & Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, et al., at 10–11 (2018), https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/05/CCMC_IPO-Report_v17.pdf.

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

I. Comments Relating to Specific Questions in the Commission's Release

II.A. Proposed Amendments—Proposed Exemption
Questions 5, 7 and 8:

> ***Question 5. Should we require written communications under the proposed rule to be filed with the Commission, for example, as an exhibit to a registration statement, and to become subject to Section 11 liability? Why or why not? If so, at what point should they be required to be filed?***

We agree with the Commission's position that written test-the-waters communications that comply with the proposed rule should not be required to be filed with the Commission as part of the registration statement and therefore be subjected to Section 11 liability. The purpose of test-the-waters communications is to gauge investor interest *before* an issuer in fact conducts a securities offering rather than to establish the disclosure record on which sales are based. We do not believe it would be consistent with the proposed rule's purpose to subject test-the-waters communications to Section 11 liability when such communications may occur substantially before the effective date of the related registration statement. We believe the applicability of Section 10(b) and Rule 10b-5 to such test-the-waters communications provides adequate and appropriate protection, particularly because the proposed rule limits test-the-waters communications to investors that are, or are reasonably believed to be, qualified institutional buyers ("QIBs") or institutional accredited investors ("IAIs"). Moreover, any investor that participates in the related offering will ultimately receive a prospectus subject to Section 11 and Section 12(a)(2) liability.[2]

We also concur with the Commission's position that, because the proposed rule limits test-the-waters communications to investors that are, or are reasonably believed to be, QIBs or IAIs, there is no need for additional safeguards, such as legending requirements. We believe the applicability of Section 10(b) and Rule 10b-5 appropriately protects these investors. Moreover, the Commission would continue to have the ability to review test-the-waters communications in connection with an offering upon request.

> ***Question 7. Should we permit written or oral solicitations of interest to be made by an issuer before and after a registration statement is filed, as proposed? Why or why not? Should we treat pre-filing and post-filing test-the-waters communications differently? If so, how should they be treated?***

We believe the Commission should, as proposed, permit written or oral solicitations to be made by an issuer[3] both before and after a registration statement is filed. Section 5(d), which currently allows emerging growth companies ("EGCs") to test the waters, makes no distinction between

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[2] We believe similar considerations, including the preliminary nature of test-the-waters communications, the sophistication of their recipients, the applicability of the general anti-fraud provisions of the Securities Act and the Exchange Act and the availability of a final disclosure document, would support not treating test-the-waters communications as "offers" that are subject to Section 12(a)(2) liability.

[3] We also support the Commission's position that, in addition to issuers themselves, persons authorized to act on behalf of an issuer, including an underwriter, may rely on the proposed rule. We believe it would be helpful to restate this position in the Commission's final release, particularly as certain Commission rules (e.g., Rule 163, Rule 163A) are not available to an offering participant who is an underwriter.

pre-filing and post-filing test-the-waters communications, and we do not believe such a distinction would be beneficial here. In particular, we do not believe post-filing test-the-waters communications should be subject to a filing requirement. As noted above, the communications are limited to QIBs and IAIs, who will benefit from the protections of Section 10(b) and Rule 10b-5 and must receive a prospectus, subject to Section 11 and Section 12(a)(2) liability, at the time of sale. Filing these communications would not enhance investor protection.

> ***Question 8. In what circumstances does Regulation FD affect the use of the current accommodation for test-the-waters communications under Section 5(d)? Should there be a specific exception to Regulation FD for some or all communications made in compliance with the proposed rule? If so, under what circumstances and how should such an exception apply?***

We do not believe a specific exception to Regulation FD for test-the-waters communications pursuant to the proposed rule is necessary. Where communications include material nonpublic information ("MNPI") and Regulation FD is applicable, we believe issuers will avail themselves of an existing exception under Regulation FD, such as entering into a confidentiality agreement with the potential investor, or issuers will publicly disclose such MNPI, as appropriate. Regulation FD currently provides sufficient flexibility to allow issuers to engage in meaningful communications with investors, while still providing the appropriate protections against selective disclosures. This flexibility will similarly apply to test-the-waters communications by issuers.

II.C. Proposed Amendments—Investor Status
Questions 11 and 12:

> ***Question 11. Should issuers be required to establish a reasonable belief that the potential investors involved in proposed Rule 163B communications are QIBs and IAIs, as proposed? If not, what would be the appropriate standard? Are existing guidance and practice sufficient for issuers to be able to establish a reasonable belief with respect to QIB and IAI status? Should the proposed rule provide a non-exclusive list of methods that could be used to establish a reasonable belief as to whether an investor is a QIB or IAI? Why or why not?***

We believe the reasonable belief standard should be retained as proposed. Market participants are familiar with the reasonable belief standard. Existing guidance and practice is sufficient for issuers and broker-dealers. We do not believe there is widespread misapplication of the standard. Broker-dealers participating in Rule 144A offerings have experience applying the standard, which is applied in such offerings using largely consistent practices. We also do not believe that there should be a non-exclusive list of methods to establish a reasonable belief standard. In our experience, although designed to assist in the application of a standard, a non-exclusive list of methods creates, in practice, a de facto exclusive list of methods as issuers and their advisors seek to adopt policies and establish standards that will provide certainty with respect to compliance. We have seen this occur in the application of non-exclusive methods of verification for accredited investor status included in Rule 506(c) of Regulation D.

<u>Question 12</u>. Should the proposed exemption limit communications to QIBs and IAIs, as proposed? Why or why not? If not, what different types of investors should issuers be permitted to communicate with? Alternatively, should there be no restrictions on the types of investors that issuers could communicate with under this rule? Why or why not? If there are no restrictions on the types of investors that issuers could communicate with, should the rules impose any filing or legending requirements for the communications? Why or why not?

We believe the Commission should, as proposed, limit communications to QIBs and IAIs, as is the case with the current regime of Section 5(d). QIBs and IAIs are better positioned than other investors, such as retail investors, to communicate with issuers with the more limited protections of the proposed rule (e.g., without Section 11 liability and filing with the Commission). Section 5(d) limits the scope of test-the-waters communications by EGCs to QIBs and IAIs and the market is therefore familiar with this limitation. Moreover, EGC issuers are not constrained by this limitation, in light of the relatively more significant influence of institutional investors on matters such as valuation and offering size. We believe this would also be the case in test-the-waters communications under the proposed rule.

The Commission could, in the future, consider expanding the applicability of test-the-waters communications to a class of individual investors that qualify as accredited investors. We note that the definition of accredited investors is currently subject to Commission review and there are questions as to the appropriate standard, so we believe consideration of permitting test-the-waters communications to an additional class of accredited investors should be part of that rulemaking. Accordingly, we see no reason at this point to expand the proposed exemption beyond the proposed two categories of QIBs and IAIs.

<u>II.D. Proposed Amendments—Non-exclusivity of the Proposed Rule</u>
<u>Question 13</u>:

<u>Question 13</u>. Should the proposed rule be non-exclusive, as proposed? Why or why not?

We believe the proposed rule should be non-exclusive, as proposed. This construct is consistent with existing SEC Rules 163 and 164, which similarly are non-exclusive and allow an issuer to claim the availability of any other exemption or exclusion applicable to the situation at issue.

II. Additional Comments

<u>No Conflict with Related Registration Statement</u>

The Release provides that information in proposed Rule 163B test-the-waters communications "must not conflict with material information in the related registration statement."[4] We note that this requirement is not in fact stated in the text of the proposed rule, and we believe that it should not be a requirement of the proposed rule or included in staff guidance. A similar requirement

[4] Release at 12.

currently applies to free writing prospectuses used in reliance on Rule 433.[5] However, while Rule 433 is only available *after* a registration statement has been filed,[6] test-the-waters communications under proposed Rule 163B, just like those under Section 5(d), may be used *before* the filing of a registration statement. Requiring consistency of test-the-waters communications with a yet-to-be-filed registration statement seems potentially problematic. Among other things, the diligence and disclosure drafting process may still be ongoing at the time of the test-the-waters communications, with more information only becoming available at a later point, and final offering terms will likely be informed by the test-the-waters communications.

Communications that do not qualify for the proposed exemption would automatically trigger violation of Section 5, with all its attendant consequences. If actual or alleged inconsistencies between test-the-waters communications and the filed registration statement were to have the potential of putting the availability of the exemption at risk, this may have a chilling effect on the use of test-the-waters communications. Significantly, Section 5(d) contains no such requirement with respect to test-the-waters communications by EGCs. We believe that the Commission's ability to request copies of any test-the-waters materials for its review, together with the anti-fraud provisions of the Securities Act and the Exchange Act, will be sufficient to deter any abuse in this area.

Inclusion of Anti-evasion Language

Rule 163B, as proposed, "is not available for any communication that, although in technical compliance with [the] rule, is part of a plan or scheme to evade the requirements of section 5 of the Act."[7] We believe it is not necessary to include anti-evasion language in the proposed rule. In the context of the Securities Act, this type of language is typically included in exemptions that are intended to serve as safe harbors from the registration or gun-jumping provisions of Section 5. Examples are the private placement exemption of Regulation D, the resale exemptions of Rules 144, 144A and 145(d), the communication exemptions in Rules 168 and 169, and the offshore offering exemption in Regulation S. Those safe harbors are intended to establish objective criteria that provide certainty regarding compliance with more open-ended and policy-driven requirements. The anti-evasion language is included to prevent the underlying policy from being subverted by a mere technical compliance with the objective criteria that is inconsistent with the spirit and purpose of the more open-ended requirement.

These concerns about evasion or circumvention do not appear to be present here because proposed Rule 163B does not set forth objective criteria for compliance with a more general exemption that could also be established by other means. Instead, Rule 163B as proposed seems more akin to the bright-line communication exemptions in Rule 163 (certain communications by well-known seasoned issuers) and Rule 163A (certain communications by issuers more than 30 days before a registration statement is filed), neither of which contain anti-evasion language. We

[5] Rule 433(c)(1).
[6] Rule 433(a).
[7] Release at 74.

further note that Section 5(d) applicable to test-the-waters communications by EGCs includes no such anti-evasion provision.

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We appreciate the efforts of the Commission and its staff to encourage greater participation in our public markets in a manner consistent with investor protection interests, and we look forward to continued engagement with you on efforts to facilitate capital formation. If you have any questions regarding SIFMA's comments above or require additional information, please do not hesitate to contact the undersigned at [redacted], or our counsel on this matter, Shearman & Sterling LLP, copied below.

Very truly yours,

Kenneth E. Bentsen, Jr.
President and CEO

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