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January 24, 2014

Ms. Josephine Tao
Assistant Director
Division of Trading and Markets
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Removal of Certain References to Credit Ratings Under the Securities Exchange Act of 1934, Release No. 34-64352 (Apr. 27, 2011), File No. S7-15-11 (the "2011 Release"); References to Ratings of Nationally Recognized Statistical Rating Organizations, Release No. 34-58070 (July 1, 2008), File No. S7-17-08 (the "2008 Release")

Dear Ms. Tao:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is aware that the SEC has yet to finalize proposed amendments to the exception for "investment grade non-convertible and asset-backed securities" from Rules 101 and 102 of Regulation M (17 CFR 242.101 and 102) in order to implement Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which requires the SEC to replace references to credit ratings in its regulations with a standard of credit-worthiness that the SEC determines is appropriate. We are also aware that the Division of Trading and Markets has requested information from several of our members to further inform its consideration of alternatives. We are writing on behalf of our full membership, including those members to whom you have sent requests, to provide additional input[2] to augment the feedback already provided or to be provided by those members.

Rules 101 and 102 of Regulation M generally prohibit issuers, selling security holders, and distribution participants from purchasing securities that are the subject of an ongoing distribution. Currently, Rules 101(c)(2) and 102(d)(2) of Regulation M (the "Investment Grade Exceptions") exclude non-convertible debt, non-convertible preferred stock, and asset-backed

1 SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

2 SIFMA has commented on these proposals with respect to the Regulation M exceptions. *See* Letter from Deborah A. Cunningham and Boyce I. Greer, Co-chairs, SIFMA Credit Rating Agency Task Force, to Florence E. Harmon, Acting Secretary, dated Sept. 4, 2008 ("SIFMA I"); Letter from Sean C. Davy, Managing Director, Corporate Credit Markets Division, SIFMA, to Elizabeth M. Murphy, Secretary, dated Dec. 8, 2009 ("SIFMA II"); Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, to Elizabeth M. Murphy, Secretary, dated July 5, 2011 ("SIFMA III").

New York | Washington

120 Broadway, 35th Floor | New York, NY 10271-0080 | P: 212.313.1200 | F: 212.313.1301

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securities from the purchase prohibitions, so long as the securities are rated investment grade by at least one nationally recognized statistical rating organization.

The SEC first proposed removing the Investment Grade Exceptions' references to credit ratings in 2008. The SEC again proposed removing the Investment Grade Exceptions' references to credit ratings in 2011, following enactment of Dodd-Frank. As noted above, Dodd-Frank now requires the Commission to remove references to credit ratings. We believe that the Commission's first objective in doing so should be to fulfill the Congressional mandate while simultaneously minimizing the extent to which the rule changes affect the scope of financial instruments covered by the relevant provisions of the existing rules or otherwise alter the actions of market participants. We appreciate the Commission's adoption of this objective in the 2011 Release.[3]

We believe that the Commission's second objective should be to adopt an approach that is objective and follows a clear "bright line" that is simple to interpret, implement and enforce. We would strongly urge the Commission to avoid subjective tests that are subject to any significant interpretive uncertainties and resulting in after-the-fact risk. As is the case with the current Investment Grade Exceptions, a clear and easy-to-apply exception would be preferable to a more complicated exception involving significant interpretation.

SIFMA's principal concern with the SEC's 2011 proposal, which included a subjective test requiring interpretation of securities' trading characteristics and independent verification was that it raised excessive uncertainty and after-the-fact risk.[4] In the face of the Congressional requirement articulated in Dodd-Frank, we reiterate the suggestion, first made in SIFMA's letter in 2011, that the SEC adopt an objective approach that – like the standard proposed in 2008 – uses standards applied for other purposes in the marketplace. Specifically, we now propose that a non-convertible debt security, a non-convertible preferred security, or an asset-backed security would qualify for the Regulation M Exceptions (i) if the security is registered on Form S-3, Form F-3, or uses shelf procedures for securities registered under Schedule B of the Securities Act of 1933[5] or (ii) if the issuer of the security is eligible to file a registration statement on Form S-3, Form F-3, or to use such procedures under Schedule B. We believe that such an approach would appropriately address the market manipulation concerns upon which Regulation M is based while permitting the activities that firms are presently permitted to conduct under the Investment Grade Exceptions. The suggested standard effectively identifies issuers with a high likelihood of having a substantial existing securities market, whose fixed-income securities are less susceptible

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3 *See* 2011 Release at 8 ("The Commission, in proposing alternatives to credit ratings, is seeking generally to neither narrow nor broaden the scope of financial instruments that would qualify for the benefits conferred in the existing rules while, at the same time, fulfilling the statutory mandate in Section 939A of the Dodd-Frank Act.").

4 *See* SIFMA III at 4-7.

5 Shelf procedures for Schedule B issuers and eligibility therefor are the subjects of SEC Release No. 33-6240 (September 10, 1980) and SEC Release No. 33-6424 (September 2, 1982).

to manipulation due to their fungibility, yield-based trading, and the issuers' wide industry following.[6]

This proposal has the clear benefit of being a bright-line test, based on objectively-determined eligibility tests that are already used for other purposes in the marketplace. It avoids the uncertainty and after-the-fact risk raised by the proposal in the 2011 Release as to whether market participants' subjective determination of compliance would in fact be deemed to comply with the rule. This objective test is also more compatible with the rapid launching of transactions and resulting rapid turnaround present in today's fixed-income market, avoiding what could be an overly lengthy process of making a subjective determination of eligibility and securing independent third-party verification of such a determination.[7]

In making this suggestion, we recognize that our suggestion would not produce perfectly congruent results compared to the current Investment Grade Exceptions. Some investment-grade securities that currently qualify for the Investment Grade Exceptions will no longer be able to do so. The Commission, in adopting amendments to Form S-3 and F-3 eligibility requirements to eliminate reference to credit ratings that we propose tracking, believed, and we agree, that universe to be small.[8] In contrast, some non-investment grade securities would become newly eligible to rely upon the Investment Grade Exceptions, although the Commission also believed, and we agree, that the number would be small.[9] When the Commission adopted the Investment Grade Exceptions, it did so on the belief that investment-grade securities were less vulnerable to manipulation because they trade primarily on the basis of yield spread to comparable securities and are generally fungible with other similarly rated securities.[10] In light of the substantial growth of the non-investment grade market since the Commission adopted the Investment Grade Exception,[11] we believe that the same can be said today about non-investment grade securities.

6 *See* 2008 Release at 34 ("Thus, we believe that the nonconvertible debt and nonconvertible preferred securities that fall within the proposed exceptions should be resistant to manipulation because of their fungibility, trading based on yield, and this wide industry following.").

7 For a detailed analysis of these and other problems raised by the proposal in the 2011 Release, *see* SIFMA III at 4-7.

8 *See* Security Ratings, Release No. 33-9245, 34-64975, File No. S7-18-08 (July 27, 2011) at 25-28.

9 *Id.*

10 *See* 2008 Release at 31 (explaining current exceptions "were originally based on the premise that these securities are traded on the basis of their yields and credit ratings, are largely fungible and, thus, are less likely to be subject to manipulation").

11 Based on data from Thomson Reuters, the amount of non-investment grade debt issued in 2010 is nearly ten times the amount of investment-grade debt issued in 1983, making trading of such securities more yield-based and making it difficult to manipulate the price of non-investment grade debt securities that qualify for the standard we suggest. *See* SIFMA III at 9, n.22. We would also note that a substantial amount of non-investment grade securities are offered and sold pursuant to Rule 144A transactions. Such offerings would not be counted towards the volume necessary to qualify for Form S-3 or F-3. And to the extent that such offerings migrated towards registration, such a development would be in furtherance of SEC policy.

Accordingly, we do not believe that the possibility that some non-investment grade securities would be eligible for an exception from Regulation M is a cause for concern.[12]

In sum, we believe that a standard based on S-3, F-3, and Schedule B eligibility addresses the market manipulation concerns that Regulation M seeks to address, while providing firms with a clear and objective rule against which they can engage in the activities presently permitted by the Investment Grade Exceptions. This standard would achieve the Congressional mandate while minimizing the real-world effect on market participants' current actions. We thank the Commission for the opportunity to comment again on this important area. Should you have any questions regarding our comments, please do not hesitate to contact me at [redacted] or via email at [redacted] or Alan Beller of Cleary Gottlieb Steen & Hamilton LLP at [redacted] or via email at [redacted].

Sincerely,

Sean C. Davy
Managing Director
Corporate Credit Markets Division
Securities Industry and Financial Markets Association

cc: Mary Jo White, Chairman
Luis A. Aguilar, Commissioner
Daniel M. Gallagher, Commissioner
Kara M. Stein, Commissioner
Michael S. Piwowar, Commissioner
Bradley Gude, Special Counsel, Division of Trading and Markets
Alan L. Beller, Cleary Gottlieb Steen & Hamilton LLP

12 It could be argued that, based on the changes in the non-investment grade market, Regulation M should no longer apply in the non-convertible fixed income market generally. We are not, however, pursuing adoption of that suggestion at this time, in light of the fact that we are narrowly addressing the Commission's mandate to develop workable provisions to replace the Investment Grade Exceptions. We would, however, favor the Commission's considering whether a proposal to amend Regulation M further should be made to exclude all non-convertible fixed income securities (debt and preferred stock) from the operation of its prohibitions. The Commission requested comment on such a proposal in 2011, which SIFMA provided. *See* SIFMA III at 14.