May 30, 2019

Submitted via email to rule-comments@sec.gov

Vanessa Countryman, Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SEC File Number SR-FINRA-2019-012

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on SR-FINRA-2019-012 (the "Rule Change Proposal"), which sets forth extensive proposed amendments to FINRA Rule 5110 (the "Rule" and, as proposed to be amended by the Rule Change Proposal, the "Proposed Rule").[2]

As explained by FINRA, the Rule Change Proposal "includes a range of amendments to Rule 5110, including reorganizing and improving the readability of the Rule" and covers "the following areas: (1) [f]iling requirements; (2) filing requirements for shelf offerings; (3) exemptions from filing and substantive requirements; (4) underwriting compensation; (5) venture capital exceptions; (6) treatment of non-convertible or non-exchangeable debt securities and derivatives; (7) lock-up restrictions; (8) prohibited terms and arrangements; and (9) defined terms."[3] SIFMA strongly supports FINRA's efforts to review, streamline and modernize its rules and believes the Rule Change Proposal is an important step in that process.

Consistent with FINRA's efforts, SIFMA believes there are additional opportunities for modification that would further streamline the Rule, reduce unnecessary costs and ease

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[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 one million employees, we advocate on 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. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association.

[2] *See* SEC Release No. 34-85715 (April 25, 2019), 84 Fed. Reg. 18592 (May 1, 2019) (the "Rule Change Filing"). *See also* FINRA Regulatory Notice 17-15 (April 12, 2017), which sought industry comment on FINRA's proposed amendments to the Rule and served as the basis for the Rule Change Proposal ("RN 17-15").

[3] *See* Rule Change Filing at p. 4, 84 Fed. Reg. at 18592-3.

administrative burdens for both member firms and FINRA review staff, while at the same time preserving the essential investor and issuer protections afforded by the Rule. We believe the modifications suggested below would help clarify the operation of the Rule and make it more workable in everyday practice and, thus, would further FINRA's stated goals expressed in the Rule Change Proposal.[4] Finally, we believe our suggested modifications will lessen the burdens placed on capital formation under the Rule by providing greater certainty and reducing the need to request exemptive relief for commonly encountered issues.

Suggested Additional Modifications:

1. Requirement to File a Description of All Securities Acquired During the Review Period. In our comment letter with respect to RN 17-15 (the "2017 SIFMA Letter"),[5] we stated that the requirement set forth in paragraph (a)(4)(B)(iv) of the Proposed Rule should only require a description of any securities-based underwriting compensation acquired during the review period by participating members, rather than a "description of *any securities* of the issuer acquired and beneficially owned by any participating member during the review period" (emphasis added). In declining to make this change, FINRA explained that a "description of any issuer securities acquired and beneficially owned by the participating member during the review period is needed to fully evaluate the underwriting terms and arrangements of the public offering and to ensure that there is no circumvention of the Rule."[6]

We now understand FINRA's concern that our suggestion in this regard was overbroad and believe that the provision could be modified in a manner that would both address FINRA's concern and minimize the additional costs and administrative burdens that the proposed requirement would impose on member firms. Specifically, we believe the requirement should be limited to "a description of any securities acquired and beneficially owned by the participating member during the review period, *other than those securities that are expressly excluded from characterization as underwriting compensation in the Rule*." Accordingly, disclosure would not be required with respect to, *e.g.*, listed securities purchased in public market transactions, securities acquired as the result of a conversion of securities originally acquired prior to the review period, securities acquired in accordance with the so-called "Venture Capital Exceptions" and other securities acquisitions set forth in Supplementary Material .01(b) of the Proposed Rule.

We note that, without this change, the obligation to disclose all such securities acquisitions would impose significant additional costs and administrative burdens on member firms of the very kind sought to be eliminated by the Rule Change Proposal and, due to likely fluctuations in holdings over the review period, would be virtually impossible to comply with.

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[4] *See* Rule Change Filing at p. 3, 84 Fed. Reg. at 18592 ("FINRA recently conducted the equivalent of a retrospective review to further modernize the Rule by, among other things, significantly improving the administration of the Rule and simplifying the Rule's provisions while maintaining important protections for market participants, including issuers and investors participating in offerings.")

[5] Available at http://www.finra.org/industry/notices/17-15.

[6] *See* Rule Change Filing at p. 49, 84 Fed. Reg. at 18605.

2. Look-Through Requirements for Beneficial Owners That Are Funds. In its comment letter on RN 17-15, the American Bar Association ("ABA") raised a concern relating to "the representation requirement in proposed Rule 5110(a)(4)(B)(iii) where beneficial owners of 5 percent or more of any class of the issuer's equity securities are funds or other types of investment vehicles, which are usually in the form of limited partnerships or limited liability companies."[7] SIFMA believes this concern has merit and should be further considered by FINRA.

SIFMA's member firms frequently encounter issues when trying to obtain beneficial ownership information from private investment funds and similar vehicles regarding whether the limited partners of such entities are associated persons or affiliates of a participating member. Accordingly, SIFMA agrees with the ABA that the required representation should be limited to a statement of association or affiliation with respect to the general partner or investment manager of such fund or investment vehicle, and any limited partner beneficially owning more than 25 percent of the limited partnership or limited liability company membership interests of the fund or investment vehicle. We believe this limitation would appropriately balance FINRA's interest in gathering information that might raise conflict issues with the difficulties in obtaining information as to limited partners having no investment discretion or control over the fund's investments.

3. Itemized Disclosure of Underwriting Compensation. We note that FINRA changed the Rule Change Proposal from its earlier Securities and Exchange Commission filing in November 2018 to add back a requirement to separately disclose and ascribe a specified dollar amount to all individual items of underwriting compensation (other than the underwriting discount or commission), rather than permitting disclosure of the maximum amount of all such underwriting on an aggregate basis. FINRA stated that the reason for retention of the itemized disclosure requirement was that certain commenters believed the itemized disclosure was beneficial to investors.

While SIFMA agrees that the disclosure of certain types of underwriting compensation to be received by participating members may be of interest to investors, we do not believe that itemized disclosure of individual dollar amounts is necessary or helpful to investors if the amount is immaterial in the context of the transaction. As a result, SIFMA suggests that FINRA consider including a *de minimis* exception for such itemized disclosure. For example, we believe FINRA can appropriately address its stated goal of easing costs and administrative burdens while serving investors' desire for transparency with a provision along the following lines:

> Participating members may disclose a maximum aggregate value for items of underwriting compensation that do not individually or in the aggregate exceed the lesser of (i) $50,000 and (ii) 0.1% of the dollar amount of securities offered in the public offering.

4. Exclusion from Underwriting Compensation for Ordinary Compensation to Associated Persons of Participating Members. In the 2017 SIFMA Letter, we suggested amending proposed Supplementary Material .01(b) to expressly provide that underwriting compensation would not include any cash compensation, securities or other benefit received by an associated person or

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[7] *See id*.

employee of an affiliate of a participating FINRA member (or an immediate family member thereof), if the member or its parent or other affiliate is issuing its own securities in the public offering. FINRA declined to accept this modification, stating that a "a broad carve-out could be used to circumvent the requirements of [the Rule]," but noted that "[e]xemptive relief may be available on a case-by-case basis as necessary and appropriate where a participating member or its parent or other affiliate is issuing its own securities in the public offering."[8]

While we appreciate that FINRA may be willing to entertain requests for exclusion on a case-by-case basis, we nevertheless believe that many routine waiver requests could be avoided by at least providing that compensation (such as annual salaries, bonuses and securities issued pursuant to written employee benefit or equity incentive plans) paid to associated persons of a FINRA member or employees of affiliates of the FINRA member (or immediate family members thereof) in the ordinary course under existing employment arrangements would not be considered underwriting compensation within the meaning of the Rule.

5. Venture Capital Exceptions – Co-Investments with Certain Regulated Entities. The Rule Change Proposal includes a new exception from characterization as underwriting compensation for securities of the issuer acquired in a private placement by a participating member if at least 15% of the total number of securities sold in the private placement were acquired, at the same time and on the same terms, by certain non-exchange traded open-end investment companies.

SIFMA supports the inclusion of this new exception. However, we believe that this new exception should be expanded to include certain other highly regulated entities that purchase in the private placement under the same conditions specified in the Rule Change Proposal in respect of open-end investment companies. In particular, SIFMA believes that the list of regulated entities should include any entity subject to a general exemption pursuant to FINRA Rule 5130(c) (other than paragraph (c)(4) thereof), provided that, in each case, no participating member manages such entity's investments or otherwise controls or directs the management or policies of such entity. We believe that a co-investment by any such entity would equally serve to protect against the risk that the co-investment was made "for the purpose of providing undervalued securities to a participating member in return for acting as an underwriter."[9]

6. Venture Capital Exceptions – Definition of Institutional Investor. In the 2017 SIFMA Letter, we commented that, given the expansive definition of "participating member" (a term that includes, among others, all associated persons of a member firm and their immediate family) it is often difficult to ascertain whether an entity truly qualifies as an "institutional investor" for purposes of the Rule. Accordingly, we suggested that the focus of the definition should instead be on whether a participating member manages the investor's investments or otherwise controls or directs the investment decisions of the investor.

In its response to comments, FINRA stated that our suggestion to "focus on controlling or directing investment decisions would insert uncertainty and subjectivity into the definition" and

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8 *See* Rule Change Filing at pp. 69-70, 84 Fed. Reg. at 18610.

9 *See* Rule Change Filing at p. 21, 84 Fed. Reg. at 18597.

that the Proposed Rule "retains this definition because the current definition is more objective."[10] We respectfully disagree and we urge FINRA to reconsider its approach in this regard. While the current so-called "Venture Capital Exceptions" are relied on in certain situations, far more often they are not fully considered simply due to the difficulties in conducting proper due diligence to make the determination as to "institutional investor" status. As noted above, fund managers and others often do not know the "associated person" or "immediate family" member status of their investors and, even if known, are reluctant to share that information with others. Moreover, it is hard to understand why aggregate equity interest of 5% or 1% (as the case may be) by such persons (who may be wholly unrelated to each other and affiliated with different participating members) should have any impact on the ability of a participating member to rely on the particular Venture Capital Exception being considered. Accordingly, we continue to believe that focus on managing, controlling or directing investment decisions would be far more objective, provide greater certainty, reduce administrative burdens, and enhance the utility of these exceptions.[11]

Alternatively, as suggested in the 2017 SIFMA Letter, FINRA could narrow the scope of those subject to the "equity interest" calculation solely to the participating FINRA member firm and its affiliates (*i.e.*, the calculation should not include associated persons that are not otherwise "affiliates" of the member firm or immediate family of such associated persons). Again, we believe this change would provide greater analytical certainty and objectivity, and reduce administrative burdens and cost, without any loss of investor protection.

7. Venture Capital Exceptions – Timing of Calculations. SIFMA believes that the determination of whether a securities acquisition qualifies for exclusion under one of the Venture Capital Exceptions must be made at the same time the determination to acquire the securities is made. Requiring a reassessment at a later date would not be appropriate as circumstances may have changed in a manner that could not reasonably have been foreseen and would not be related to the original investment decision. Moreover, later reassessment would be administratively difficult and costly and would diminish the utility of the exceptions.

For example, at the time of acquisition by a participating member ("Party A") of securities in a private placement, none of the other "institutional investors" were "associated" with any other FINRA member participating in the subsequently filed public offering. However, between the filing date and pricing, the issuer adds a new FINRA member to the underwriting syndicate that results in the loss of "institutional investor" status for one of the original private placement investors which, if the calculations were required to be re-run at such time, would cause the Venture Capital Exception criteria to no longer be satisfied in respect of the acquisition of securities by Party A.

We do not believe that this change in circumstance should affect the application of the exception (which potentially could result in the expulsion from the underwriting syndicate of the FINRA member affiliated with Party A). Given that the timing for assessment of the Venture

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[10] *See* Rule Change Filing at p. 89, 84 Fed. Reg. at 18615.

[11] In this regard, we point to FINRA's own definition of "control" in FINRA Rule 5121(f)(6), which is incorporated by reference in the Rule and includes, among other criteria, beneficial ownership thresholds and the "power to direct or cause the direction of the management or policies of an entity."

Capital Exception criteria is currently not clear under the Rule, we call on FINRA to add guidance to the Proposed Rule to expressly state that the potential application of a particular Venture Capital Exception must be made (and need only be made) at the time of the acquisition of the securities by the participating member.

8. Lock-Up Requirements – Follow-On Offerings. FINRA notes that the Proposed Rule "continues the historical approach of a 180-day lock-up period for both initial and follow-on public offerings," while at the same time acknowledging that "the insider lock-up period could be less than 180 days in a follow-on offering."[12] In the 2017 SIFMA Letter, we proposed reducing (or, under certain conditions, eliminating) the lock-up period for follow-on offerings given that the insider lock-up period is commonly shorter for such offerings. Although FINRA appears to agree that follow-on lock-ups for insiders may be less than 180 days for non-IPOs, FINRA nonetheless believes that maintaining the current uniform 180 day lock-up for underwriters is appropriate.

While certain of the additional exceptions included in the Proposed Rule may mitigate the impact of the lock-up restrictions in follow-on offerings, we continue to believe that a bifurcated approach to IPOs and follow-on offerings is more reflective of market realities and adherence to such approach would not undermine the policy rationale underlying the lock-up restriction. Indeed, FINRA itself acknowledges in the Rule Change Proposal that "[k]eeping the same lock-up period for underwriters and the issuer's insiders provides equivalent protections for the secondary market."[13] Accordingly, and in line with this statement, we recommend that the lock-up period for participating members in a follow-on offering should be the same as the lock-up period imposed on insiders in such offering. Moreover, we request that FINRA consider eliminating the lock-up period requirement for offerings of securities that are "actively-traded" (as defined in Rule 101(c)(1) of SEC Regulation M).

9. Lock Up Requirements – Investment Advisers. In the 2017 SIFMA Letter, we suggested that the exception in Proposed Rule 5110(e)(2)(A)(vii) should be modified to allow for the sale or other disposition of locked-up securities by participating members that are registered investment advisers and are acting in such capacity, since such advisers are separately regulated and have a fiduciary duty to act in the best interests of their clients and the lock-up restrictions may interfere with that regulatory responsibility. FINRA, however, declined to accept our comment and continues to believe that the current provision is appropriate as to securities received as underwriting compensation by a fund managed or controlled by a participating member. Given the additional exclusions and guidance in the Proposed Rule as to whether securities acquired by participating members will be deemed "underwriting compensation," we believe this restriction should be less problematic in practice but would hope FINRA would nonetheless be willing to consider requests for relief in appropriate circumstances.

10. Definition of Issuer. Although the Proposed Rule helpfully includes a carve-out for "issuers" from the definition of "participating member," FINRA declined to include a parallel carve-out for "participating members" from the definition of "issuer." SIFMA continues to believe

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[12] *See* Rule Change Filing at p. 80, 84 Fed. Reg. at 18613.

[13] *See id*.

that a carve-out for "participating members" from the definition of "issuer" is appropriate and believes this change would further clarify the operation of the Rule. SIFMA agrees, however, that such carve-out should exclude any participating member that is the actual corporate issuer of the securities being offered or a selling security holder offering its own beneficially held securities to the public. Without such a carve-out, any FINRA member (or affiliate) acting as an underwriter or selling group participant that is an affiliate of the actual corporate issuer or selling security holder would then also be considered the "issuer." We believe this circular and illogical result can be eliminated by adding the suggested language below to Proposed Rule 5110(j)(12):

> The term "issuer" means a registrant or other person that is offering its securities to the public, any selling security holder offering securities to the public, any affiliate of the registrant or such other person or selling security holder, and the officers or general partners, and directors thereof, provided that the term "issuer" shall not include a participating member that is an affiliate of any of the foregoing unless such participating member is itself the registrant or a selling security holder offering its own beneficially held securities to the public.

11. Definition of "Experienced Issuer". We understand FINRA's desire to replace the current Rule's reference to the "pre-1992 standards" for S-3, F-3 and F-10 issuers with a new definition of "experienced issuer" in order to make the filing exemption for such issuers easier to understand. However, as noted in the 2017 SIFMA Letter, we believe certain changes must be made to the proposed definition to make the concept workable and ease unnecessary compliance burdens for member firms. In particular, the terminology used by FINRA in the definition of "experienced issuer" differs meaningfully from the terminology used by the SEC for purposes of current Forms S-3, F-3 and F-10. These differences are likely to lead to confusion and increased costs for issuers and participating members as they attempt to make the calculations necessary to determine the availability of the exemption.

For example, FINRA's definition of "affiliate" (as set forth in FINRA Rule 5121) differs substantially from the SEC Rule 405 definition used for purposes of Forms S-3 and F-3, which could lead to differences in the public float calculation. In addition, for purposes of assessing aggregate market value, the definition of "experienced issuer" looks solely to the issuer's "voting stock," while Forms S-3 and F-3 reference the issuer's "voting and non-voting common equity."[14] Because of these inconsistencies, we believe the inclusion of the "experienced issuer" definition in its present form may actually create more issues than it was intended to resolve. Accordingly, we reiterate our prior comment and urge FINRA to modify the definition of "experienced issuer" as follows:

> The term "experienced issuer" means an issuer that (i) meets the registrant requirements specified in paragraph I.A of SEC Form S-3 or F-3 or paragraph I.C of Form F-10 (as applicable), except that for purposes of paragraph I.A.3 of Form S-3, paragraph I.A.2 of

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[14] SEC Rule 405 defines the term "common equity" as "any class of common stock or an equivalent interest, including but not limited to a unit of beneficial interest in a trust or a limited partnership interest." (We note that FINRA Rule 5121 also defines "common equity," but in a different manner.) SEC Form F-10 also uses different terminology and incorporates different definitions for certain terms and concepts than set forth in Forms S-3 and F-3.

Form F-3 and paragraph I.C.3 of Form F-10 the reference to "twelve calendar months" shall be deemed to refer instead to "36 calendar months" and (ii) has an aggregate market value of outstanding voting and non-voting common equity held by non-affiliates (as calculated pursuant to the General Instructions to Form S-3, F-3 and F-10, as applicable) of (a) at least U.S.$150 million or (b) at least U.S.$100 million and the issuer has had an annual trading volume of its common equity of at least three million shares (or share equivalent).

We believe incorporating the foregoing definitional changes would also address our prior concern that FINRA's present formulation as set forth in the Proposed Rule appears to eliminate the SEC history and interpretive guidance that accompany the Form S-3, Form F-3 and Form F-10 eligibility requirements. If the foregoing definitional changes are not made, however, we urge FINRA to allow participating members to continue to rely, as a "safe harbor" alternative to the proposed new formulation, on the existing "pre-1992 standards" set forth in the current Rule.

12. Option Valuation Formula. Although RN 17-15 included a proposal to allow alternative, commercially available valuation methods for valuing certain securities-based underwriting compensation, the Proposed Rule "would retain the current Rule 5110 formula for valuing options, warrants and convertible securities because of the conflicting views on the proposed change to the valuation formula and the lack of information regarding what commercially available valuation methods may be used by members."[15]

We agree there is merit in consistency and, accordingly, acknowledge that the inclusion of a standard formula has utility. However, we continue to believe that certain circumstances may call for other approaches. Thus, we urge FINRA to consider alternative methodologies on a case-by-case basis. In addition, for purposes of clarification, we request that Proposed Rule 5110(c)(3) contain an express exclusion for options and other derivatives acquired at a fair price.

13. Compensation Paid to Non-Participating Members. In its response to comments, FINRA notes that "Rule 5110 does not apply to fees and other compensation paid to underwriters for securities distributions made exclusively in foreign markets. Notwithstanding that some shares may be sold in foreign markets global offerings typically register shares in the U.S. to accommodate the potential for flow back in the U.S. At the time of FINRA's review, the exact amount of shares that will be sold in the U.S. is not available. Therefore, FINRA's initial review is based on the entire amount registered."[16]

It is not clear to us whether this response fully addresses the commenter's original inquiry, which related to whether fees and other compensation paid to non-U.S. broker-dealers in connection with the non-U.S. distribution of the offering are deemed underwriting compensation. However, we wish to expand on this inquiry and request that FINRA expressly confirm that compensation (including, *e.g.*, advisory fees, rights of first refusal and securities) received by a non-U.S. underwriter that is not itself a FINRA member or an affiliate of a participating FINRA

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[15] *See* Rule Change Filing at p. 94, 84 Fed. Reg. at 18617.

[16] *See* Rule Change Filing at pp. 62-63, 84 Fed. Reg. at 18608.

member is not counted as underwriting compensation and is not otherwise subject to the disclosure and other requirements of the Rule (or Proposed Rule). We note that such underwriter is not within the definition of "participating member" and thus such elements of compensation should not be covered by the Rule; however, we believe there continues to be inconsistent industry practice in this regard and that clarification by FINRA on this matter is warranted.

14. Non-Cash Compensation. FINRA states that the Proposed Rule "does not include any changes to current Rule 5110(h) (Non-Cash Compensation). These provisions are the subject of a separate consolidated approach to non-cash compensation."[17] While we understand FINRA is thus reluctant to include any substantive changes to the Non-Cash Compensation provisions at the present time, we nonetheless believe FINRA should clarify that the restrictions on receipt of non-cash compensation as set forth in the current Rule and Proposed Rule 5110(f) are not intended to limit or otherwise be inconsistent with other provisions in the Rule/Proposed Rule that implicitly permit the receipt by participating members of non-cash compensation under appropriate circumstances (including, *e.g.*, rights of first refusal and securities-based compensation). Rather than including this clarification in the text of the Proposed Rule (as we had originally suggested in the 2017 SIFMA Letter), FINRA can simply update its current FAQs on the Rule[18] or add language to such effect in the release or regulatory notice accompanying the adoption of the Proposed Rule.

15. Supplementary Material .01 – Securities Acquired During the Review Period. We note that paragraph (7) of Supplementary Material .01(a) includes as underwriting compensation any equity securities acquired by a participating member during the review period. We request clarification here or in Supplementary Material .01(b) that any securities purchased by a participating member (including any of its associated persons or affiliates) in the public offering at the public offering price will not be deemed underwriting compensation.

In this regard, we also note that Supplementary Material .04, which addresses securities acquired by a participating member's associated persons or their immediate family members in issuer directed sales programs, should be modified to focus only on securities acquired at a price lower than the public offering price. FINRA's proposed inclusion of securities acquired in a public offering at the public offering price would be a significant departure from current practice and we see no justifiable rationale for making such a drastic change in the Proposed Rule.

16. Supplementary Material .01 – Compensation for Prior Proposed Offerings. In the 2017 SIFMA Letter, we noted that Item (13) of Supplementary Material .01(a) provides that "underwriting compensation" includes "any compensation paid to any participating member in connection with a prior proposed public offering that was not completed, if the member firm participates in the revised public offering." While we acknowledge that this provision is consistent with a similar provision in the current Rule (*see* Rule 5110(c)(3)(A)(xiii)), we continue to believe that inclusion of such compensation, if properly received for services previously provided, is not appropriate.

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[17] *See* Rule Change Filing, fn. 7 at p. 4, 84 Fed. Reg. at fn. 7, p. 18593.

[18] *See* https://www.finra.org/industry/faq-public-offering-frequently-asked-questions-faq.

We also are uncertain as to the intended scope of the provision. Among other things, what constitutes a "revised public offering"? Is the inclusion of compensation limited to compensation received solely by the participating member during the review period for the "revised public offering"? If compensation is received for advisory services provided in respect of a proposed public equity offering by an issuer that was not completed, is such compensation included in a subsequent debt offering by the issuer? Is the reimbursement of out-of-pocket expenses for the prior offering included? As previously noted, we believe this provision should be eliminated or, at the very least, further clarified.

17. Filing Requirements Relating to QIU Participation. SIFMA understands that FINRA is not proposing to make changes to FINRA Rule 5121 at this time, other than those definitional changes required as a result of the proposed amendments to the Rule. However, given that the required participation by a "Qualified Independent Underwriter" (or "QIU") under FINRA Rule 5121 will trigger the filing requirements of the Rule, SIFMA believes that FINRA should clarify – either in connection with this rulemaking or via separate interpretive guidance that could be issued in advance of adoption of the Proposed Rule – the precise circumstances in which QIU participation is required. We believe the current language set forth in FINRA Rule 5121, which (subject to certain exceptions) requires QIU participation if the "member(s) *primarily responsible for managing* the public offering" has/have a "conflict of interest" as defined in Rule 5121(f)(5) (emphasis added), is confusing and has led to inconsistent application of the requirement.[19]

In this regard, SIFMA believes that (absent availability of another exception) the participation of a QIU should be required only if all of the lead underwriters or managing bookrunners have a conflict of interest and urges FINRA to issue guidance to such effect. We believe that this clarification would be extremely helpful, while losing none of the investor protections served by the QIU requirement.

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We thank you for your consideration of our comments. If you have any questions with regard to this letter, please do not hesitate to call the undersigned at [redacted] or Dana Fleischman of Latham & Watkins LLP, our outside counsel for this matter, at [redacted].

Respectfully submitted,

Aseel Rabie
Managing Director and Associate General Counsel
Securities Industry and Financial Markets Association

[19] For example, if the "lead left" has a conflict but the "lead right" does not, is a QIU required? If the "lead left" does not have a conflict, but the "lead right" does, is a QIU required?