June 1, 2020

Via email (rule-comments@sec.gov)

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Attention: Vanessa A. Countryman, Secretary

Re: Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets (File Number S7-05-20)

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is writing in response to the amendments proposed by the Securities and Exchange Commission (the "Commission") to "simplify, harmonize, and improve certain aspects" of the framework for offerings exempt from registration under the Securities Act of 1933, as amended (the "Securities Act") (the "Proposal").[2] We appreciate the opportunity to provide comments to the Commission on the Proposal.

As noted in our comment letter in response to the Commission's request for comment on a concept release on the harmonization of securities offering exemptions (the "Concept

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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 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. With offices in New York and Washington, DC, SIFMA is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, 85 Fed. Reg 17956 (proposed Mar. 31, 2020).

Release"),[3] we believe the clarification and simplification of the integration framework is a much needed change. The Proposal reflects consideration of our and others' suggestions, and we are generally supportive of the proposed amendments. In this letter, we suggest certain changes to the Proposal insofar as it would modify the Regulation S safe harbor and include provisions allowing for "testing the waters" ("TTW") in connection with exempt offerings, and we urge the Commission to consider providing relief for inadvertent general solicitation "foot faults."

We note that this comment letter does not address the proposed changes to Regulation A and Regulation Crowdfunding.

1. 30-Day Integration Safe Harbor

SIFMA welcomes and agrees with the proposal to reduce the six-month cooling off period in the existing integration safe harbors to 30 days. As noted in our comment letter on the Concept Release, we believe a 30-day cooling off period is appropriate given changes to markets, technologies and the securities laws since the six-month timeframe was adopted.

2. Integration of Regulation S Offerings

SIFMA agrees with the proposal to codify existing Commission statements and provide an explicit integration safe harbor for offers and sales made in compliance with Regulation S. However, we strongly urge the Commission to reconsider proposed Rule 906, which would require that an issuer prohibit resales of securities sold in reliance on Regulation S to U.S. persons for a period of six months from the date of sale except to "qualified institutional buyers" ("QIBs") as defined in Rule 144A or institutional accredited investors under Rule 501 ("IAIs"). This proposed restriction would apply regardless of whether the offering fits within Category 1, 2 or 3 of Regulation S and would apply in addition to the applicable distribution compliance period (if any).

We believe proposed Rule 906 is unnecessary and inconsistent with prior Commission guidance on Regulation S. Regulation S already applies a distribution compliance period to protect against flowback that is calibrated, in duration and certain other respects, based on the likelihood of flowback. Even in a Category 1 transaction, where there is no distribution compliance period, Section 4(a)(3)'s prospectus delivery obligations preclude free public resale in the United States for a 40-day period following the Regulation S offering. Rule 905 of

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[3] *Harmonization of Securities Offering Exemptions*, 84 Fed. Reg. 30460 (Jun. 26, 2019).

Regulation S also already reflects the Commission's determination that domestic equity securities are the only securities offered under Regulation S with a flowback risk that warrants treatment as "restricted securities," thus precluding their free public resale in the United States for six months or one year, as applicable.[4]

Additionally, as the Proposal itself notes, the Commission has long recognized that Regulation S offerings will not be integrated with concurrent public offerings or private placements. Even more directly applicable to the purported concern about directed selling effort restrictions in the context of a concurrent registered or exempt offering involving general solicitation, the adopting release for Regulation S expressly states that such general solicitation will not constitute directed selling efforts.[5] Accordingly, to dispel any confusion in the market over whether any method of general solicitation permissibly used in an exempt offering would constitute directed selling efforts, we suggest the Commission simply reiterate (or codify) its existing guidance that general solicitations in connection with concurrent private placements, including but not limited to those using widely accessible internet or similar communications, are not directed selling efforts for the purposes of Regulation S.

We are concerned that issuers and other offering participants would find the requirements of proposed Rule 906 burdensome and difficult to implement (for example, in the context of a home country public offering by a foreign issuer). We believe the most likely outcome is that issuers would simply avoid relying on exemptions that allow for general solicitation, which is at odds with the Commission's apparent goal of making Rule 506(c) easier to use (for example, by proposing certain incremental simplifications to the requirement to take reasonable steps to verify ("RSTV") accredited investor ("AI") status, as we discuss below).

3. "Testing the Waters" for Exempt Offerings

SIFMA supports the proposal to permit issuers to TTW for exempt offerings, which would allow issuers to solicit indications of interest in an exempt offering orally or in writing. We agree with the Commission that this change would benefit both issuers (in allowing them to gauge market interest and tailor the terms of the offering based on feedback received) and investors (in

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[4] *See* Rule 144 under the Securities Act.

[5] In addressing directed selling efforts in the Regulation S adopting release, the Commission stated: "Offering activities in contemporaneous registered offerings or offerings exempt from registration will not preclude reliance on the safe harbors." Proposal at n. 107 (quoting *Offshore Offers and Sales*, 55 Fed. Reg. 18306 (May 2, 1990), at n. 47).

allowing them to have input into the structure and convey areas of interest to the issuer). However, we are concerned that the requirement that an issuer not yet have chosen which exemption it will rely on in order to TTW under proposed Rule 241 is both unnecessarily restrictive and too subjective to enforce as a practical matter. In both respects it seems similar to the restriction in current Rule 152 that integration of a private placement and subsequent registered offering can be avoided only if the issuer had not decided to make the public offering at the time of the private placement. The Proposal would in fact eliminate this restriction in Rule 152. We respectfully suggest the Commission not add a similarly subjective condition to the proposed TTW provision. We acknowledge and believe reasonable the Commission's concern that issuers not engage in TTW as a means of general solicitation. However, we believe the balance of the TTW proposal adequately addresses this concern through the requirement that an issuer assess if any TTW activity constituted a general solicitation and whether this would result in the intended exemption no longer being available (or require the issuer delay until the end of the 30-day cooling off period).

Additionally, we respectfully suggest the Commission consider adding to the TTW proposal an alternative, along the lines of Rule 163B in the public offering context, providing that if the TTW activity is limited to QIBs and IAIs, such activity would not be integrated with a subsequent private placement that does not permit general solicitation. Although an issuer may reasonably conclude on its own that TTW so limited would not constitute general solicitation, it would facilitate the capital raising process to remove any doubt on this point. This would allow issuers to avoid the burdensome requirement that the exempt offering not permitting general solicitation not commence for at least 30 days after the completion of the TTW, while appropriately balancing investor protection by limiting the participants in the TTW to those allowed under Rule 163B. While acknowledging the Commission's statement that there may be relatively limited institutional investor interest in many types of exempt offerings as compared with registered offerings, and agreeing that the proposed TTW rule as a whole should not be limited to institutions, we think this addition would provide issuers with useful flexibility.

Finally, we note the Commission's statement that an issuer may not follow TTW activities that constitute general solicitations with an offering pursuant to an exemption that does not permit general solicitation if the offerees contacted in such offering were solicited by the general solicitation.[6] We assume the Commission did not intend to preclude the participation in the

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[6] Proposal at 17977.

subsequent offering of an offeree that was solicited as part of TTW activities that constituted a general solicitation, but with whom the issuer (or any of its agents) has a pre-existing substantive relationship that was established otherwise than pursuant to the TTW activities and prior to the commencement of such offering. We would appreciate the Commission confirming that our assumption is correct.

4. Rule 508 and Foot Faults

We appreciate the Commission's interest in relieving some of the AI verification burdens under Rule 506(c). As noted in the Proposal, although the rule's verification methods are non-exclusive, many market participants do treat them as exclusive and view them as onerous. The Commission proposes to add that when an issuer previously confirmed an investor's AI status through RSTV, the 506(c) RSTV requirement would be met if the investor simply provides a written representation that he or she still qualifies as an AI (as long as the issuer is not aware of information to the contrary). While we think this change would be beneficial, we question whether this incremental relaxation of the RSTV requirement in Rule 506(c) will significantly expand the use of that exemption.

We therefore reiterate the suggestion made in our comment letter on the Concept Release that the Commission consider revising Rule 508, which currently provides that any violation of the conditions relating to general solicitation is deemed significant to a Regulation D offering, to provide that non-intentional conduct (so called "foot faults") that would otherwise be a general solicitation would not be automatically deemed significant. For example, we believe the Commission should make clear that a non-intentional disclosure, even one made publicly, that is limited to information of the kind that could be included in a Rule 134 notice would not be deemed significant. Additionally, we suggest that the Commission provide that an inadvertent general solicitation that goes beyond Rule 134 information would not be deemed significant if the purchasers in a single Rule 506(b) offering are limited to AIs and QIBs and those purchasers were found either based on pre-existing substantive relationships or otherwise than as a result of the inadvertent publicity.

These changes would mean that non-intentional general solicitations would no longer render the safe harbor provided by Rule 506(b) automatically unavailable, which would avoid the unnecessarily punitive result of an issuer always being forced to delay an offering due to inadvertent publicity, while balancing investor protection considerations through either limiting the type of information inadvertently released that would be eligible for the relief or restricting investors that are eligible to participate in the exempt offering. We believe this would provide meaningful relief to offering participants, particularly in situations such as when an external publication publishes limited information about a private offering without the approval of the issuer. We do not believe this treatment of inadvertent conduct is inconsistent with the Commission's decision in KCD[7] because it would be limited to non-intentional publicity and thus not in conflict with the underlying policy prohibiting general solicitation in exempt offerings under Section 4(a)(2) of the Securities Act or Rule 506(b).

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If you have any questions regarding SIFMA's views or require additional information, please do not hesitate to contact the undersigned at [redacted], or our counsel on this matter, Leslie N. Silverman or Jeffrey D. Karpf of Cleary Gottlieb Steen & Hamilton LLP, at [redacted].

Very truly yours,

Aseel M. Rabie
Managing Director and Associate General Counsel

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[7] *See* In the Matter of the Application of KCD Financial Inc., SEC Exch. Act Release No. 80340 (Mar. 29, 2017).