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: Notice of Filing of a Proposed Rule Change to Amend FINRA Rule 5110 (Corporate Financing Rule – Underwriting Terms and Arrangements) to Make Substantive, Organizational and Terminology Changes (SEC File Number SR-FINRA-2019-012)

Dear Ms. Countryman:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section (the "Section") of the American Bar Association (the "ABA") in response to the request for comments by the Securities and Exchange Commission with respect to a proposal by the Financial Industry Regulatory Authority, Inc. ("FINRA") to amend FINRA Rule 5110 (the "Proposed Rule Change"), as more fully set forth below.[1]

This letter was prepared by members of the Committee's Subcommittee on FINRA Corporate Financing Rules. The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors, and should not be construed as representing the official policy of the ABA. In addition, this letter does not represent the official position of the Section, nor does it necessarily reflect the views of all members of the Committee.

According to the Release, FINRA is proposing to amend FINRA Rule 5110 (the "Corporate Financing Rule" or the "Rule", and as proposed to be amended, the "Proposed Rule") to "make substantive, organizational and terminology changes to the Rule. The Proposed Rule Change is intended to modernize Rule 5110 and to simplify and clarify its provisions while

[1] *See* SEC Release No. 34-85715 (April 25, 2019) (the "Release"). *See also* FINRA Regulatory Notice 17-15 (April 12, 2017) ("Notice 17-15").

maintaining important protections for market participants, including issuers and investors participating in offerings."[2]

The Committee enthusiastically supports FINRA's efforts to modernize and streamline the Corporate Financing Rule and believes the proposed changes will generally be welcomed by member firms. However, as discussed below, the Committee sees room for further improvement in various sections of the Rule and we believe modifications to the Proposed Rule along the lines discussed below would further FINRA's goals as expressed in the Release.

A. Filing Requirements

1. Proposed Rule 5110(a)(4) – Documents and Information Required to be Filed

(i) **Proposed Rule 5110(a)(4)(B)(ii).** The Proposed Rule (like the current Rule) requires the filing of "all documents relevant to the underwriting terms and arrangements," including (among others) engagement letters. The Committee believes that M&A and private placement engagement letters should expressly not be required to be filed, even if entered into within the review period, unless the letter contains a right of first refusal (or "ROFR") for a future public offering (other than a ROFR that is limited to the issuer's IPO) or otherwise provides for securities-based compensation that may be deemed underwriting compensation for the public offering under review. We believe this result should obtain under the wording of the current Rule and the Proposed Rule, but note that FINRA's Public Offering System (and staff interpretation) nonetheless requires the filing of all engagement letters entered into with the issuer during the review period even if the engagement provides solely for cash compensation for M&A services or for acting as a placement agent in a private placement and does not contain an ongoing ROFR.

(ii) **Proposed Rule 5110(a)(4)(B)(iii).** The Committee supports FINRA's decision to eliminate the current representation required to be made by participating members with respect to any association or affiliation with holders of unregistered equity securities acquired during the review period and to limit the required representation with respect to a participating member's association or affiliation with any 5% beneficial owner of the issuer's securities to include only the ownership of any class of the issuer's "equity or equity-linked securities". However, as noted in its 2017 comment letter with respect to Notice 17-15 (the "2017 Comment Letter"), the Committee believes that this disclosure requirement is difficult to comply with in the case of 5% beneficial owners that are funds or similar types of investment vehicles (collectively referred to herein as "Funds") if it would require a participating FINRA member to "look through" to the ultimate beneficial owners of interests in such Funds (which are typically in the form of

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[2] *See* Release at p. 1.

limited partnerships or limited liability companies). Our comment as to the difficulty of obtaining information in this regard is based on the collective and extensive experience of our members who act as underwriters' counsel tasked with obtaining this disclosure and who routinely receive resistance from Funds that are not willing or are unable to disclose such information, and our members who act as Fund counsel, who are often tasked with rejecting these requests for beneficial ownership information.

Accordingly, the Committee believes FINRA should expressly limit this requirement or provide clarifying guidance to the effect that the statement of association or affiliation applies only with respect to the general partner or investment manager of the Fund and, if FINRA believes further disclosure is necessary with respect to holders of significant interests in a Fund, such additional disclosure should be limited to those limited partners or investors beneficially owning more than 25% of the equity interests of the Fund.

(iii) **Proposed Rule 5110(a)(4)(B)(iv).** The Proposed Rule requires a "description of any securities of the issuer acquired and beneficially owned by any participating member during the review period." The Committee strongly believes that this requirement is overbroad and unnecessarily burdensome. Moreover, as a practical matter, strict compliance with such a requirement will be impossible. In this regard, the Committee notes that participating members – a term that includes, among others, any affiliates and associated persons of a participating FINRA member – may come into possession of securities that are expressly excluded from "underwriting compensation" in the Proposed Rule. Such exclusions include the acquisition of securities in certain secondary market transactions at fair prices, listed securities acquired in public market transactions and other acquisitions not related to the underwriting, allocation or distribution of securities in the public offering. Having to disclose all such holdings (which are likely to fluctuate over the course of the review period) is simply not practicable and the imposition of such requirement where the securities are already expressly excluded from underwriting compensation would impose significant compliance costs and administrative burdens that are not justifiable.

(iv) **Proposed Rule 5110(a)(4)(C).** The Proposed Rule adds a new and burdensome requirement for member firms to file a written notification to FINRA with respect to any underwriting compensation received by a participating member in connection with an offering that was filed with FINRA but that was ultimately not completed according to its terms. Any agreement governing such arrangement would also be required to be filed (presumably, to the extent it has not already been filed pursuant to Proposed Rule 5110(a)(4)(A)(ii)).

First, the Committee believes that no such notification or filing should be required in respect of items of compensation received in compliance with paragraphs (g)(4) and (g)(5) of the Proposed Rule. Second, we are concerned that the lack of clarity as to when an offering is deemed not to have been "completed

according to the terms of an agreement entered into by the issuer and a participating member" will inevitably lead to confusion and compliance failures. We note that issuers may indefinitely suspend the SEC review of their offerings after an initial registration statement is filed with or submitted confidentially to the SEC and when such a suspension results in a protracted delay or the offering is abandoned indefinitely, it is unclear when the obligation to make the notification would be triggered. Does the requirement spring into effect when the registration statement has been officially withdrawn by the issuer? If so, what if the withdrawal takes place several years after the original filing? What if the withdrawal occurs without notification to the participating member?

We also note that FINRA provides that the compensation received by a participating member for a "prior proposed offering that was not completed" will be counted as underwriting compensation for a "revised public offering" if the participating member participates in such new offering.[3] The Committee believes the inclusion of prior compensation for a "revised public offering" in which the member participates is not appropriate, particularly if such compensation is received for services actually rendered and/or for out-of-pocket expenses actually incurred in connection with the prior unconsummated offering in compliance with the requirements of paragraphs (g)(4) and (5) of the Proposed Rule. Moreover, it is not clear (i) what a "revised public offering" is, (ii) whether the inclusion is limited solely to compensation received (or arrangements for compensation entered into) during the review period for the revised public offering, and (iii) how this provision relates to the provision discussed above requiring notice of compensation received for a prior unconsummated offering. Does this effectively mean that Proposed Rule 5110(a)(4)(C) is applicable only to those situations in which the participating member is also participating in the subsequent offering?

Given the significant compliance costs and administrative burdens imposed by this new requirement, we request that FINRA further clarify the scope and purpose of this obligation.

B. Underwriting Compensation

1. Proposed Rule 5110(j)(22) -- Definition of Underwriting Compensation

Paragraph (j)(22) defines "underwriting compensation" to include "finder's fees, underwriter's counsel fees, and securities." We believe this additional language is confusing and unnecessary in light of the much clearer and more fulsome language contained in the Supplementary Material. For example, Supplementary Material .01(a)(3) and (a)(4) expressly state that finder's fees and underwriter's counsel fees are counted as compensation only if "paid or reimbursed to, or paid on behalf of, the participating members." Because the definition in the Proposed Rule is not limited to those situations in which these fees are "paid or reimbursed to, or paid on behalf of, the participating members," a reader may mistakenly believe that even such fees that are not "paid or

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[3] *See* Supplementary Material .01(a)(13) to the Proposed Rule.

reimbursed to, or paid on behalf of, the participating members" must also be included as underwriting compensation. The Supplementary Material also contains more specific language regarding when "securities" acquired and beneficially owned by a participating member should be counted as underwriting compensation.

2. Proposed Supplementary Material .01(a)(7) – Securities Acquired During the Review Period

The Committee notes that Supplementary Material .01(a)(7) includes as underwriting compensation common stock and other equity securities beneficially owned and acquired by a participating member during the review period. Under the Rule as currently constructed and interpreted, securities purchased in the public offering itself at the public offering price by a participating member are not considered underwriting compensation. The proposed formulation would appear to change this approach and require disclosure of such securities as underwriting compensation in the prospectus, even if the compensation value determined pursuant to the Proposed Rule is zero.

We believe this change in approach – which apparently also led to the inclusion of Supplementary Material .04 to address "Issuer Directed Sales Programs" – is unwarranted. Accordingly, we urge FINRA to explicitly provide in the Proposed Rule that any securities purchased by a participating member in the public offering at the public offering price (unless such purchase is prohibited by other FINRA rules, including FINRA Rule 5130) will not be deemed underwriting compensation for the offering. We also urge FINRA to modify Supplementary Material .04 such that it addresses only securities acquired in issuer directed share programs by associated persons of participating members (and their immediate family members) at a preferential price.

Finally, the Committee believes it would be helpful if FINRA included clarifying language to Supplementary Material .01(a)(7) providing that the securities captured by this item do not include securities expressly excluded from underwriting compensation elsewhere in the Proposed Rule.

3. Proposed Supplementary Material .01(a)(9) – Rights of First Refusal

In its comment letter with respect to Notice 17-15, the Securities Industry and Financial Markets Association ("SIFMA") suggested that FINRA eliminate the arbitrary 1% valuation assigned to ROFRs. We agree with this comment and urge FINRA to reconsider its position on this matter. We understand that the 1% valuation was added in order to ensure that ROFRs were considered "items of value" under the Rule. We believe this historical rationale is no longer applicable in the context of the Proposed Rule and simply including ROFRs among the list of items that constitute underwriting compensation should be sufficient and would still require disclosure to FINRA and to investors through inclusion of a description of the ROFR's terms in the plan of distribution section of the prospectus for the public offering.

4. Proposed Supplementary Material .01(a)(14) – Gifts and Gratuities

In response to SIFMA's comment on Notice 17-15 as to whether nominal gifts and occasional meals or other business entertainment should be treated as underwriting compensation for purposes of the Rule, FINRA states in the Release that "[t]o the extent that any gifts and business entertainment are provided in compliance with the limits set forth in proposed Rule 5110(f)(2)(A) and (B), the amount of underwriting compensation attributable to the gifts and business entertainment should not be significant in practice."

The Committee agrees with FINRA's assessment as to value, but – for that precise reason – respectfully disagrees with FINRA that an exception from underwriting compensation under such circumstances is not warranted. Because of the broad filing requirements of paragraph (b)(1) of the Proposed Rule, which now requires a "description of each item of underwriting compensation received or to be received by a participating member," as well as the guidance set forth in Supplementary Material .05 (requiring the inclusion of a dollar amount in respect of each individual item of compensation), we believe the requirement to separately disclose nominal gifts and occasional entertainment is overly burdensome, not helpful to investors and could lead to inadvertent compliance failures.

5. Proposed Supplementary Material .01(b)(4), (b)(5) and (b)(6) – Excluded Compensation Items

Given the construct of these items in the list of exclusions, and the definition of underwriting compensation in paragraph (j)(22) of the Proposed Rule which covers payments from "any source," we suggest that FINRA delete the words "to the issuer" in each of items (b)(4), (b)(5) and (b)(6).

6. Proposed Supplementary Material .01(b)(14) – Exemption for Securities Acquired as a Result of Conversion

For clarity, the Committee suggests that FINRA add to this exclusion securities acquired as the result of an "exercise" (in addition to "conversion") of securities that were originally acquired prior to the review period.

7. Proposed Supplementary Material .01(b)(12) – Exemption for Securities Acquired as a Result of an Employee Plan

As noted in our 2017 Comment Letter, while the Committee supports the expansion of the exclusion for securities received as a result of certain employee benefit plans, we recommend that the exception from underwriting compensation for securities received "through any stock bonus, pension, or profit-sharing plan that qualifies under Section 401 of the Internal Revenue Code (the "IRC") *or a similar plan*" be revised to expressly include securities received under a written compensatory benefit plan in an offering exempt from registration pursuant to Rule 701 under the Securities Act of 1933 (the "Securities Act").

As with IRC Section 401 qualified plans, grants by issuers pursuant to Securities Act Rule 701 plans are for the purpose of compensating employees and are wholly unrelated to any underwriting compensation in connection with a public offering and thus we assume that a Securities Act Rule 701 plan would be captured as a "similar plan." However, we believe that expressly including Securities Act Rule 701 plans in the exception would minimize any interpretive confusion. Moreover, we recommend that FINRA also expressly include within the exception any other "employee benefit plan (as such term is defined in Securities Act Rule 405)."

8. Proposed Supplementary Material .01(b)(21) – Exemption for Certain Securities Acquired in Secondary Market Transactions

Proposed Supplementary Material 01(b)(21) excludes from underwriting compensation "securities acquired in the secondary market by a participating member that is a broker-dealer in connection with the performance of bona fide customer facilitation activities" (subject to a proviso relating to securities acquired from the issuer not at a fair price). For clarity, and consistent with the rationale underlying this exclusion, the Committee believes that the exclusion should also explicitly reference "bona fide market making activity."

C. Non-Cash Compensation -- Proposed Rule 5110(f)

The Committee understands that FINRA has determined to delay addressing the provisions covering the receipt by member firms of non-cash compensation pending a separate consolidated review of the non-cash compensation rules generally. However, the Committee continues to believe that some clarification of the impact of the non-cash compensation provisions in the Rule and the Proposed Rule is warranted. As noted in our 2017 Comment Letter, the non-cash compensation provisions state that FINRA members and their associated persons may not receive any non-cash compensation other than those limited items set forth in the provision itself, and those items do not include certain forms of non-cash consideration such as securities, derivative instruments or rights of first refusal that are expressly or implicitly permitted elsewhere in the Rule. We believe that resolution of such an inherent conflict should not be deferred, but instead can and should be addressed at the present time, including through language in an FAQ on FINRA's website addressing the Corporate Financing Rule or in the adopting release or accompanying Regulatory Notice with respect to the Proposed Rule that makes clear that non-cash compensation received by participating members in accordance with the other provisions of the Rule will not be deemed to violate the non-cash compensation provisions of the Rule.

D. Unreasonable Terms and Arrangements

1. Proposed Rule 5110(g)(4) – Advisory or Consulting Fees

The Committee applauds FINRA for adding a provision that allows the payment prior to the commencement of sales of a public offering of "advisory or consulting fees for services provided in connection with the offering that subsequently is completed according to the terms of an agreement entered into by an issuer and a participating member." However, the Committee believes such payments should also be permitted in respect of

offerings *not completed* if the payments are for services actually provided and the issuer has not terminated the services of the participating member for cause.

2. Proposed Rule 5110(g)(11) – Participation of Issuer Personnel

Paragraph (g)(11) of the Proposed Rule provides that a FINRA member may not "participate with an issuer in the public offering of securities if the issuer hires persons primarily for the purpose of solicitation, marketing, distribution or sales of the offering, except in compliance with Section 15(a) of the Exchange Act or SEA Rule 3a4-1 and applicable state law."[4] We believe this provision, which modifies slightly the corresponding provision in Rule 5110(f)(2)(K), should be further modified to limit this prohibition to those instances in which the FINRA member knows, or reasonably should have known, that the issuer had hired such persons absent compliance with applicable federal or state securities laws.

E. Exemptions from the Filing and/or Rule Compliance Requirements

1. Proposed Rule 5110(h)(1) and FINRA Rule 5121(a)(2) – Exempt Issuers Required to File with FINRA Due to the Required Participation of a Qualified Independent Underwriter

In our 2017 Comment Letter, the Committee requested that FINRA reconsider its requirement that registration statements relating to offerings that would otherwise meet an exemption from the filing requirements pursuant to the Proposed Rule be filed with FINRA solely because an offering requires the engagement of a qualified independent underwriter ("QIU") pursuant to FINRA Rule 5121(a)(2). Although FINRA declined to reflect our comment in the Proposed Rule Change, the Committee continues to believe that this requirement is outdated and unnecessary. In particular, we note that FINRA no longer requires member firms to register to act as a QIU and, instead, relies on each member firm to confirm that it meets the QIU requirements in connection with a particular offering. Accordingly, as a practical matter, FINRA is not engaged in a review of whether the member firm meets the QIU requirements. Moreover, FINRA Rule 5121 requires prominent disclosure of all conflicts of interest as well as QIU arrangements in the prospectus or prospectus supplement for the related offering.

Finally, we note that this requirement regularly causes issuers, which are otherwise exempt from the Rule's filing requirements, to file and pay a filing fee for the aggregate dollar amount of securities originally registered on a shelf registration statement in connection with a single take-down requiring QIU participation, even if only a limited number of securities registered on the registration statement remain unsold or the registration statement is nearing its three-year expiration at the time of the offering. Accordingly, the Committee believes that this filing requirement is unduly burdensome on capital formation, serves no investor protection role and should be eliminated. If FINRA nonetheless determines to preserve this requirement in the Proposed Rule, we

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[4] References to the "Exchange Act" in this definition and elsewhere in this letter are to the U.S. Securities Exchange Act or 1934, as amended (the "Exchange Act").

believe the filing fee, which is borne by the issuer, should be limited to only those securities subject to the particular shelf take-down for which QIU participation is required.[5]

2. Proposed Rule 5110(h)(1)(A) – Investment Grade Debt Exemption

In the Proposed Rule, the investment grade debt exemption would be expanded to explicitly include securities offered by "banks." The Committee believes this is a helpful change. Similarly, we think the exemption should be further clarified to indicate that the reference to "corporate issuers" is not meant to exclude issuers from reliance on the exemption if they are not organized in "corporate" form (such as limited partnerships or limited liability companies). In this regard, we note that FINRA's response to comments indicates that it had considered replacing the term "corporate issuer" with the term "corporation" in Notice 17-15, but decided against doing so in order to avoid including "a lengthy list of different types of legal persons." While we understand FINRA's desire for brevity, we believe that member firms and their counsel seeking to navigate these exemptions would be aided by the additional clarification as to the scope of the exemption and the different types of entities that may rely on it.

3. Proposed Rule 5110(h)(1)(C) and (j)(6) – Experienced Issuer Exemption

The Committee appreciates the attempt to streamline the exemption for offerings by issuers that meet the so-called "pre-1992" requirements for filing registration statements on Forms S-3, F-3 and F-10 by incorporating the historical reporting and public float criteria required at that time into the new defined term "experienced issuer".[6] Including the criteria for the exemption directly in the definition effectively eliminates the need for participating members to consult Notice to Members 93-88 (issued November 1993) and nearly 30-year old registration statement forms just to determine applicable eligibility thresholds.[7] Nevertheless, while the new definition appears simpler on its face, it does not reflect related SEC and FINRA interpretive guidance (including guidance

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[5] We note that FINRA has indicated that it is not inclined to make any substantive changes to FINRA Rule 5121 in connection with the Proposed Rule Change other than conforming changes necessitated as a result of changes to the Proposed Rule. Nonetheless, we believe the difficulties caused by the QIU filing requirement under the Rule and the Proposed Rule could be mitigated if FINRA were to clarify when a QIU is actually necessary. The Committee believes that the current provision in Rule 5121 requiring QIU participation (absent another exception) if the "member(s) primarily responsible for managing the public offering" do(es) not have a conflict of interest is confusing and urges FINRA to clarify this provision in the context of the Proposed Rule Change. As stated in our 2017 Comment Letter, the Committee believes a QIU should be necessary only when *all* the lead managers or bookrunners have a conflict of interest and the offering does not meet the requirements of FINRA Rule 5121(a)(1)(B) or (C).

[6] An experienced issuer is defined as "an entity that has (A) a reporting history of 36 calendar months immediately preceding the filing of the registration statement; and (B) at least $150 million aggregate market value of voting stock held by non-affiliates; or alternatively the aggregate market value of the voting stock held by non-affiliates of the issuer is $100 million or more and the issuer has had an annual trading volume of such stock of three million shares or more." Among the other issues with this definition as discussed herein, we note that the term "reporting history" is not defined.

[7] *See, e.g.*, FINRA (then NASD) Notice to Members 93-88, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=1551.

published as part of Notice to Members 93-88) and it uses terms that are not the same as those used by the SEC. Therefore, the Committee believes that this approach will lead to additional confusion, interpretive questions and calculation issues when determining whether issuers can rely on this exemption. Instead, the Committee urges FINRA to more closely align the definition to the terms used by the SEC in its registration forms and explicitly acknowledge that participating members can rely on SEC guidance with respect to the use and availability of those forms in determining whether the FINRA filing exemption is available.

4. Proposed Rule 5110(h)(2)(G) – Tender Offers

The Proposed Rule (like the current Rule) provides that "tender offers made pursuant to Regulation 14D under the Exchange Act" are not subject to compliance with the Rule. The Committee requests that FINRA revise this exemption to also include tender offers by issuers for their own securities under Exchange Act Section 13e-4 and pursuant to Schedule TO. The Committee notes that there is little logic for excluding third-party tender offers, but not issuer self-tenders, when a FINRA member may act as dealer manager in connection with either type transaction.[8]

F. Definitions

1. Proposed Rule 5110(j)(2) – Definition of "Bank"

Proposed Rule 5110(j)(2) defines the term "bank" (which would now apply to the entire Rule rather than solely to the so-called venture capital exceptions) as "a bank as defined in Section 3(a)(6) of the Exchange Act or is a foreign bank that has been granted an exemption under this Rule and shall refer only to the regulated entity, not its subsidiaries or other affiliates." The Committee believes that the definition of "bank" should also explicitly include U.S. branches and agencies of a foreign bank (which, we note, have been interpreted by the SEC to constitute U.S. banks for other purposes under the federal securities laws, including in connection with Rule 15a-6 under the Exchange Act).[9]

Moreover, we believe the need for a "foreign bank" to apply to FINRA for an exemption under the Rule is unnecessarily burdensome, particularly in the context of reliance on the investment grade debt exemption set forth in Proposed Rule 5110(h)(1)(A). For purposes of this exemption, the investment grade rating issued by a nationally recognized statistical rating organization should be sufficient without further imposing on the foreign bank issuer an obligation to seek an additional exemption from FINRA in order to utilize the filing exemption – an obligation which is not imposed on any other foreign entity seeking to rely on the investment grade debt exemption.

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[8] In this connection, the Committee notes that, as currently constructed, the FINRA Public Offering System does not provide a method for filing a tender offer on Schedule TO.

[9] In addition, the word "is," before "a foreign bank," in the quoted language from the proposed definition should be deleted as superfluous.

2. Proposed Rule 5110(j)(16) – Definition of "Participation"

The Committee believes that the definition of the terms "participate, participation or participating" should also exclude acting as a broker for a selling shareholder in return for compensation consisting of customary brokerage commissions and under circumstances in which the broker offers and sells the securities as agent on behalf of the selling shareholder without the use of "special selling efforts and selling methods" (as such term is understood for purposes of SEC Regulation M).

In this regard, we note that the negotiation and execution of a customary brokerage or sale agreement with respect to such activity should not be deemed to constitute "special selling efforts and selling methods" for such purpose and the participation of a FINRA member in the preparation of any such agreement should not be deemed to constitute "involvement in the preparation of the offering document or other documents." Instead, we believe that "involvement in the preparation of the offering document or other documents" should be modified to refer to the "preparation of the offering document or *similar disclosure documents used to offer the securities for sale to the public.*"

3. Proposed Rule 5110(j)(18) – Definition of "Public Offering"

The Committee believes that the definition of "public offering" should also explicitly exclude securities offered or sold by a broker-dealer (including a broker-dealer no longer acting in the capacity of an underwriter in connection with a prior distribution) pursuant to Securities Act Section 4(a)(3). In this regard we note that the definition of "underwriter" under Securities Act Section 2(a)(11) is tied to the presence of a "distribution" and such exception would be consistent with the exception for securities sold pursuant to Securities Act Rule 144A, which itself is a safe harbor intended to allow reliance on the exemptions from registration under the Securities Act provided by Securities Act Sections 4(a)(1) and 4(a)(3). Similarly, we believe the definition of "public offering" should also exclude offers and sales by brokers pursuant to Securities Act Section 4(a)(4), which addresses "brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders."

Finally, we note that offerings effected pursuant to current Section 4(a)(5) (which provides a registration exemption for transactions involving offers or sales by an issuer to accredited investors without the use of advertising or public solicitation) should also be listed among the exclusions from the definition of "public offering" under Proposed Rule 5110(j)(18).[10]

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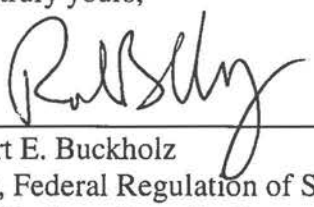
[10] The content of what is now Section 4(a)(5) of the Securities Act was previously set forth in Section 4(a)(6) and is referenced among the exclusions from the definition of "public offering" currently contained in FINRA Rule 5121(f)(11)(A). This subsection of Securities Act Section 4(a) was renumbered in connection with the implementation of the Jumpstart Our Business Startups Act of 2012.

We greatly appreciate the opportunity to provide comments with respect to this important rule-making effort and thank the FINRA staff for its efforts and thoughtful approach to the issues addressed by the proposed amendments. Members of the Drafting Committee are available to meet and discuss these matters with the SEC and FINRA staff and to respond to any questions.

Very truly yours,



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