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June 5, 2019

Re: Comments on File Number SR-FINRA-2019-12
Proposed Amendment to FINRA Rule 5110

Submitted via email to: rule-comments@sec.gov

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

Dear Ms. Countryman:

This letter is submitted in response to the solicitation for comments published by the U.S. Securities and Exchange Commission in SEC Release No. 34-85715 (April 25, 2019) with respect to proposed amendments to FINRA Rule 5110 (the "Rule"). While we generally support the proposed amendments, we believe the modifications proposed below will make the Rule more efficient and provide members more certainty with regard to potential outcomes under the Rule. Our specific recommendations are below.

Recommendations.

(A) Filing Requirements

(1) Eliminate the requirement to file documents regarding fees for non-distribution services performed by participating members.

Both current Rule 5110(b)(5)(A)(ii) and proposed 5110(a)(4)(A)(ii) require the filing of all documents relevant to the underwriting terms and arrangements of the offering, which were or will be entered into during the review period. We have no problem with the literal meaning of this provision. We question the Corporate Financing Department's interpretation of this provision to require the filing of engagement letters and other documents relating solely to M&A and private placement services performed by participating members. Department staff impose this requirement notwithstanding the fact that compensation for M&A and private placement services are excluded from the definition of "item of value" under the current Rule and "underwriting compensation" under the proposed Rule. We believe the rationale underlying the exclusion from compensation is that such services are unrelated to the distribution of the offering and Rule 5110 only regulates distribution services. If services performed by participating members are

unrelated to the distribution of the offering, we believe documents relating to such services should not be required to be filed and that either the Rule or Supplementary Material following the Rule should so state.

Further, we note that in addition to fees for M&A and private placement services, the exclusion from "item of value" under the current Rule and "underwriting compensation" under the proposed Rule includes fees for providing or arranging for a loan. Currently, Department staff either do not require the filing of or do not review loan agreements entered into by participating members and the issuer during the review period. This is because fees for such services do not give rise to underwriting compensation. If contracts relating to one set of services that do not involve underwriting compensation are not required to be filed or reviewed, then there should be no requirement to file contracts for other services that do not give rise to underwriting compensation. Otherwise, the Rule is applied inconsistently.

Finally, if FINRA is unwilling to modify the Rule or Supplementary Material to clarify that documents unrelated to the distribution of the offering need not be filed, a check box could be added to the Public Offering System screen to ensure compliance with the Rule. The text next to the check box would state that "all documents relevant to the underwriting terms and arrangements" of the offering have been filed. In this way, counsel is providing a representation using the words of the Rule and Department staff will not have to bear the burden of reviewing documents unrelated to the distribution of the offering.

(2) Modify required representation regarding partners of a partnership that acquired securities during the review period.

Under the existing and proposed Rule, underwriters' counsel is required to provide FINRA with information as to any participating member that holds unregistered securities of the issuer that were acquired during the review period. This includes information regarding any limited partners of limited partnerships that acquired securities during the review period. Often, it is extremely difficult to obtain this information from investment funds organized as limited partnerships because they do not collect this information from their limited partners. Because of the scope of the definition of participating member (i.e., associated persons and **affiliates** of a member participating in the distribution of the offering) and the large number of affiliates that a member may have, it is difficult for members participating in the distribution of an offering to represent that none of their affiliates is a limited partner of a fund that acquired securities during the review period. It is this type of issue that delays offerings and makes it impossible for members to seek limited review of an offering.

In Supplementary Material .02(b) of FINRA Rule 5131, FINRA took note of the difficulty of obtaining similar information from limited partners in a fund of funds context and has lessened that burden. We respectfully request that FINRA provide relief here by modifying section (a)(4)(B)(iv) to only require the filing of information regarding participating members that are 10% or greater holders of a fund organized as a limited partnership, which has acquired securities of the issuer in the review period. We believe this modification strikes the proper balance between mitigating what can be a very difficult diligence burden and investor protection concerns. In the alternative, FINRA could modify the information requirement based on the number of shares acquired by a limited partnership during the review period (e.g., require information for acquisitions by limited partnerships of more than 2% of the issuer's outstanding shares).

(3) Modify requirement to file information regarding all securities acquired by participating members during the review period.

We concur with the comment of the American Bar Association's Federal Regulation of Securities Committee (the "ABA Committee") that it is unduly burdensome for FINRA to require the filing of information regarding the acquisition of securities during the review period that are specifically excluded from underwriting compensation in the Rule or Supplementary Material. For example, if there is a specific exclusion from compensation for such securities under proposed Supplementary Material .01(b) (e.g., listed securities purchased in public market transactions), we believe there is no regulatory objective served by requiring counsel to disclose acquisitions of such securities to FINRA.

(4) Eliminate requirement to notify FINRA regarding underwriting compensation received in connection with uncompleted offerings.

We question the need for the new requirement to notify FINRA regarding underwriting compensation received by a participating member in connection with an offering filed with FINRA but not completed according to its terms. We concur with the ABA Committee that because of a member's continuing obligation under the Rule to update information regarding underwriting terms and arrangements, this additional requirement is unnecessary. In addition, when an offering has been dormant for some period of time and counsel has been instructed not to do any further work on the offering, how will counsel become aware of any new items of compensation? Because of a lack of information, it is likely that counsel will involuntarily violate this requirement.

(B) Underwriting Compensation

(1) Securities acquired pursuant to a bona fide compensatory benefit plan by immediate family of associated persons of a participating member, who are employees of the issuer, should be excluded from underwriting compensation.

We appreciate FINRA's expansion of the exclusion from underwriting compensation for securities acquired under qualified compensatory benefit plans to securities acquired under "similar plans." We find that a large percentage of equity compensation granted in the review period of offerings we file with the Corporate Financing Department is attributed to an associated person of a participating member who, for example, is married to a longstanding employee of the issuer who has received such compensation in the ordinary course pursuant to a bona fide equity compensation plan. We would appreciate confirmation from FINRA that grants of equity compensation to such persons (i.e., immediate family of participating members who are other than new employees of the issuer) in the ordinary course of business pursuant to bona fide equity compensation arrangements will never be deemed underwriting compensation. Further, we disagree with the ABA Committee that the exclusion from underwriting compensation only apply to equity grants made under SEC Rule 701. There are limitations on annual grants of equity compensation under Rule 701 that force reliance on section 4(a)(2) of the Securities Act. Reliance on the latter should not eliminate the exclusion from underwriting compensation for grants of equity compensation pursuant to bona fide compensatory benefit plans.

(2) Fees for ordinary course services performed by participating members that are unrelated to the distribution of the offering should be excluded from underwriting compensation.

We appreciate that Supplementary Material .01(b)(5) and (6) exclude from underwriting compensation fees for certain services provided by participating members in the ordinary course of business. Because of the difficulty of anticipating the nature of all such services, we propose that these provisions be replaced by an exclusion for fees for services performed by participating members in the ordinary course of business that are unrelated to the distribution of the offering.

(3) Securities purchased by participating members in a public offering should not be deemed securities acquired in the review period and should not constitute underwriting compensation.

We concur with the comments of Suzanne Rothwell and the ABA Committee that securities acquired by participating members in the public offering at the public offering price should not be deemed underwriting compensation. We agree that such purchases should only be deemed underwriting compensation when a participating member is acquiring such securities at a preferential price.

(4) Securities acquired during the review period upon exercise of securities acquired before the review period should be excluded from underwriting compensation.

We concur with the recommendation of the ABA Committee that securities acquired during the review period upon exercise of securities acquired prior to the review period be specifically excluded from underwriting compensation.

(5) Securities acquired by participating members in the course of bona fide market making activities should be excluded from underwriting compensation.

We concur with the suggestion of the ABA Committee that the exclusion from underwriting compensation for securities acquired in connection with "bona fide customer facilitation activities" be extended to bona fide market making activities.

(6) Fee payments to foreign broker-dealers, affiliated with participating members, for services rendered outside the US in connection with a multi-national offering, should be excluded from underwriting compensation.

In response to Regulatory Notice 17-15, we asked FINRA whether fees paid by an issuer to foreign broker-dealers affiliated with participating members for services provided outside the US would constitute underwriting compensation under the Rule. FINRA misunderstood our request and responded that the Rule is inapplicable to compensation arrangements of non-members in non-US offerings. We believe cash fees and other compensation paid in connection with the foreign distribution of an offering occurring both in the US and outside the US simultaneously should not be deemed underwriting compensation under Rule 5110. We would appreciate confirmation on this issue.

(7) Eliminate requirement to treat compensation acquired in connection with a "prior proposed offering that was not completed" as underwriting compensation for a "revised public offering."

We believe this proposal is unjustified where a participating member receives compensation for bona fide services in connection with the failed offering. Further, if the compensation complies with proposed Rule 5110(g)(5) (current Rule 5110(f)(2)(D), we do not understand why it would be considered compensation in connection with a new offering. For example, if a participating member was the lead underwriter on the first failed attempt at an IPO and received reimbursement for expenses actually incurred, does that expense reimbursement count as underwriting compensation on the issuer's second attempt at an IPO where the participating member acts as a dealer? There are also definitional questions here that will cause significant confusion. For example, what is a revised public offering? Does the determination of whether there are two offerings, rather than one continuous offering, depend on whether the registration statement has been withdrawn from the SEC? This could be problematic with confidential submissions that cannot be withdrawn from the SEC. If the prior proposed offering related to an IPO and the issuer opted for a direct listing, would a secondary offering be deemed a "revised public offering?" Also, for the sake of consistency, shouldn't the new provision require that any compensation from the failed offering be received in the review period of the "revised public offering?" We believe the lack of precision in the provision as drafted will make it difficult for members to determine in advance whether past compensation will be treated as compensation in connection with a future offering and could result in disparate treatment by Department staff analyzing such compensation.

(C) Definitions/Exemptions from Filing Requirements

(1) Redefine "participating in a public offering" to exclude members acting in an agency capacity for customary brokerage commissions.

In our comment letter to FINRA in response to Regulatory Notice 17-15, we sought an exemption from the filing requirements for shelf offerings registered for the benefit of selling shareholders, which are intended to be sold in ordinary market transactions by members acting as agents. FINRA responded that such exemption would not be necessary because prospectus supplements relating to such offerings would no longer be required to be filed. However, if the sole purpose of a shelf offering is to register shares of selling shareholders to be sold in agency transactions for customary brokerage commissions, how is investor protection enhanced by filing the shelf offering with FINRA? For this reason, we ask FINRA to exclude members acting in an agency capacity for customary brokerage commissions from the definition of "participation in a public offering."

(2) Modify definition of "experienced issuer" to more closely align with the terms used in the pre-1992 eligibility criteria.

We concur with the recommendation of the ABA Committee that the definition of "experienced issuer" more closely conform to terms in the pre-1992 eligibility criteria of the relevant SEC forms. As you know, by providing an exemption for shelf offerings of experienced issuers, as defined, FINRA has eliminated the problem inherent in basing an exemption on SEC eligibility criteria no longer in effect. However, by not using the terms in the SEC eligibility criteria

in the definition of experienced issuer, it is unclear whether SEC and FINRA guidance about such criteria is applicable.

We greatly appreciate the opportunity to provide comments with regard to the proposed Rule. We are available to answer any questions or discuss any of the foregoing issues at your convenience. Please do not hesitate to contact Michael Kaplan at [redacted], Richard Truesdell at [redacted] or Marcie Goldstein at [redacted].

Very truly yours,

Davis Polk & Wardwell